ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 10, 2014

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 section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Sandstone Springs Development Corporation with respect to the cancellation of *Water Act* Preliminary Certificate No. 00250484-00-00 issued to Sandstone Springs Development Corporation by the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Costs Decision: *Sandstone Springs Development Corporation* v. *Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, (10 April 2014), Appeal No. 12-043-CD (A.E.A.B.).

PANEL MEMBERS:

Mr. Alex MacWilliam, Panel Chair;
Dr. Alan Kennedy, Board Member; and
Mr. Jim Barlishen, Board Member.

SUBMISSIONS BY:

Appellant: Sandstone Springs Development Corporation, represented by Mr. Derek King, Brownlee LLP.

Director: Mr. Brock Rush, Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Charlene Graham, Ms. Alison Altmiks, and Ms. Vivienne Ball, Alberta Justice and Solicitor General.

Intervenor: Town of Okotoks, represented by Mr. Gilbert J. Ludwig, Wilson Laycraft.

EXECUTIVE SUMMARY

In 2010, Alberta Environment and Sustainable Resource Development (AESRD) issued a Preliminary Certificate to the Sandstone Springs Development Corporation (Sandstone) under the *Water Act*, to divert 98,550 cubic metres of groundwater annually from two wells located in E½ 24-20-1-W5M in the Municipal District of Foothills near Okotoks, Alberta, for municipal purposes. However, based on information in a report that had not been provided by Sandstone to AESRD until February 2011, AESRD cancelled the Preliminary Certificate because the report indicated the groundwater source in the Preliminary Certificate is likely connected to "Reserved Water." Under the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order* (the Allocation Order), all surface water and water below the ground naturally flowing to and from the rivers and tributaries within these basins is Reserved Water. Licences cannot be issued for Reserved Water except under specific circumstances.

The Board held a hearing to hear submissions and evidence on whether AESRD's decision to cancel the Preliminary Certificate was appropriate. The Board recommended, and the Minister ordered, the decision to cancel the Preliminary Certificate be confirmed.

The Town of Okotoks, an intervenor at the hearing, requested costs totalling $29,050.17 for consultant fees.

The Board found the consultant materially assisted the Board at the hearing by providing clear explanations of the significance and relative importance of the data presented. The Board awarded costs totalling $3,417.75 to be paid by Sandstone Springs to the Town of Okotoks.

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I. INTRODUCTION

[1] This is the Board's decision regarding the costs application submitted by the Town of Okotoks ("Okotoks" or the "Intervenor") with respect to the appeal filed by Sandstone Springs Development Corporation ("Sandstone" or "Appellant"). Alberta Environment and Sustainable Resource Development ("AESRD") cancelled Preliminary Certificate No. 00250484-00-00 (the "Certificate") that was issued to Sandstone under the *Water Act*, R.S.A. 2000, c. W-3. The Certificate, issued on February 9, 2010, entitled Sandstone to a licence for groundwater from two wells for municipal purposes when all conditions of the Certificate were met.

[2] Okotoks appealed the issuance of the Preliminary Certificate.[1] The Board scheduled a hearing and, in the process of preparing for the hearing of Okotoks' appeal, additional relevant information that was in Sandstone's possession became available to AESRD following a request from Okotoks. After reviewing the additional information, AESRD asked that the hearing be adjourned to provide additional time to review the new information to determine if the proposed production wells were hydraulically connected to "reserved water." Under the *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta. Reg. 171/2007 (the "Allocation Order"), all surface water and water below the ground naturally flowing to and from the rivers and tributaries within these basins is reserved water ("Reserved Water"), and licences cannot be issued for Reserved Water except under specific circumstances.

[3] Following a review of the additional material, AESRD cancelled the Certificate, and Sandstone Springs subsequently appealed. The Environmental Appeals Board (the "Board") held a hearing on whether the water applied for was Reserved Water. Okotoks participated in the hearing as an intervenor.

[4] Following the hearing, the Board recommended the decision to cancel the Certificate be confirmed. The Minister issued an order confirming the cancellation of the Certificate.

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[1] See: Environmental Appeals Board Appeal No. 09-051.

[5] Okotoks applied for costs for retaining a consultant. After reviewing Okotoks' application and the parties' submissions, the Board awarded costs totalling $3,417.75 to be paid by Sandstone Springs to Okotoks.

II. BACKGROUND

[6] On February 9, 2010, the Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the "Director"), issued the Certificate to Sandstone. The Certificate entitled Sandstone to a licence, if all conditions of the Certificate were met, to divert 98,550 cubic metres of groundwater annually from wells PW1-05 and PW2-06 located in E½ 24-20-1-W5M near Okotoks, Alberta, for municipal purposes (a country residential subdivision with 230 lots and 70 patio homes).

[7] On March 30, 2010, Okotoks filed an appeal of the decision to issue the Certificate. The Board notified Sandstone and the Director of the appeal and requested the Director provide to the Board with a copy of the records (the "Record") relating to the appeal. The Record was received on April 22, 2010, and copies were provided to the Okotoks and Sandstone.

[8] A hearing was scheduled for April 12, 2011. On February 8, 2011, Okotoks requested that Sandstone provide a copy of a report prepared by a consulting firm, Matrix Solutions Inc. ("Matrix"), and referenced in the documentation supporting the application. The Board received the August 2008 report prepared by Matrix (the "Matrix Report") on February 23, 2011, and provided it to the Director and Okotoks.

[9] On March 9, 2011, the Director requested the Board adjourn the hearing, because the Matrix Report included new information suggesting there is a connection between the aquifer and surface water (Reserved Water) and because certain data appeared to be missing from the Matrix Report.

[10] Between March 2011 and December 2012, the Director and Sandstone engaged in discussions regarding the new information and missing data in the Matrix Report. During this time, the Director and Sandstone provided the Board with regular updates on their discussions.

[11] On November 6, 2012, following discussions with the Director, Okotoks, and Sandstone, the Board scheduled a hearing for April 10, 2013.

[12] On January 16, 2013, Sandstone requested the hearing be adjourned for five months so a pumping simulation could be carried out. Okotoks supported the adjournment but the Director did not. The Board denied the request for an adjournment on January 23, 2013.

[13] On February 6, 2013, the Director notified the Board that the Certificate had been cancelled. This effectively concluded the appeal by Okotoks (E.A.B. Appeal No. 09-051).[2]

[14] On February 15, 2013, the Board received a Notice of Appeal (E.A.B. Appeal No. 12-043) from Sandstone appealing the cancellation of the Certificate. The Board notified the Director and Okotoks of the appeal on February 21, 2013. With the consent of the Appellant, Director, and Okotoks, the Board decided to proceed with the April 10, 2013 hearing date and set the schedule to receive submissions for the hearing on the appeal of the cancellation of the Certificate.

[15] In response to the Notice of Hearing, the Board received an intervenor request from Okotoks. On March 14, 2013, the Board notified the Appellant and Director that Okotoks (the "Intervenor") was granted intervenor standing and allowed to participate fully.

[16] The Board received submissions from the Appellant, Director, and Intervenor (collectively, the "Participants") between March 21 and 28, 2013.

[17] The hearing was held on April 9 and 10, 2013, in Calgary. The Appellant and Intervenor reserved their right to apply for costs.

[18] The Board subsequently provided its Report and Recommendations to the Minister. The Minister accepted the Board's recommendations and issued her Ministerial Order on September 17, 2013.[3] The Board provided copies of its Report and Recommendations and the Ministerial Order to the Participants on September 19, 2013.

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[2] See: Board's letters, dated February 4, 6, and 12, 2013.

[3] See: *Sandstone Springs Development Corporation* v. *Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, (15 May 2013), Appeal No. 12-043-R (A.E.A.B.).

[19] On October 4, 2013, the Intervenor filed a request for costs. No costs application was received from the Appellant.

[20] On October 18, 2013, the Board received response submissions from the Director and Appellant.

III. SUBMISSIONS

A. Intervenor

[21] The Intervenor claimed costs for its consultant, totalling $29,050.17. The Intervenor did not claim costs for its legal representation.

[22] The Intervenor submitted the evidence presented by its consultant, Mr. Lucien Lyness, substantially contributed to the hearing, was directly related to the matters contained in the Notice of Appeal and the issue set by the Board, and made a significant contribution to the goals of the *Water Act*.

[23] The Intervenor submitted the evidence provided by its consultant included:

1. information on the regionally-occurring near-vertical fracture system;
2. effect of glacial unloading on fracture permeability and the effect of vertical fractures as leakage mechanisms;
3. explanation of aquifer types;
4. explanation of till layers and incidences of vertical fracturing;
5. potential effect of test pits on water conductivity;
6. interpretation of pump test data including limitations of parameters and results;
7. interpretation of water chemistry data and Stiff diagrams; and
8. concerns regarding the integrity of the water quality testing conducted.

[24] The Intervenor stated it was instrumental in bringing forward the Matrix Report to the Director since it was disclosed only after the Intervenor requested it be produced. The Intervenor stated the Matrix Report provided information that was vital to the Board's decision, particularly the concerns raised in the Matrix Report regarding hydraulic connectivity to

Reserved Water that the Appellant was aware of when its application was initially submitted to the Director.

[25] The Intervenor submitted Mr. Lyness materially contributed to the process by requesting the provision of the Matrix Report for review, through preparation of his own report, and through his participation in the hearing. The Intervenor said that, given the highly technical nature of the data, the evidence the Intervenor provided significantly contributed to the Board's process.

[26] The Intervenor provided invoices totalling $29,050.17, which included $25,443.75 for labour services, $2,035.50 for office support, $187.57 for disbursements, and $1,383.35 GST. The labour services included costs for two hydrogelogists billed out at a rate of $210.00 per hour, environmental drafters billed out at a rate of $105.00 per hour, and a project manager who billed out at a rate of $115.00 per hour.

[27] The Intervenor submitted the costs claimed were reasonable in the circumstances and were directly and primarily related to the preparation and presentation of its submissions.

B. Appellant

[28] The Appellant submitted the Board should deny an award of costs to the Intervenor, and let each party bear its own costs.

[29] The Appellant disagreed with the Intervenor's submissions regarding the Intervenor's involvement in drawing the Director's attention to the Matrix Report and that this report was material to the overall analysis of the issues in this appeal. The Appellant submitted the Intervenor did not recognize the distinction between the matters addressed in the appeal of the Certificate filed by Okotoks and the appeal filed by Sandstone Springs of the Director's decision to cancel the Certificate. The Appellant argued that while the request for the Matrix Report may have contributed to Okotoks' appeal of the issuance of the Certificate, that appeal had been rendered moot.

[30] The Appellant said that, even though Okotoks was accepted as an intervenor, its submissions and evidence were not required to justify the Director's decision and the

Intervenor's submissions simply reiterated the Director's evidence. The Appellant argued that awarding costs would effectively award costs for the moot appeal.

[31] The Appellant submitted the Intervenor was an unnecessary participant at the appeal. The Appellant said the Intervenor's submissions were mostly unheeded in the Board's analysis, and the Board only considered the Director's evidence in making its recommendations.

[32] The Appellant stated the Director made his decision to cancel the Certificate based on the data he had before him, including the Matrix Report obtained during the previous, moot appeal. The Appellant stated the Director was the party most suited and most capable of defending his decision. The Appellant argued that, for the Intervenor's submissions to be considered a substantial contribution to the appeal, the submissions should have raised novel issues not addressed in the Director's decision or should have provided substantial support for aspects of the Director's decision for which the Director failed to provide supporting evidence. The Appellant submitted the Intervenor's submissions did neither.

[33] The Appellant said the Intervenor's evidence and submissions only restated the basis of the Director's decision and why it considered the decision was correct. The Appellant stated the Director and the Intervenor provided essentially the same evidence regarding vertical fracture systems, aquifer types, and the interpretation of pump test data and water chemistry.

[34] The Appellant argued the issues raised by the Intervenor were mostly irrelevant or redundant. The Appellant said the report provided by Mr. Lyness was not required to support the decision of the Director, and it, as well as the Intervenor's submissions, merely restated the information provided by the Director.

[35] The Appellant stated the Board focused mainly on the examination of the data and the evidence provided by the Director and acknowledged the Intervenor's submissions agreed with those of the Director. The Appellant stated the Board did not suggest that any of the additional information put forward by the Intervenor contributed substantially to the Board's recommendations.

[36] The Appellant said the Intervenor did not provide any new evidence or information that made a substantial contribution to the Board's decision regarding material misrepresentation.

[37] The Appellant submitted the costs application should be denied.

[38] The Appellant said it acted in good faith in determining its appeal was necessary in order for the Board to consider competing interpretations of data and the lack of clarity as to the degree of evidence and confidence needed to establish that water is not Reserved Water pursuant to the Allocation Order. The Appellant noted there were different interpretations of the same data and of the relevance of the data in the context of the local hydrogeology. The Appellant argued it should not be penalized based on its attempt to seek clarification of these data interpretations.

[39] The Appellant said the regulatory system regarding this water basin and the determination of which water is reserved or exempt is largely unclear. The Appellant submitted it would be inappropriate to impose costs against it as the issues were complex and open to different conclusions, justifying an appeal in order to seek clarification of how the regulatory system is intended to work. The Appellant stated ordering costs against it would set a precedent whereby future appellants would be strained by the risk of a costs award in favour of potential intervenors if appellants were to seek reconsideration of complex environmental issues from the Board.

[40] The Appellant said that granting the Intervenor costs does not promote the purpose of the *Water Act* to ensure the shared responsibility of citizens to protect the environment. The Appellant argued it would create a chilling effect on citizens based on the threat of having to subsidize the costs of appeals, thereby impacting the essential and fair appeals process.

[41] The Appellant said the costs claimed were excessive and disproportionate to the Intervenor's contribution to the appeal. The Appellant said that even though the Intervenor limited its costs to its consultant's fees and excluded its legal costs, this does not justify any reduced scrutiny of the appropriateness of its consultant's costs.

[42] The Appellant noted the costs included time charged by two senior hydrogeologists for drafting and reviewing the report. The Appellant argued using two senior hydrogeologists was redundant and unnecessary. The Appellant said the Intervenor charged for administrative time and included an office support charge that appeared to be duplicative.

C. Director

[43] The Director took no position on the Intervenor's costs application.

IV. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[44] The legislative authority giving the Board jurisdiction to award costs is section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("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."[4]

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.)[5]

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

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

[45] The sections of the *Environmental Appeal Board Regulation*,[6] (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.
>
> …
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> 20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.
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> (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.
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> (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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> (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."

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6 *Environmental Appeal Board Regulation*, A.R. 114/93.

[46] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of the *Water Act* as stated in section 2.[7]

[47] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in the *Water Act* and the Regulation should apply to a particular claim for costs.[8] The Board also determines the relative weight to be given to each criterion, depending on the specific circumstances of each appeal.[9] 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."[10]

[48] As stated in previous appeals, the Board evaluates each costs application against the criteria in the *Water Act* 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:

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[7] Section 2 of the *Water Act* provides:

"The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

(b) the need for Alberta's economic growth and prosperity;

(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;

(d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;

(e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;

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

[8] *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.)).

[9] *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.).

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

(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."[11]

[49] 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.[12]

B. Courts vs. Administrative Tribunals

[50] 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. In all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The Board's task is not to simply determine a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. In determining whether an award of costs is appropriate, the Board must consider the public interest generally and the overall purposes listed in section 2 of the *Water Act*.

[51] The distinction between 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

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

[12] *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.).

> 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."[13]

[52] 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:
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> > 'In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"[14]

[53] 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

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[13] *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."

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

> 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."[15]

V. ANALYSIS

[54] The Intervenor submitted a claim for costs incurred for the participation of its hydrogeologist, Mr. Lyness, in the hearing process.

[55] Although the Board may not have specifically quoted his evidence in its Report and Recommendations, the Board considered his evidence as it did the evidence given by all witnesses at the hearing.

[56] The Board recognizes the Matrix Report was brought to the Director's attention by Okotoks as part of the appeal of the issuance of the Certificate. However, this report was pivotal in the Director's decision to cancel the Certificate and in the issues argued before the Board. Sandstone had not disclosed the report to the Director until it was requested by Okotoks. Although the Board cannot award costs to Okotoks for bringing the Matrix Report to the Director's attention, this action demonstrates the efforts made by Okotoks to ensure all of the relevant data for the site were made available to the Participants.

[57] The Board appreciated Mr. Lyness' clear explanation of the hydrogeology in the area of the proposed wells. Of particular benefit to the Board was his prioritization of the different parameters measured. Mr. Lyness clearly explained that, of all the data collected, the results of pump testing were the most relevant and conclusive information in determining whether the proposed wells were hydraulically connected to surface water. Although other

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[15] *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.).

parameters provided additional information, Mr. Lyness provided clear explanations of their reliability and their relative significance in determining whether connectivity exists.

[58] Mr. Lyness' evidence supported the position of the Director. He provided alternative ways of assessing the data and assisted the Board in understanding the hydrogeology in the area and how the Sandstone Springs aquifer is Reserved Water. Given the value of Mr. Lyness' evidence, the Board is of the view that an award of costs for his participation in the hearing is appropriate.

[59] The invoice provided with the costs claim includes administrative costs totalling $2,035.50. The Board generally does not award administrative costs, because these costs are not directly related to the preparation and presentation of the submission before the Board. Therefore, these costs will not be considered by the Board.

[60] Additional costs were claimed for work done by others in Mr. Lyness' office. The Board understands that work is often delegated to others in an effort to reduce costs for clients. However, the information provided by the Intervenor in support of its costs application provides no explanation as to what specific work was completed by other personnel or how their work related to the preparation and presentation of the submissions to the Board. Therefore, the Board will only consider the portion of the costs related to work done by Mr. Lyness.

[61] The Board will award costs for the time charged by Mr. Lyness in the week of the hearing. The hearing lasted two days, or approximately 16 hours. He has claimed a total of 31 hours for that week. This would take into account time spent at the hearing as well as preparation time. One hour of preparation time for each hour spent at the hearing is well within the range the Board has accepted for determining appropriate costs for preparation. Therefore, the amount that will be used by the Board to determine the amount of the costs award is $6,510.00 (31 hours x $210.00 per hour).

[62] Costs are awarded to recognize a participant's assistance to the Board in making its recommendations. If the Board finds a participant was helpful enough to the Board to consider awarding costs, the Board's practice is to reduce the relevant fees and expenses by 50 percent to reflect the Board's belief that participants to an appeal should bear at least some of

their own costs of bringing environmental issues forward. This amount is then adjusted up or down depending on the level of assistance the participant provided to the Board and taking into account the other factors listed in the Regulation.

[63] Applying this approach to the amount calculated in paragraph 61 would reduce the costs in respect of Mr. Lyness' contribution to $3,255.00. The Board does not believe there are any factors that would justify adjusting this amount up or down. Accordingly, the Board considers $3,255.00, plus $162.75 GST for a total of $3,417.75, as reasonable costs for Mr. Lyness' participation in the hearing.

[64] The Intervenor also requested costs for disbursements totalling $187.57. These costs were for taxi fares to attend meetings with legal counsel. These costs will not be awarded as they are not related to the preparation and presentation of evidence before the Board.

[65] Therefore, the Board awards costs to the Intervenor of $3,255.00, plus $162.75 for GST, for a total costs award of $3,417.75.

VI. Who Should Bear the Costs?

[66] Although the legislation does not prohibit the Board from awarding costs against the Director, the Board has stated in previous cases, and the Courts have concurred,[16] that costs should not be awarded against the Director providing he carried out his statutory duties in good faith.

[67] In this case, the Board confirmed the Director's decision. 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

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

> 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."[17]

[68] The Intervenor in this case did not argue the Director should be responsible for paying any of the costs. There was no indication the Director acted in bad faith and, in this case, the Intervenor's evidence supported the Director's decision.

[69] The Board believes it is appropriate for the Appellant to pay the costs award as provided for under section 20 of the Regulation.

VII. DECISION

[70] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Intervenor, in the amount of $3,417.75, to be paid by the Appellant, Sandstone Springs Development Corporation.

[71] The Board orders these costs be paid within 60 days from the date of this decision. Payment is to be made to the Intervenor's legal counsel, Mr. Gilbert Ludwig, in trust.

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

Sandstone Springs Development Corporation is requested to provide written confirmation to the Board that payment has been made.

Dated on April 10, 2014, at Edmonton, Alberta.

"*original signed by*"

Alex MacWilliam
Panel Chair

"*original signed by*"
Alan Kennedy
Board Member

"*original signed by*"
Jim Barlishen
Board Member