ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 11, 2012

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

-and-

IN THE MATTER OF appeals filed by Gas Plus Inc. and Handel Transport (Northern) Ltd. with respect to *Environmental Protection and Enhancement Act* Environmental Protection Order No. EPO-2010/58-SR and Amendments issued to Gas Plus Inc. and Handel Transport (Northern) Ltd. by the Director, Southern Region, Operations Division, Alberta Environment and Water.

Cite as: Costs Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment and Water*, (11 July 2012), Appeal Nos. 10-034, 11-002, 008, & 023-CD (A.E.A.B.).

BEFORE: Justice Delmar W. Perras (ret.), Board Chair;
Dr. Alan J. Kennedy, Board Member; and
Dr. Nick Tywoniuk, Board Member.

PARTICIPANTS:

Appellants:	Gas Plus Inc. and Handel Transport (Northern) Ltd., represented by Mr. Richard I. John.
Director:	Mr. Darren Bourget, Director, Southern Region, Operations Division, Alberta Environment and Water, represented by Mr. William McDonald and Ms. Erika Gerlock, Alberta Justice.
Intervenors:	Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Terry Floate and Ms. Heather Cummings, Mr. Andy and Ms. Bonnie Ross, and Mr. Francesco Mele and Ms. Alison Hayter, represented by Mr. Richard C. Secord, Ackroyd LLP.

EXECUTIVE SUMMARY

Alberta Environment and Water issued an Environmental Protection Order (the EPO) to Gas Plus Inc. and Handel Transport (Northern) Ltd. (collectively the Appellants) requiring the remediation of a gas station site and surrounding area in the City of Calgary. The remediation is required because a release of gasoline contaminated the gas station site and the contamination has migrated from the site into the surrounding area, including a residential area where it has affected a number of homes. Alberta Environment and Water subsequently issued three amendments.

The Environmental Appeals Board received Notices of Appeal from the Appellants appealing the EPO and each of the amendments. The Board held a hearing on November 22 to 25, 2011. The Board recommended the EPO be amended, and the Minister issued a Ministerial Order amending the EPO.

The residents impacted by the contamination were granted intervenor status for the hearing. At the hearing, the residents reserved their right to file a costs application.

The residents applied for costs totalling $131,574.31, including $110,881.51 for legal costs and $20,692.80 for consultant's costs.

The Board granted costs totalling $47,397.59 for legal fees since the residents' counsel effectively cross-examined the witnesses and ensured the direct evidence was relevant to the issues of the hearing. The Board also granted $18,117.75 for the residents' consultant. The Board found his evidence was of assistance when preparing the recommendations and formed the basis for the amendments to the EPO. The Board ordered the Appellants pay the total costs award of $65,515.34, in trust to the residents' counsel.

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I. INTRODUCTION

[1] This is the Environmental Appeals Board's costs decision regarding a costs application filed by the residents who participated in the hearing of an appeal filed by Gas Plus Inc. ("Gas Plus") and Handel Transport (Northern) Inc. ("Handel Transport"). The appeal was in relation to an Environmental Protection Order issued to Gas Plus and Handel Transport regarding contamination resulting from a release of gasoline at a gas station site ("On-site") in the Bowness neighbourhood of Calgary. Some of the contamination migrated from the gas station site into adjacent areas ("Off-site"), including a residential area where it is impacting a number of homes. The Environmental Protection Order requires the remediation of all the contamination.

[2] Gas Plus and Handel Transport objected to the remediation methods and timelines required in the Environmental Protection Order, appealing the original Environmental Protection Order and each of three subsequent amendments. At the hearing held on November 22 to 25, 2011, the residents, who were granted full intervenor status, reserved their right to file a costs application.

II. BACKGROUND

[3] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment* (the "Director"), issued Environmental Protection Order No. EPO-2010/58-SR (the "EPO") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Gas Plus and Handel Transport (collectively the "Appellants"). The EPO was issued in relation to a gas station site located near the Bow River, at 6336 Bowness Road NW, in Calgary, Alberta (the "Site"). The Director issued three amendments to the EPO on April 21, 2011, June 1, 2011, and September 13, 2011.

* For all relevant times during these appeals, the Department was named Alberta Environment. However, as of October 12, 2011, the Department was renamed Alberta Environment and Water. Then, on May 8, 2012, the

Department was renamed Alberta Environment and Sustainable Resource Development. For the purposes of this Report and Recommendations, the Department will be referred to as Alberta Environment.

[4] On December 10, 2010, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Gas Plus and Handel Transport appealing the EPO. The Appellants appealed the amendments on April 28, 2011, June 9, 2011, and September 19, 2011 respectively.

[5] In response to the Board's Notice of Hearing, the Board received and accepted intervenor requests filed by Mr. Terry Floate and Ms. Heather Cummings, Mr. Francesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Andy and Ms. Bonnie Ross (collectively the "Residents"). The Residents live in homes, adjacent to the Site, that have been impacted by the contamination.

[6] The Board held a hearing on November 22 to 25, 2011, in Calgary to hear three issues.[1] The Report and Recommendations and the Ministerial Order were issued on January 25, 2012, amending the EPO.[2]

[7] At the hearing, the Residents reserved their right to file a costs application. The Residents submitted their costs application on February 8, 2012. The Director provided a response on February 10, 2012, and the Appellants provided their response on February 22, 2012.

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[1] The issues heard were:

1. Are the remediation techniques and timelines included in the amended Environmental Protection Order to address the on-site and off-site contamination appropriate?
2. Should the amended Environmental Protection Order be reversed or varied based on the alleged "frustration" of Gas Plus Inc. with respect to the Bow Liquor Inc. lease?
3. Should the amended Environmental Protection Order be varied to identify only Handel Transport (Northern) Ltd. as the person responsible, as opposed to both Gas Plus Inc. and Handel Transport (Northern) Ltd. as currently identified in the amended Environmental Protection Order?

[2] See: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment*, (29 December 2011), Appeal Nos. 10-034, 11-002, 008, & 023-R (A.E.A.B.).

III. SUBMISSIONS

A. Residents

[8] The Residents claimed costs totaling $131,574.31, including $20,692.80 for consultant's fees and $110,881.51 for legal costs. They pointed out they have been seriously impacted by the contamination migrating from the Site.

[9] The Residents submitted this is an exceptional case that warrants awarding costs on a solicitor-client basis for the following reasons:

1. The Residents, their legal counsel, and their consultant made a substantial contribution to the appeal process;
2. The actions of the Appellants necessitated the participation of the Residents, as well as their legal counsel and consultant;
3. The Residents co-ordinated their efforts, thereby saving costs and ensuring their presentation at the hearing proceeded efficiently and effectively;
4. An award of costs would be consistent with and would further the goals as set out in section 2 of EPEA; and
5. The costs being claimed are reasonable in the circumstances.

[10] The Residents explained they required financial resources to offset the costs of making an adequate submission. They noted some of them have health problems, one couple built a new home that they were unable to move into, another couple invested in a lot but are unable to get a development permit to build on the lot, and another couple is moving to a new home as a result of the gasoline release.

[11] The Residents stated the issues considered at the hearing were complex and required costs beyond what is usual for a standard environmental hearing. The issues required a significant amount of technical expertise. The Residents stated legal advice was required because the Appellants repeatedly sought to use various legal tactics to delay remediation. The Residents explained it was important and necessary to provide a clear and articulate presentation at the hearing given the contamination had a direct and adverse impact on the Residents.

[12] The Residents stated their consultant, Dr. Jim Sevigny, provided important written and oral evidence by:

1. explaining the nature of the contamination, including its composition and migration path;
2. explaining the nature and characteristics of the On-site and Off-site areas;
3. explaining the environmental interaction between the contamination and the On-site and Off-site areas;
4. explaining the ineffectiveness of remediation techniques recommended by the Appellants for treating the contamination;
5. identifying critical areas of contamination requiring immediate remediation;
6. identifying data gaps in the delineation work;
7. explaining the significance of the Tier 2 Guidelines to the delineation and remediation work;
8. identifying the importance of measuring soil vapours and delineating soil vapour plumes;
9. identifying the advantages and disadvantages of the various remediation techniques; and
10. providing specific recommendations and timelines for remediating the contamination.

[13] The Residents noted only Dr. Sevigny presented timelines and a detailed plan to remediate and delineate the contamination. The Residents submitted that, without Dr. Sevigny's participation, several issues would not have been raised. They stated the Board appeared to adopt or agreed with Dr. Sevigny's evidence on several points, including:

1. the nature of the contamination, its migration path, and the effect of seasonality on the measurement of contamination levels;
2. the need for additional information and testing;
3. the importance of applying Tier 2 Guidelines;
4. the importance of conducting soil vapour testing;
5. the critical areas that require immediate and aggressive remediation;
6. the endorsement of Dr. Sevigny's approach to delineation;
7. the secant wall or triangular version would be ineffective in preventing further off-site migration; and
8. shoring walls may be useful or necessary in protecting properties.

[14] The Residents stated the Board's recommendations to the Minister and her Ministerial Order incorporate all of his recommendations. This indicated his evidence was useful and significant and, therefore, full costs of Dr. Sevigny's participation in the hearing should be awarded. They submitted Dr. Sevigny significantly contributed to the body of scientific evidence, thereby assisting in resolution of the issues and the formulation of the Ministerial Order.

[15] The Residents submitted their effectiveness in the appeal process was due in large part to the efforts of their legal counsel. The Residents submitted their legal counsel's participation materially assisted the Board in determining the substantive issues by:

1. coordinating and streamlining the Residents' submissions and presentation of their evidence at the hearing to ensure the submissions were not repetitive and were focused on the issues to ensure the hearing proceeded effectively and efficiently;
2. effective direct examination of the witnesses;
3. effective cross-examination of the Appellants' witnesses that demonstrated the deficiencies and errors in the Appellants' evidence, illustrated the Appellants' mindset towards the contamination and their responsibilities to the Residents, showed Mr. Handel should be named personally responsible, and explained the practicality and capability of the remediation methods suggested by the Appellants; and
4. providing submissions on the procedural and evidentiary matters at the hearing, specifically the admissibility of a report provided by one of the Appellants' witnesses.

[16] The Residents stated the issues in the hearing were complex and involved a high degree of public interest since the determination of the issues would have a direct effect on the Residents. They stated their counsel ensured the Residents had meaningful participation in the hearing, and they asked their full legal costs be awarded.

[17] The Residents stated that, given the public interest in the appeal, it was important the Board heard from community members. The Residents stepped into the role of advocates for the public interest.

[18] The Residents stated they contributed in the appeal process by providing:

1. evidence of the adverse impacts on them caused by the contamination;
2. evidence of their concerns regarding indoor air quality, air monitoring, and vapour intrusion into their residences, and their desire for more direct participation in the indoor air quality monitoring program;
3. evidence of their concerns of the Appellants' consultant's work on delineating and remediating the contamination;
4. submissions on the Stay applications explaining the serious and significant health and safety issues of the contamination;
5. submissions on the various remediation methods, and bringing forward concerns regarding the in-situ bioremediation technique advanced by the Appellants;
6. submissions to name Mr. Sal Handel personally on the EPO; and
7. submissions on the recommendations that should be included in the Board's Report and Recommendations.

[19] The Residents noted the Board took the Residents' concerns seriously and their contributions, as well as their consultant's contribution, helped determine the issues and shape the recommendations.

[20] The Residents stated they incurred considerable responsibility and financial costs bringing the environmental and public issues forward, including legal costs totaling $110,888.51.

[21] The Residents submitted this is a case in which a solution should have been reached expeditiously, but the Appellants' egregious conduct forced the Residents to incur inordinate costs. The Residents stated the Appellants' operations caused the contamination, and the Appellants were required to remediate the contamination. The Residents stated the contamination should have been remediated expeditiously, but it was not and still very little remediation has been done.

[22] The Residents argued the Appellants:

1. used the appeal process to delay their responsibilities;
2. attempted to shift their responsibilities to others, including the Director; and
3. have "thumbed their noses" at the Director, the EPO, and the purpose of EPEA.

[23] The Residents stated the Appellants' actions to stall remediation resulted in the Residents having to participate in the appeal process to ensure their interests, health, safety, and well-being were protected. The Appellants' actions increased costs for all the participants.

[24] The Residents argued the Appellants "…should be held responsible for their flagrant disregard of their obligations under the *EPEA*."[3] The Residents recognized the Board does not use costs for punitive measures, but in this case, a solicitor-client cost award would be in the public interest to hold the Appellants responsible for the costs of their inaction towards remediating the contamination.

[25] The Residents submitted it would not be fair for them to bear all of the costs for participating in an appeal that was not their choice, so an award of solicitor-client costs would be the only just way to compensate them.

[26] The Residents noted they consolidated their issues and resources, and their collaboration reduced the duplication of evidence at the hearing, ensured the process proceeded effectively and efficiently, reduced costs, saved time, and reduced the possibility of redundancy in the process.

[27] The Residents submitted making a costs award in favour of the Residents supported the goals of EPEA as stated in section 2(a), (g), (i), and (j).[4]

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[3] Residents' submission, dated February 8, 2012, at paragraph 70.

[4] Sections 2(a)(g)(i) and (j) of EPEA provide:

"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…

(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;

[28] The Residents stated they provided evidence on the necessity and appropriateness of certain remediation methods and the effects the methods would have on human health and the environment. They exercised their right to participate in the proceedings to protect the environment and public interest. The Residents submitted the polluter pays principle must be interpreted to include the cost of funding the participation of local residents who have been negatively impacted by the polluter. They argued they should not have to bear the costs of advancing important public issues when the issues would not have arisen but for the Appellants' acts.

[29] The Residents stated the costs requested are reasonable and relate directly to the issues set by the Board. The issues were complex legally and technically. The Residents stated the assistance of legal counsel and an expert in environmental risk management was warranted, and they contributed to the Board's understanding of the issues. The Residents stated the legal costs reflect the time and disbursements spent in preparing the submissions, preparing for the hearing, reviewing evidence, preparing witnesses for the hearing, and attending the hearing.

[30] The Residents explained their legal counsel, Mr. Richard Secord, has more than 31 years at the Alberta Bar and expertise in environmental law. The hourly rate claimed, $350.00, was commensurate with the rate charged by a lawyer of his experience and qualifications.

[31] The Residents noted the Government of Alberta Rate for lawyers with 15 years or more at the Alberta Bar is $250.00 per hour, but the rate has not changed in the last eight years. The Residents submitted that, given the complexity of the case and Mr. Secord's seniority, the Scale of Costs set out by the Alberta Utilities Commission ("AUC") or the Energy Resources Conservation Board ("ERCB") should apply ("Scale of Costs"). Under the Scale of Costs, the rate for lawyers with more than 12 years at the bar is $350.00 per hour.

[32] The Residents noted two junior lawyers who assisted Mr. Secord: (1) Ms. Debbie Bishop, who was called to the Bar in 2006, charged a rate of $200.00 per hour, even though the

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(j) the important role of comprehensive and responsive action in administering this Act."

Scale of Costs allows for $280.00 per hour for a lawyer who has been at the bar for 5 to 7 years; and (2) Ms. Sharon Au, who was called to the Bar in 2010, charged a rate of $160.00 per hour, even though the Scale of Costs allows for $240.00 per hour for a lawyer who has been at the bar for 1 to 4 years. The Residents explained the assistance of other counsel was economical and necessary given the amount of material and law. They worked with the residents, prepared submissions, and attended the hearing. The Residents noted the amount claimed for Ms. Bishop was only for the preparation of the Residents' submissions. The mileage claims were based on the Scale of Costs rate of $0.46 per kilometre.

[33] The Residents stated Dr. Sevigny is a senior scientist in the area of environmental risk assessment. The total cost of his work was $20,692.80. He reduced his actual costs by: (1) reallocating 23 hours of his time to an intermediate scientist at a rate of $85.00 per hour; (2) did not charge the higher rate of $275.00 per hour for hearing time; (3) reducing travel expenses by 50 percent; and (4) removing all charges related to colour reproduction.

[34] The Residents noted they did not claim compensation for their own time committed to the appeal process, including preparing written submissions, meeting with legal counsel and the expert, and attending the hearing. They also did not claim for out-of-pocket expenses.

[35] The Residents submitted that, given their contributions to the appeal process and the fact the Appellants' actions necessitated the Residents' involvement, this is an exceptional case that warrants full payment of their legal and expert costs totaling $131,574.31.

[36] The Residents submitted the Appellants should be responsible for paying the Residents' costs, because they started the appeal process and Stay applications. It is also in line with the polluter pays principle in section 2(i) of EPEA. The Residents did not ask that the Director pay any of the Residents' costs.

B. Appellants

[37] The Appellants acknowledged the report and submissions provided by the Residents' consultant, Dr. Sevigny, appeared to be of value to the Board. Therefore, the

Appellants did not object to the Board awarding reasonable costs incurred by Dr. Sevigny with respect to the hearing.

[38] The Appellants stated the Residents did not have significant involvement at the hearing. The legal fees incurred were disproportionate to the small benefit gained by the Residents attending the hearing. Legal fees should be a fraction of what were submitted by the Residents.

[39] The Appellants submitted the Residents should be awarded a small fraction of the costs asserted, except for the costs associated with Dr. Sevigny.

C. Director

[40] The Director took no position regarding the costs claimed by the Residents.

IV. ANALYSIS

A. Statutory Basis for Costs

[41] 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."[5]

Further, Mr. Justice Fraser stated:

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

> "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.)[6]

[42] The sections of the *Environmental Appeal Board Regulation*,[7] (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:
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> (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

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

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

(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."

[43] 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.[8]

[44] 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.[9] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[10] In *Cabre*, Mr. Justice Fraser noted that section "…20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding

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[8] 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."

[9] *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.)).

[10] *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.).

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."[11]

[45] 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."[12]

[46] 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.[13]

B. Courts vs. Administrative Tribunals

[47] 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

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

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

[13] *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.).

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.

[48] The distinction between the costs awarded in judicial and quasi-judicial settings was stated by the Federal Court of Appeal 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."[14]

[49] 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 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

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[14] *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."

> 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.'"[15]

[50] 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."[16]

C. Analysis

[51] The Board has generally accepted the starting point is that costs incurred in an appeal are the responsibility of the individual parties.[17] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[18]

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

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

[17] *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.).

[18] 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…."

[52] In this case the Residents did not file the appeal, but their interests were adversely affected by the contamination released from the Appellants' property. The Residents were compelled to participate in the appeal process to protect their interests. Therefore, the Board considers it appropriate to consider the costs application filed by the Residents.

[53] The Board will consider the costs application for the Residents' consultant, Dr. Sevigny of Iridium Consulting Inc., and then the legal costs.

[54] When assessing whether to award costs, the Board looked at the degree to which the Residents' contribution to the hearing assisted the Board in developing its recommendations. The Board reviewed the costs submissions from the Appellants and Residents 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. Although the Residents requested full solicitor-client costs be awarded given the actions of the Appellants. The Board does not award costs as a punitive measure. Costs are awarded to recognize the value of the contribution made to the Board in preparing its report and recommendations.

1. Consultant Costs

[55] The Residents asked for costs totaling $20,692.80 for their consultant. The Board notes the Appellants did not have any objection to awarding reasonable costs for Dr. Sevigny of Iridium Consulting Inc.

[56] Dr. Sevigny's costs were broken down as follows:

Preparation for hearing	45 hours at $225.00 per hour	$10,125.00
Attendance at hearing	24 hours at $225 per hour	$5,400.00
Travel	16 hours at $112.50 per hour	$1,800.00
Expenses		$427.43
GST		$887.62
Total		$18,640.05

[57] In awarding costs the Board assesses the level of assistance the person made to the Board in determining its recommendations. In this case, Dr. Sevigny was of great assistance to the Board. He provided alternative remediation options, proposed a remediation plan for the On-site and Off-site areas, and provided a balanced view of the options and limitations. The Board used his proposed remediation plan as the basis for its recommendations.

[58] The Board considers it appropriate to award relevant costs for Dr. Sevigny's participation in the appeal process.

[59] Dr. Sevigny's hourly rate of $225.00 per hour is reasonable given his 17 years experience dealing with contaminated sites. The Board notes he reduced his hourly rate for the time spent traveling. According to his invoice, Dr. Sevigny spent 45 hours preparing for the hearing. Given he was at the hearing for 24 hours, this equates to a ratio of two hours preparation time for each hour of hearing. This falls within the generally accepted practice of two to four hours preparation time, depending on the complexity of the issues, for each hour of the hearing. The issues in this hearing were complex. There was no question contamination from the Site had migrated Off-site and impacted the Residents' properties. However, the major issue the Board had to consider was the remediation options to determine the most appropriate method to use to remediate the contaminated area.

[60] The Board generally does not award costs for travel when the hearing is held in a major city. As many of the major consultant companies have offices in the major cities, it is reasonable to expect a hearing participant would be able to retain a consultant from that city. The Board wants it to be clear that a hearing participant is free to retain any consultant they may want. It is only when assessing travel costs and time that the location of the consultant would be a factor before the Board. The Board notes Dr. Sevigney reduced his travel expenses by half. However, the Board reduces the costs claimed by subtracting the expenses claimed for travel by Dr. Sevigney, including the costs of the rental vehicle and fuel, hotel, meals, and travel incidentals. All of these costs are associated with expenses incurred as a result of retaining a consultant from outside the local area. Therefore, the total costs claim is reduced by $427.43

plus $21.37 GST. In addition, the time claimed for travelling to and from the hearing is deducted. This amounts to $1,800.00 plus $90.00 GST.

[61] In reviewing the timesheets provided, the Board notes Dr. Sevigney claimed one hour after the close of the hearing for reviewing and responding to documents. This time is clearly not relevant to the preparation and presentation at the hearing and, therefore, this hour is deducted from the time claimed, reducing the costs claimed for Dr Sevigney by $225.00 plus $11.25 GST. Therefore, the total costs claimed is reduced by $2,575.05. This leaves a rationalized costs claim of 68 hours at $225.00 per hour, totaling $15,300.00 plus $765.00 GST, amounting to $16,065.00.

[62] Included in the costs claim for Dr. Sevigney were costs associated with a junior consultant totaling $1,955.00 for 23 hours of work. It is reasonable to expect junior consultants to conduct some of the preliminary work. As the hourly rate is usually less than the senior consultant, using a junior consultant reduces costs to their clients. From the information provided, it appears the junior consultant compiled and verified data. As the analysis was required for Dr. Sevigney to complete his report, and the hours and rate claimed were reasonable, the Board will award all costs for the junior consultant, totaling $1,955.00 plus $97.75 GST.

[63] When the Board considers awarding costs, it assesses whether the evidence provided during the hearing assisted the Board in preparing its Report and Recommendations for the Minister. In this case, Dr. Sevigney presented concise, relevant, and applicable evidence. As stated, the report he prepared for the hearing was the basis of the Board's recommendations. Therefore, the Board considers it reasonable in this circumstance to award all relevant costs, as rationalized above, for Dr. Sevigney's participation at the hearing. Therefore, the Board awards total costs of $18,117.75 for Dr. Sevigney's and Iridium Consulting Inc.'s participation in the hearing.

2. Legal Costs

[64] Counsel for the Residents ensured the hearing process continued efficiently. Residents' counsel effectively cross-examined the Appellants' witnesses, identifying areas of

concern in the Appellants' proposed remediation plan. He kept the Residents' submissions focused on the issues identified for the hearing. The Residents worked together to avoid duplication in their submissions and evidence. By combining their joint resources, the Residents retained an effective consultant and experienced counsel. This provided for a more effective and efficient hearing. Therefore, the Board considers it appropriate to award legal costs.

[65] The Residents' counsel provided a detailed breakdown of the hours spent on the file. Included in the legal costs claimed were costs associated with work done by junior lawyers. Although the Board sees value in having junior lawyers conduct some of the research and preliminary preparation work, the Board cannot justify, in this case, awarding costs for more than one junior lawyer. Ms. Sharon Au was the primary assistant to lead counsel, Mr. Richard Secord, throughout the hearing process. Therefore, the Board reduces the costs claimed by only considering the time and expenses claimed by Mr. Secord and Ms. Au.

[66] Also, as stated in the discussion of the consultant's costs, the Board will not consider time or expenses for retaining counsel outside of Calgary. This includes travel to and from the hearing as well as accommodation and meals.

[67] Mr. Secord argued the Board should use the Scale of Costs as established by the ERCB or AUC. The Board uses the tariff of fees for outside counsel as set out by the Government of Alberta, because it provides an objective standard. Although the rates may not be in line to what counsel may charge in private practice, the Board considers it appropriate to use this tariff in determining costs awards. The Board recognizes there may be circumstances in which the tariff may not be appropriate. However, in this case, the Board considers the Government of Alberta tariff to be appropriate. The Board notes the rates charges by Ms. Au and another lawyer at the firm who did work on the file, Ms. Debbie Bishop, were 66.7 percent and 71 percent, respectively, of the Scale of Costs. The Scale of Costs lists the rate for a lawyer with more than 12 years at the bar at $350.00 per hour. If a similar reduction in rate is used for Mr. Secord as was used for the Ms. Au and Ms. Bishop, the resulting hourly rate is in line with the Government of Alberta tariff. For example, 67 percent of the Scale of Costs rate for a lawyer with more than 12 years at the bar would amount to $234.50 per hour, and at 71 percent, the rate

would be $248.50. As this is an arbitrary reduction, the Board considers the Government of Alberta tariff rate reasonable, which in this case, for a lawyer of Mr. Secord's experience and 31 years at the bar, is $250.00 per hour. For Ms. Au, with one year at the bar, the Government of Alberta tariff rate is $95.00 per hour.

[68] The general starting point in determining legal costs is at half of the relevant costs. This takes into consideration the principle that members of the public are obligated to accept some of the responsibility of bringing environmental issues forward. The Board adjusts the amount depending on whether counsel's participation at the hearing assisted the Board.

[69] In reviewing the summary of accounts provided, there are numerous occasions where time is spent consulting between the different lawyers. Although this is essential for preparing an effective presentation, it would be inappropriate for the party paying costs to pay for what would be essentially the same service twice. Therefore, the Board is reducing the costs claimed by Ms. Au for the hours she consulted with Mr. Secord. The Board will retain the meeting time claimed by Mr. Secord. In addition, the Board will adjust the hours claimed by Ms. Au to remove time spent on matters not related to the preparation and presentation of the Residents' submissions. Examples include time spent reviewing the Appellants' leases and obtaining information on the status of companies. Based on the information provided, the Board reduces the hours claimed by Ms. Au by 17.2 hours. By subtracting the travel time and adjusted hours claimed, Ms. Au's legal costs would be for 96 hours at a rate of $95.00 per hour, totaling $9,120.00 plus $456.00 GST.

[70] Ms. Au assisted Mr. Secord in preparing the submissions and organizing the presentation before the Board. She did not actively participate in the hearing. However, the Board considers it appropriate to award half of Ms. Au's adjusted costs to recognize the assistance she provided Mr. Secord to ensure the Residents' participation was effective. Therefore, the Board awards costs for Ms. Au totaling $4,560.00 plus $228.00 GST, totaling $4,788.00.

[71] Mr. Secord claimed 195.7 hours. This does not include the travel hours claimed which the Board will not consider in the costs award. Of this, approximately 32 hours was for

attending at the hearing. The remaining hours results in approximately five hours of preparation for each hour of hearing, which exceeds the general guideline of two to four hours preparation time for each hour of hearing. The Board recognizes time claimed also includes the costs incurred in responding to the stay applications filed by the Appellants, and given the complexity of the issues in these appeals and the number of Residents he represented, the Board does not consider the time claimed excessive. Therefore, the Board accepts the hours claimed with the following adjustments.

[72] The Board notes costs were included in Mr. Secord's summary of accounts for items that were not directly related to the preparation and presentation of the Residents' submissions. For example, time was claimed for conferencing with someone regarding shrinking pdf files. Although this may have assisted legal counsel in sending documents or compiling the information, it is not directly related to the actual submissions to the Board. Therefore, time claimed for these meetings, and others that cannot be established as to their purpose, cannot be included in the hourly calculations.

[73] In reviewing the breakdown of the time spent on the file by Mr. Secord, it is often difficult to determine the exact time spent on a specific item. For example, the description of the service provided might include telephone calls to the consultant, conferences with other lawyers on the file, drafting letters to the Board, and reviewing emails, all within 0.4 hours. In circumstances such as this, the Board can only estimate what time is applicable in a costs claim. There was no indication to the breakdown of time spent discussing relevant matters compared to those that were not relevant to the preparation and presentation of submissions. The Board is reducing the hours claimed Mr. Secord by 10 percent to compensate for those circumstances where it is unclear what portion of the time claimed is not appropriately part of the costs the Board will consider. Therefore, the total hours the Board will consider for Mr. Secord is 176.1.

[74] When calculating legal fees for Mr. Secord at an hourly rate of $250.00 and with the adjusted hours, the legal fees for Mr. Secord would amount to $44,025.00 plus $2,201.25 GST. Mr. Secord represented a number of Residents who were impacted by the Off-site migration of the contaminants. Had each of the Residents retained individual counsel, the

hearing process would have lasted longer and would have likely resulted in submissions being repetitive. Given the assistance Mr. Secord gave to the Board in ensuring arguments and evidence and cross-examination were effective and efficient, the Board is willing to award 90 percent of these costs, totaling $39,622.50 plus $1,981.12 GST.

[75] Therefore, the total costs award for Mr. Secord's participation in the hearing process is $39,622.50 plus $1,981.12 GST, totaling $41,603.62.

[76] Included in the accounts for legal fees were disbursements. The Board will not award costs for on-line searches that can be done using libraries at no cost. In addition, the Board does not see the relevance of tax searches to the issue under appeal. The Board does not consider it appropriate to award costs for long distance charges. Had the Residents retained counsel and consultants from Calgary, these charges would not apply or might have been reduced. The Board notes email was used extensively between the Residents and their counsel. As stated above, the Board will not award costs for travel, including hotel expenses, mileage, or meals. There is no explanation of what is included under "supplies." Without some explanation of what this includes, the Board will not include these costs in a costs award. An administration fee does not assist in the preparation or presentation of the submissions. Therefore, the administration fee will not be considered in the costs award.

[77] The Board will award costs for the following disbursements:

1. photocopies : $48.15 plus $2.41 GST;
2. scanning: $14.50 plus $0.72 GST;
3. printer copies: $864.30 plus $43.22 GST;
4. courier charges: $29.87 plus $1.49 GST; and
5. postage: $1.25 plus $0.06 GST.

Total: $958.07 plus $47.90 GST = $1,005.97

[78] Therefore, the Board awards legal costs of $45,140.57 plus $2,257.02 GST, totaling $47,397.59. This includes $4,788.00 for Ms. Au's participation, $41,603.62 for Mr. Secord's participation, and $1,005.97 for disbursements.

D. Who Should Bear the Costs?

[79] 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,[19] that costs should not be awarded against the Director providing his actions in carrying out his statutory duties were done in good faith.

[80] 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

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[19] See: *Cabre Exploration Ltd.* v. *Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

> circumstances that would give rise to such an order before those circumstances arise."[20]

[81] The Appellants in this case did not argue the Director should be responsible for paying any of the costs. The Residents asked that costs be awarded against only the Appellants. In this case, the Board agrees.

[82] Therefore, the Board considers it appropriate the Appellants pay the costs as determined above for the Residents' legal and expert costs. The Appellants were responsible for the contamination and are responsible for the remediation work. The Appellants should have taken every step possible to mitigate the effects of the contamination as soon as they became aware of it. If the necessary steps were taken earlier, the effects on the Residents may have been minimal or prevented. However, as the contamination affected the Residents, they were compelled to participate in the hearing to protect their interests. Section 2(i) of EPEA recognizes the principle of the polluter pays.[21] This requires the polluter pay the costs of the remediation work and, in this case, the costs associated with the Residents needing to participate in the appeal process to protect their interests due to the Appellants' actions.

[83] Therefore, the Board orders the Appellants pay all costs as determined above.

V. DECISION

[84] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Residents, in the amount of $65,515.34, payable by the Appellants, Gas Plus Inc. and Handel Transport (Northern) Ltd. This includes $18,117.75 for the Residents' consultant, $4,788.00 for Ms. Au's participation, $41,603.62 for Mr. Secord's participation, and $1,005.97 for legal disbursements.

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

[21] Section 2(i) of EPEA provides:

> "The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing … the responsibility of polluters to pay for the costs of their actions."

[85] The Board orders these costs be paid within 60 days from the date of this decision. Payment is to be made to the Residents' counsel, Mr. Richard Secord, in trust. Gas Plus Inc. and Handel Transport (Northern) Ltd. are requested to provide written confirmation to the Board that payment has been made.

Dated on July 11, 2012, at Edmonton, Alberta.

"*original signed by*"
D.W. Perras
Chair

"*original signed by*"
Alan J. Kennedy
Board Member

"*original signed by*"
Nick Tywoniuk
Board Member