

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 7, 2016

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 appeals filed by Tania Demencuik and Terri Savitsky with respect to *Water Act* Approval No. 00349047-00-00 issued to the Municipal District of Bighorn No. 8 by the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development.

Cite as: Costs Decision: *Demencuik and Savitsky v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development, re: Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.).

BEFORE:

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

SUBMISSIONS BY:

Appellants:

Ms. Tania Demencuik and Ms. Terri Savitsky,
represented by Mr. Neil Patterson.

Approval Holder:

Municipal District of Bighorn, represented by
Mr. Derek King, Brownlee LLP.

Director:

Mr. Brock Rush, Director, South
Saskatchewan Region, Alberta Environment
and Sustainable Resource Development,
represented by Ms. Jodie Hierlmeier and Mr.
Gabriel Hill, Alberta Justice and Solicitor
General.

Other:

Mr. Paul Baumberg.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) (now Alberta Environment and Parks) issued an Approval to the Municipal District of Bighorn No. 8 (the Approval Holder) under the *Water Act* for work to be undertaken in Pigeon Creek.

Ms. Tania Demencuik and Ms. Terri Savitsky (the Appellants), who reside in a condominium complex adjacent to Pigeon Creek, appealed the issuance of the Approval.

Based on the Board's recommendations the Minister issued a Ministerial Order varying the Approval.

The Appellants filed a costs application in the amount of \$48,431.65 for costs associated with retaining their lawyer. The Board noted the complexity of the issues and the fact that, because AESRD dealt with the appeals by way of a Notice of Decision rather than publication of a Notice of Application for the Approval, the Appellants had no opportunity to be involved in the approval process other than to file a Notice of Appeal. The Board awarded costs, payable by the Municipal District of Bighorn, to the Appellants in the amount of \$16,619.10.

Mr. Paul Baumberg, who appeared at the hearing on behalf of Ms. Demencuik, also applied for costs for legal counsel totaling \$17,910.58 and costs of \$2,405.29 associated with retaining a technical expert, Dr. Richard Guthrie. Mr. Baumberg had appealed the Approval but withdrew his appeal before the hearing was held. Therefore, the costs claimed by Mr. Baumberg related to expenses incurred prior to withdrawing his appeal. Since Mr. Baumberg was not a party at the hearing, the costs claimed did not relate to the preparation and attendance at the hearing. Therefore, the Board did not award legal costs to Mr. Baumberg.

However, the Board noted that it was Mr. Baumberg who contacted Dr. Guthrie initially with the intent of retaining him as an expert at the hearing. When Mr. Baumberg withdrew his appeal, he no longer required Dr. Guthrie's services. Based on the written concerns provided by Dr. Guthrie to the Appellants' counsel and forwarded to the Board regarding public safety of the proposed project, the Board subsequently retained Dr. Guthrie as its expert at the hearing. Therefore, the Board will pay Mr. Baumberg's costs associated with Dr. Guthrie in the amount of \$1,368.00 plus \$68.40 GST, for a total of \$1,436.40.

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I. INTRODUCTION

[1] These are the Board's reasons for decision in relation to the costs applications filed by Ms. Tania Demencuik and Ms. Terri Savitsky (collectively, the "Appellants") and Mr. Paul Baumberg in relation to the issuance of Approval No. 00349047-00-00 (the "Approval") to the Municipal District of Bighorn No. 8 (the "Approval Holder" or "Bighorn").¹

[2] The Environmental Appeals Board (the "Board") held a hearing and, based on the Board's recommendations, the Minister of Environment and Parks issued Ministerial Order 33/2015 varying the Approval.

[3] The Appellants made a costs application totaling \$48,431.65 for legal costs incurred. The Board awards costs to the Appellants totaling \$16,619.10, payable by the Municipal District of Bighorn.

[4] Mr. Paul Baumberg, who appeared on behalf of Ms. Demencuik at the hearing, also filed a costs application totaling \$20,305.87. Mr. Baumberg had filed a Notice of Appeal with respect to the Approval, but he withdrew his appeal prior to the hearing. The costs claimed by Mr. Baumberg related to legal costs and costs of retaining a technical expert that he incurred before he withdrew his appeal. The Board decided not to award legal costs. The Board determined it will pay the costs associated with retaining the expert who appeared at the hearing as a witness for the Board. The Board awards costs to Mr. Baumberg of \$1,368.00 plus \$68.40 GST, for a total of \$1,436.40.

II. BACKGROUND

[5] On April 3, 2014, Bighorn applied for approval of a flood recovery project in Pigeon Creek as a result of impacts from the June 2013 flood. At the request of Bighorn, the Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource

¹ The Board also received Notices of Appeal from Mr. Paul Baumberg and Ms. Joan Corbeil. Mr. Baumberg withdrew his appeal on November 25, 2014, and Ms. Corbeil withdrew her appeal on November 27, 2014, both prior to the hearing.

Development² (the “Director”) waived the Notice of Application requirements under section 108(1) of the *Water Act* on the basis that it was an emergency pursuant to section 108(6) of the *Water Act*.³ A consultant for the Approval Holder had expressly requested the Director waive notice under this section.

[6] On May 12, 2014, the Director issued the Approval to the Approval Holder authorizing the installation of bank protection (rip rap), channel re-alignment, construction or excavation of a new channel, the filling in of an existing channel, and the construction of berms affecting Pigeon Creek in SE 13-24-10-W5M, SW 18-24-09-W5M, and NW 07-24-09-W5M. The Notice of Decision to grant the Approval was posted at the post office kiosk in the Hamlet of Dead Man’s Flats on May 14, 2014, near the Appellants’ condominium complex.

² AESRD is now called Alberta Environment and Parks. However, all relevant events occurred regarding these appeals while the Department was called AESRD.

³ Section 108(1) of the *Water Act* provides:

“An applicant

- (a) for an approval,
- (b) for a licence,
- (c) for a renewal of a licence if the Director has decided to conduct a public review of the licence renewal,
- (d) for an amendment of
 - (i) an approval,
 - (ii) a preliminary certificate, or
 - (iii) a licence,

or

- (e) for a transfer of an allocation of water under a licence,
shall provide notice of the application in accordance with the regulations.”

Section 108(6) of the *Water Act* states:

“Notwithstanding subsection (1), if the Director has received an application for an approval, a licence or an amendment of an approval, preliminary certificate or licence or the Director proposes to make an amendment on the Director’s own initiative, the Director may waive the notice requirement under subsection (1) if the Director is of the opinion that

- (a) there is an emergency,
- (b) the activity or diversion of water specified in the application for the approval or licence or the proposed amendment will result in a minimal or no adverse effect on the aquatic environment or on household users, licensees and traditional agriculture users, or
- (c) adequate notice of the subject-matter of the application or the proposed amendment has already been provided or given under this Act or the *Water Resources Act*, RSA 1980 cW-5.”

[7] On May 19 and 20, 2014, the Board received Notices of Appeal from the Appellants appealing the Approval. Ms. Savitsky also requested a stay of construction for the portion of the project located north of the Trans-Canada Highway. The Appellants' major concerns related to the large size of the proposed creek channel, the addition of extremely wide berms on each side of the channel, and the proposed realignment of the channel near their condominium complex.

[8] On May 23, 2014, the Board wrote to the Appellants, Approval Holder and Director (the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and stay request. The Board asked the Director to provide a copy of the documents upon which his decision was based (the "Record"). The Board also requested the Appellants to provide answers to the stay questions.⁴

[9] Between May 27 and 30, 2014, the Board received the Appellants' responses to the stay questions.

[10] On May 30, 2014, the Board received a copy of the Record. The Board provided a copy of the Record to the Parties on June 4, 2014.

[11] On June 9, 2014, the Board notified the Parties that a temporary stay of construction of the north portion of the project was granted pending completion of the submission process and the Board's final decision on the stay request. The Board asked the Director and Approval Holder to provide response submissions on the stay questions.

[12] On June 11, 2014, the Board notified the Parties that, based on the available dates provided by the Parties, the mediation meeting was scheduled for July 21, 2014.

⁴ The Appellants were asked to answer the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than the Municipal District of Bighorn No. 8 would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by AESRD's decision to issue Approval No. 00349047-00-00 to the Municipal District of Bighorn No. 8?

[13] The Board received response submissions on the issue of the stay from the Director and Approval Holder on June 19 and 23, 2014, respectively. Ms. Savitsky provided a final response on July 2, 2014. Ms. Demencuik did not provide a final response.

[14] On July 10, 2014, the Board notified the Parties that it was putting the stay decision on hold pending the mediation meeting.

[15] The mediation meeting was held on July 21, 2014, in Canmore. The mediation did not result in the appeals being withdrawn, and the Board proceeded to determine whether the stay should remain in place until the Board held the hearing and the Minister made a decision.

[16] On August 12, 2014, the Board requested the Approval Holder advise the Board whether the Approval Holder wanted to proceed with construction under the Approval or agree to the temporary stay remaining in place.

[17] On August 12, 2014, the Board asked the Parties to provide any preliminary motions they wanted the Board to decide and to specify the issues included in the Appellants' Notices of Appeal that should be heard by the Board at the hearing.

[18] On August 19, 2014, the Approval Holder notified the Board that it would like to proceed to complete construction of the proposed project.

[19] On August 25, 2014, the Board notified the Parties that the stay would remain in place. The Board's reasons for its decision were provided to the Parties on October 20, 2014.⁵

[20] Between August 31, 2014, and October 10, 2014, the Board received the Parties' comments on the issues for the hearing.

[21] On October 17, 2014, the Board notified the Parties the issues for the hearing were:

1. Did the Director properly exercise his discretion regarding the size and scope of the proposed project when issuing the Approval?

⁵ See: Stay Decision: *Corbeil et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn* (20 October 2014), Appeal Nos. 14-003-006-ID1 (A.E.A.B.).

2. Are the design requirements of the proposed project, including size and scope, as specified in the Approval adequate to protect the environment and ensure public safety?
3. If the Director's decision to issue the Approval was based on an invalid document, would the Approval be valid?

[22] On November 25, 2014, the Board received written submissions for the hearing from the Parties. Response submissions were received on December 4, 2014.

[23] On November 25, 2014, the Appellants provided the Board with an email from Dr. Richard Guthrie, a consultant contacted by a former appellant, Mr. Paul Baumberg, offering the services of a group of University of Calgary engineering students who were currently studying debris floods in the Bow River valley and could provide alternate designs for the work proposed for Pigeon Creek. Completion of these designs would require an adjournment of the hearing until the end of March 2015. In this email, Dr. Guthrie indicated the design authorized by the Approval raised public safety concerns specifically for users of the Trans-Canada Highway. The Board solicited comments on the Appellants' adjournment request from the other Parties.

[24] On November 28, 2014, the Board notified the Parties that the adjournment request was denied. The Board further stated that it intended to call Dr. Richard Guthrie to provide evidence at the hearing to address the public safety concerns he raised regarding the proposed project, including concerns regarding potential impacts to the Trans-Canada Highway.

[25] On December 5, 2014, the Board received a "will say" statement from Dr. Guthrie.

[26] On December 8, 2014, the Approval Holder requested an adjournment of the December 11, 2014 hearing to allow it time to prepare properly a response to Dr. Guthrie's "will say" statement and to identify a witness from Alberta Transportation who could address any safety-related issues raised by Dr. Guthrie regarding the potential impacts of the project on the Trans-Canada Highway.

[27] On December 8, 2014, the Board notified the Parties that it was granting the Approval Holder's request to adjourn the hearing scheduled for December 11, 2014. Reasons for the Board's decision were provided to the Parties on December 16, 2014.

[28] On January 6, 2015, the Board notified the Parties that it had reconsidered its August 28, 2014 decision to issue a stay of the Approval that applied to the construction portion north of the Trans-Canada Highway. The Board considered the delay in holding the hearing and the potential public safety concern raised by the Approval Holder regarding the 2015 spring freshet and determined the balance of convenience and the public interest had shifted such that continuation of the stay was no longer appropriate. Accordingly, the Board lifted the stay.

[29] On February 4, 2015, the Board notified the Parties that, based on the available dates provided, the hearing would be held on May 21 and 22, 2015.

[30] On February 24, 2015, the Board received a "will say" statement from Mr. Ralph Witten of Alberta Transportation on behalf of the Approval Holder.

[31] On April 27, 2015, the Board received supplemental submissions on the hearing issues from the Parties.

[32] The hearing was held on May 21 and 22, 2015, in Canmore.

[33] On August 31, 2015, the Board provided the Parties with a copy of its Report and Recommendations and the Ministerial Order 33/2015.⁶

[34] On September 15, 2015, the Appellants and Mr. Baumberg submitted costs applications. On October 8, 2015, the Approval Holder provided its response submissions, and additional comments were received from the Appellants and Mr. Baumberg. The Director took no position on the costs applications.

⁶ See: *Corbeil et al. v. Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (29 June 2015), Appeal Nos. 14-003-006-R (A.E.A.B.).

III. SUBMISSIONS

A. Appellants

[35] The Appellants requested costs to cover their legal counsel's expenses and fees.

[36] The Appellants stated their presentations were provided in a timely and efficient manner and did not delay or prolong the process. They also said they acted in good faith throughout the process.

[37] The Appellants took the position that AESRD was aggressive and unhelpful in providing information on the file. The Appellants explained that, when they contacted AESRD regarding a question under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, they were advised by AESRD staff that they could not talk to them because of the appeals.

[38] The Appellants stated they raised concerns regarding the design of the project early in the process. The Appellants said they talked to Alberta Transportation personnel who advised them that it would never change the size of the culverts. The Appellants noted one of the issues at the hearing related to the design of the project, and the Board recommended the Approval be varied, requiring the Approval Holder to redesign the project north of the Trans-Canada Highway.

[39] The Appellants noted that, had their legal counsel not forwarded Dr. Guthrie's concerns about the design, the Board would never have had the opportunity to see fully the problems with the design.

[40] The Appellants believed their submissions added substantially to the hearing and were directly related to the matters contained in the Notices of Appeal, and they contributed to the goals of EPEA, particularly to the protection of the environment.

[41] The Appellants said they, as well as their legal counsel, acted with integrity and professionalism. The Appellants considered their legal counsel's invoice to be reasonable.

[42] The Appellants noted it was their counsel who cross-examined witnesses on the question of whether the Approval application has been properly filled out. The Appellants noted the Board found the Approval application contained errors and was incomplete. The Appellants felt their participation helped the Board in preparing its recommendations.

[43] The Appellants' legal counsel charged the following:

1. legal fees for 173.75 hours at a rate of \$125.00 per hour for each Appellant for a total of \$47,020.52, including GST;
2. hotel expenses: \$248.08;
3. meals: \$105.02;
4. printing/photocopies: \$961.43;
5. Environmental Law Centre: \$15.00; and
6. mileage: \$81.60 for 204 km.

[44] The Appellants stated they cannot afford all of the costs incurred.

[45] Ms. Demencuik explained she and her husband run a family farm with five children, and they had no taxable income last year. She stated she cannot afford to compensate legal counsel.

[46] Ms. Savitsky explained she is a government employee and has other financial obligations including unforeseen medical costs. She stated that, in order to present the information to the Board, a lawyer of Mr. Patterson's caliber was necessary. Ms. Savitsky said she spent time and money to attend the mediation meeting, prepare for and attend the hearing, and research the issues. She valued her time and out-of-pocket costs at \$5,000.00.

[47] Ms. Savitsky said she felt bullied because of the Approval Holder's threat to seek costs against her. She stated she exercised her right to appeal as there had been no other public process to allow her opinions and those of her neighbours to be heard. Ms. Savitsky stated the threat was unmerited and caused stress to everyone, especially Mr. Baumberg. Ms. Savitsky stated it was unfortunate the Appellants only recourse had been the costly and time consuming hearing to allow for their views to be heard.

[48] The Appellants stated they decided to proceed with their appeals because their legal counsel reduced his normal hourly rate of \$400.00 to \$125.00 per Appellant because he felt the Appellants had been unfairly treated by AESRD by not being given the opportunity to raise concerns about the project before the Approval was issued.

[49] The Appellants noted the November 14, 2014 letter from the Approval Holder's counsel to Mr. Patterson, who was acting as legal counsel for Mr. Baumberg at the time. The Appellants stated the letter threatened Mr. Baumberg that he would have to pay all the Approval Holder's costs of the proceeding. The Appellants said that, as a result of the letter, Mr. Baumberg and one other appellant withdrew their appeals. The Appellants stated the Board should not allow this type of activity, and the Approval Holder should bear some, if not all, of the Appellants' costs in the hearing. They also hoped that Mr. Baumberg would also be able to recover some of his costs.

[50] The Appellants stated they had to go through a full hearing because there was no other opportunity to raise their issues, since the Director had made his decision by way of Notice of Decision. The Appellants argued there should be consequences when there is no Statement of Concern or consultation process before issuing an approval. They noted filing an appeal was the only way their concerns could be addressed. They said forcing an appellant to file an appeal, when full consultation is not undertaken, is unfair, and costly to private citizens. The Appellants suggested AESRD should consider taking steps to grant intervenor funding in cases such as this one, where there is no discussion or notice before an approval is issued.

[51] The Appellants requested the Board award all or most of their costs and direct that these costs be paid by the Approval Holder. The Appellants noted the Board found the Approval application was not reviewed as thoroughly as it should have been. The Appellants noted the Board recommended a number of changes to the design requirements and recommended the involvement of residents of Dead Man's Flats in subsequent discussions of the redesign of the project, particularly with respect to the realignment of Pigeon Creek, avoidance of trees and vegetation, and remedial landscaping.

[52] The Appellants stated their appearance at the hearing and their submissions and arguments were directly related to the matters in their Notices of Appeal, and their presentation helped the Board in its decision.

B. Paul Baumberg

[53] Mr. Baumberg asked for legal costs totaling \$17,910.58, including 5 percent GST, and \$2,405.29 for the costs associated with retaining Dr. Guthrie and his associates at SNC Lavalin.

[54] Mr. Baumberg said he acted in good faith, responded to all requests for information, met all deadlines, and was respectful in all aspects of the process.

[55] Mr. Baumberg explained he did not continue with his appeal for a number of reasons: (1) he could not spend all his savings on fees for expert witnesses and a lawyer; (2) he received a letter from the Approval Holder threatening to seek costs against him; and (3) his involvement in the appeal process increased his stress level and he started having health related issues.

[56] Mr. Baumberg said that, even though he withdrew as an appellant, he felt it was important to stay engaged, so he agreed to act as the representative for Ms. Demencuik at the hearing.

[57] Mr. Baumberg noted he was previously awarded interim costs of \$5,000.00 to help cover the costs of Dr. Guthrie but, since he withdrew his appeal, he did not receive these costs from the Approval Holder.

[58] Mr. Baumberg noted that throughout the appeal process, the Appellants argued the size and scope of the project was out of proportion to what was needed. He noted the second issue before the Board was whether the proposed project adequately protected the environment and ensured public safety.

[59] Mr. Baumberg believed he made a significant contribution to the process by providing Dr. Guthrie with the details of the appeals. Mr. Baumberg explained he paid for an initial report from Dr. Guthrie. In that report, Dr. Guthrie suggested that, while the proposed

channel design would be more efficient at transporting sediment, it did not adequately protect the environment, and the design could result in a significant safety hazard to the infrastructure and users of the Trans-Canada Highway.

[60] Mr. Baumberg explained that, after he withdrew his appeal, Dr. Guthrie contacted Mr. Baumberg's former legal counsel who forwarded Dr. Guthrie's concerns to the Board. Mr. Baumberg believed Dr. Guthrie's evidence helped form the Board's recommendations to reduce the size of the proposed project downstream of the Trans-Canada Highway.

[61] Mr. Baumberg stated the Appellants tried to make the Approval Holder consider alternative solutions that would reduce the size and scope of the project, such as installing debris nets and a sediment pond upstream by Thunderstone Quarry to reduce debris flow downstream.

[62] Mr. Baumberg said the Appellants' involvement in the appeals resulted in the Board: (1) questioning the answers provided in the Approval application; (2) noting inconsistencies in terminology used in critical reports; and (3) suggesting AESRD clarify what a consent document should contain.

[63] Mr. Baumberg stated that, even though he did not complete the appeal process, his costs for starting the appeal process were substantial. He noted he did not claim for the hours he spent in discussions, doing research, telephone calls, and tracking down information.

[64] Mr. Baumberg stated that, because the Director went directly to Notice of Decision, he had no opportunity to participate in any meaningful discussions concerning the project, and his only opportunity to be heard was through the appeal process. Mr. Baumberg said the appeal would not have occurred if proper consultation had taken place at the start. He noted that, even though the reason the Director went to a Notice of Decision was the pending emergency situation surrounding the upcoming spring freshet, there was never any evidence presented to substantiate the need to declare an emergency situation.

[65] Mr. Baumberg believed he made a substantial contribution to the hearing and focused on the issues. He said he met all the deadlines and did not ask for any extensions and did not prolong or unduly delay the hearing.

C. Approval Holder

[66] The Approval Holder confirmed it was not seeking costs.

[67] The Approval Holder requested the Appellants' claims for costs be denied.

[68] The Approval Holder noted the Appellants declined to retain Dr. Guthrie to provide the work as set out in Mr. Baumberg's interim costs application.

[69] The Approval Holder noted the Appellants did not provide any direct evidence of the size of the culverts under the Trans Canada Highway or the off-ramp, nor did they provide any evidence regarding the design of the project and whether it was adequate to protect the environment.

[70] The Approval Holder noted the Board found the Appellants did not provide any evidence to support any allegations the Director acted outside his jurisdiction, but the Appellants repeatedly raised the issue of the Director's conduct.

[71] The Approval Holder stated Dr. Guthrie's involvement in the appeal changed the nature of the appeal given he believed the project unacceptably transferred risk to Alberta Transportation's infrastructure and the public. The Approval Holder stated it provided a witness from Alberta Transportation to give rebuttal evidence at the hearing.

[72] The Approval Holder noted the Board found the Director properly exercised his discretion when issuing the Approval, and the Approval would be valid even if the consent document signed by the President of the Condominium Association, submitted as part of the application, was invalid. The Approval Holder acknowledged the Board recommended some aspects of the project be redesigned.

[73] The Approval Holder disagreed with the Appellants' characterization of their contribution to the issues. The Approval Holder stated that, based on the Notices of Appeal, initial submissions, and oral arguments, the Appellants did not focus on the removal of vegetation and potential transfer of risk to the highway. The Approval Holder said that even if the Appellants' submissions included some relevant arguments on the issues, no evidence was

submitted. The Approval Holder stated that any relevant evidence was provided by Dr. Guthrie, not the Appellants.

[74] The Approval Holder stated the design issues could only be properly addressed as a result of evidence submitted by Dr. Guthrie, and even though the recommended redesign may indirectly and partially achieve the Appellants' objectives, the result is largely incidental. The Approval Holder said the reason for the redesign did not arise as a consequence of any argument or evidence submitted by the Appellants. The Approval Holder noted it would not prioritize aesthetics over functionality in the redesign.

[75] The Approval Holder argued the Appellants' submissions did not make a substantial contribution to the appeal. The Approval Holder stated the Appellants focused on irrelevant or unavailable remedies throughout the process, including:

- an application to invalidate the decision of the Director;
- allegations of improper conduct by governmental departments, the Director, counsel for the Director, and counsel for the Approval Holder;
- the invalidity of the document signed by Mr. Derek Ryder on behalf of the Board of the Pigeon Creek Condominium Corporation;
- the lack of consultation with the Appellants; and
- the loss of amenities.

[76] The Approval Holder argued the Appellants' focus on irrelevant and extraneous issues resulted in a more complex hearing. The Approval Holder stated the Appellants: (1) did not articulate grounds of appeal within the Board's jurisdiction; (2) made preliminary motions for relief that were not within the Board's authority; (3) did not refine their grounds of appeal when legal counsel was retained; (4) did not particularize their concerns with the Approval Holder's expert reports; and (5) did not present conflicting technical, scientific, or expert opinions.

[77] The Approval Holder submitted that, without the Board's decision to retain Dr. Guthrie, it was unlikely the Appellants would have been able to rebut the expert evidence put in through the Approval Holder's experts. The Approval Holder stated that, since the Appellants did not present any expert evidence on the size and scope of the project, the Appellants made

little contribution to the appeals. The Approval Holder argued an award of costs would reward the Appellants for simply participating in the appeals.

[78] The Approval Holder submitted that, if the Board awards the Appellants some of their costs, the costs should be reduced from the amounts claimed.

[79] The Approval Holder said the hearing was unnecessarily complicated and the total time should be reduced. The Approval Holder said the duration and complexity of the hearing could have been reduced if the Appellants had limited their issues to the size and scope of the project, specifically to the loss of vegetation and the necessity of designing a channel capable of carrying flows larger than the culverts. The Approval Holder submitted a single, eight hour hearing would have been sufficient to address these issues.

[80] The Approval Holder noted the Appellants' counsel charged them for 173.75 hours to prepare for and attend a two day hearing. The Approval Holder submitted the Appellants' costs should be reduced to one hour of preparation time for every hour of the hearing. The Approval Holder stated that, at most, the Appellants should be reimbursed for an amount based on 42 hours (21 hours of total hearing time plus 21 hours preparation time.)

[81] The Approval Holder accepted \$250.00 per hour as a reasonable rate for the Appellants' counsel.

[82] The Approval Holder stated administration fees for printing, photocopying, and legal research should not be included in a costs award.

[83] The Approval Holder stated the total costs awarded should be \$2,479.85. This was based on an 8 hour hearing and 8 hours of preparation time:

16 hours x \$250.00	\$4,000.00
Plus GST	\$525.00
Hotel	\$248.08
Mileage	\$81.60
<u>Meals</u>	<u>\$105.02</u>
Total	\$4,959.70 (then reduced by half to reflect sharing of costs by the two Appellants).

[84] The Approval Holder stated that, since Mr. Baumberg was no longer a Party to the appeals, he was not entitled to costs. The Approval Holder said Mr. Baumberg did not have any experience or qualifications that allowed him to charge the Appellants for his assistance during the appeals. The Approval Holder noted Mr. Baumberg suggested in his submission that the Appellants did not incur costs in these appeals. The Approval Holder submitted that, if the Appellants did not incur any expenses, then they are not entitled to reimbursement of costs.

[85] The Approval Holder stated Mr. Baumberg asked for reimbursement of legal fees that were unrelated to the preparation and presentation of the Appellants' submissions. The Approval Holder said the invoices provided by Mr. Baumberg appeared to duplicate the invoices submitted by the Appellants' counsel.

D. Director

[86] The Director took no position on the costs applications.

IV. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[87] 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."⁷

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at

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.)⁸

[88] The sections of the *Environmental Appeal Board Regulation*,⁹ (the “Regulation”) concerning final costs provide:

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

- (a) the matters contained in the notice of appeal, and
- (b) the preparation and presentation of the party’s submission.

...

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

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

- (a) whether there was a meeting under section 11 or 13(a);
- (b) whether interim costs were awarded;
- (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.

paragraph 23 (Alta. Q.B.).

⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

⁹ *Environmental Appeal Board Regulation*, A.R. 114/93.

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

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

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

[89] 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 2.¹⁰

[90] 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.¹¹ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.¹² 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.”¹³

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

¹⁰ 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.”

¹¹ *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.).

¹² *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.).

¹³ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

“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.”¹⁴

[92] 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.¹⁵

B. Courts vs. Administrative Tribunals

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

¹⁴ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

¹⁵ *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.).

[94] 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.”¹⁶

[95] 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 tariffs [*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

¹⁶ *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.”

account, not merely the position of the litigant who has incurred expense in the vindication of a right.”¹⁷

[96] 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.”¹⁸

V. DISCUSSION

A. Appellants’ Costs Application

[97] The Appellants’ costs submission was intended to cover legal costs and disbursements. The Board notes the Appellants did not request reimbursement for any personal time or out-of-pocket expenses. The Board also notes the legal costs were shared equally between the Appellants.

[98] The Appellants suggested costs should be awarded to them and Mr. Baumberg because of the November 14, 2014 email from the Approval Holder’s counsel threatening to seek costs against Mr. Baumberg. Even though this behavior can increase the adversarial nature of the process, the Board, as a practice, does not award costs as a punitive measure. Costs awards are based on whether the evidence presented assisted the Board in determining its recommendations.

¹⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.).

¹⁸ *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:

[99] The Approval Holder argued that costs for preparation time should be limited to one hour of preparation time for each hour of the hearing, and that only eight hours of hearing time should be considered.

[100] The length of the hearing is dependent on the number of issues, the complexity of the issues, how well prepared the parties are, the responsiveness of the witnesses in cross-examination, and the number of questions posed by the Board. The Parties in these appeals were well prepared and their witnesses responded to the questions asked. Although the Approval Holder suggested the Appellants complicated the issues, the Board found the issue of the design of the proposed project was sufficiently complex, given the impacts of the June 2013 flood and the need to ensure public safety if similar events occur in the future.

[101] The hearing lasted 21 hours over the two days, so the Board will consider any costs award based on the full 21 hours. Often at hearings where there are multiple issues, one issue will be the focus of the evidence and arguments. This does not mean time spent on the other issues should not be included when determining costs.

[102] In this case, the Appellants were not provided the opportunity to participate in the approval process, because the Director issued a Notice of Decision. In most cases, a Notice of Application is published that provides directly affected persons the opportunity to file a Statement of Concern and become involved in the approval process. In this case, the first opportunity the Appellants had to participate in the process was the filing of an appeal.

[103] When assessing whether costs should be awarded, the Board looked at the degree to which the Parties' contributions to the hearing assisted the Board in developing its recommendations. The Board reviewed the costs submissions and responses and the evidence presented during the hearing to determine to what extent the written submissions and oral evidence materially assisted the Board in preparing its recommendations to the Minister.

[104] Mr. Patterson was retained as legal counsel by the Appellants. His submissions and cross-examination, for the most part, were focused on the issues identified for the hearing. Mr. Patterson raised concerns about the size of the proposed project and the environmental

impacts the project would have on Pigeon Creek. He also cross-examined witnesses presented by the Approval Holder and Director effectively and raised concerns on the design of the project and the application process. Given the issues at the hearing and the role the Appellants' counsel had in ensuring the hearing was focused on the issues, the Board considers it appropriate to award some costs to the Appellants for their legal counsel.

[105] The Appellants requested costs totaling \$48,431.65 for legal costs, including \$47,020.52 for legal fees including GST and \$1,411.13 including GST for disbursements. The disbursements were for hotel, meals, printing/photocopying, Environmental Law Centre, and mileage.

[106] The Board uses a tariff of fees for outside counsel set out by the Government of Alberta, because it provides an objective standard. Although the rates may not be in line with what counsel may charge in private practice, the Board considers it appropriate to use this tariff to judge the appropriateness of legal fees, but it is always cognizant that there may be circumstances in which it may not be appropriate.¹⁹

[107] Based on the Government of Alberta tariff, the rate for a lawyer of Mr. Patterson's experience of more than 25 years is \$250.00 per hour. This is the rate he actually charged given he charged each Appellant \$125.00 per hour. The work done by the Appellants' counsel was the same for each Appellant and all costs were evenly split between the Appellants.

[108] Given the complexity of the issues and the fact the Appellants could only participate in the approval process by way of an appeal, the Board considers three hours of preparation time for each hour at the hearing appropriate in this case. Therefore, the Board will consider a total of 84 hours (21 hours at the hearing plus 63 hours of preparation time) reasonable. At a rate of \$250.00 per hour, the legal fees that will be considered total \$21,000.00 plus \$1050.00 for GST.

[109] As the Board has stated in previous decisions, the starting point of any costs decision is that the Parties are responsible for the costs they incurred. Section 2 of the *Water Act* notes the responsibility the citizens of Alberta have in protecting the environment. Participating

¹⁹ See: Costs Decision re: *Kievit et al.* (12 November 2002), Appeal Nos. 01-097, 098, and 101-CD

in the approval and appeal processes is one way of fulfilling this obligation. To recognize the responsibility of bringing environmental issues forward, the Board will generally reduce the acceptable costs by 50 percent, and then adjust that amount up or down based on the extent to which the evidence provided by the applicant assisted the Board in determining the issues and making its recommendations.

[110] When considering this reduction to the accepted costs, the starting point for the legal fees is \$10,500.00 plus \$525.00 GST.

[111] The Appellants raised significant issues in their appeals, specifically the need for and size of the proposed project. By raising these issues, the Minister has ordered, based on the Board's recommendations, the size of the project be reduced, thereby minimizing the environmental impacts in the area and, ultimately, reducing construction costs.

[112] The Board considers the importance of the issues raised and resulting reduced environmental impacts, the contributions the Appellants made to the hearing, the raising of Dr. Guthrie's concerns, and the fact the appeal process was the only way the Appellants could participate in the approval process, as sufficient grounds to increase the costs award for legal fees. Therefore, the Board awards costs to the Appellants for legal fees in the amount of \$15,750.00 plus \$787.50 GST for a total of \$16,537.50.

[113] The Approval Holder received a benefit by proceeding by way of Notice of Decision instead of by Notice of Application. The Board acknowledges the Approval Holder asked to proceed by way of Notice of Decision because of concerns of further potential flooding during the 2014 spring freshet. However, this decision prevented directly affected persons from participating in the approval process until after the Approval was issued. By having to file a Notice of Appeal, the Appellants were required to expend considerable time and money to attend the hearing to have their concerns heard.

[114] Therefore, the Board awards costs for legal fees totaling \$15,750.00 plus \$787.50 GST, for a total of \$16,537.50.

[115] Legal counsel for the Appellants claimed disbursements totaling \$1,411.13, including \$248.08 for hotel accommodation, \$105.02 for meals, \$961.53 for photocopying expenses, \$15.00 for the Environmental Law Centre, and \$81.60 for mileage.

[116] The Appellants' legal counsel came from Calgary, which is a commutable distance to Canmore, the location of the hearing. Therefore, the Board will not award costs for hotel accommodation. The Board generally does not award costs for meals and will not depart from that practice in this case. Furthermore, it is uncertain how the costs for the Environmental Law Centre related to preparation for the hearing. Therefore, it will not be considered in the costs application.

[117] The Board does not generally award costs for in-house photocopying of documents. The Appellants have asked for \$913.00 for photocopying expenses. It is unclear if the copies were done in-house or externally, except for a receipt provided that indicated copying was done for a total of \$48.83. Without receipts to verify the expenses, the Board cannot award costs for photocopying. There was no explanation as to what the receipt for photocopying related to, so the Board cannot award costs for any of the photocopying expenses claimed.

[118] The Appellants' legal counsel claimed \$81.60 for mileage. Although the Board does not generally award costs for mileage, the Appellants only claimed mileage for their counsel to travel from Calgary to Canmore and back. Given Canmore is a smaller community, it is unlikely a lawyer with Mr. Patterson's background could be retained in Canmore. Also, as the Appellants only claimed for one return trip, the Board will allow the mileage costs claimed by the Appellants for their counsel. The Appellants stated he travelled 204 km and he charged \$0.40 per kilometre. In this case, the Board will allow the mileage claimed for the Appellants' legal counsel.

[119] Therefore, the Board awards disbursement costs to the Appellants totaling \$81.60.

E. Mr. Baumberg's Costs Application

[120] Mr. Baumberg was an appellant until November 25, 2014. Mr. Baumberg said he withdrew his appeal as a result of an email sent from the Approval Holder's counsel stating its

intention to pursue costs against the Appellants. After withdrawing his appeal, Mr. Baumberg participated in the appeal process as representative for Ms. Demencuik.

[121] The costs claimed by Mr. Baumberg were for costs he incurred as an appellant, and included legal costs and costs associated with retaining Dr. Guthrie.

[122] The legal costs incurred by Mr. Baumberg did not relate to the preparation and presentation of submissions for the hearing. Mr. Baumberg withdrew as an appellant before the submissions were required to be filed with the Board. None of the legal costs related to the actual hearing. Therefore, the Board does not award costs to Mr. Baumberg for the legal costs claimed.

[123] Mr. Baumberg also claimed costs totaling \$2,405.29, for work done by Dr. Guthrie and SNC Lavalin. The Board awarded interim costs to Mr. Baumberg to retain Dr. Guthrie for the hearing. However, once Mr. Baumberg withdrew his appeal, interim costs were not required to be paid. The Appellants did not retain Dr. Guthrie as an expert witness for the hearing.

[124] As a result of Dr. Guthrie's review of the Record and Approval, Dr. Guthrie wrote to Mr. Baumberg's counsel noting concerns he had regarding the potential impacts of the project on the Trans Canada Highway and public safety. This correspondence was provided after Mr. Baumberg withdrew his appeal because of Dr. Guthrie's concern about the project, and he felt he had an ethical obligation to advise the Board. It was this correspondence that was forwarded to the Board on November 25, 2014, that alerted the Board to public safety concerns on a broader scale. As a result, the Board retained Dr. Guthrie as its witness at the hearing.

[125] The initial report was completed for Mr. Baumberg, when he was still an appellant, as part of the review of the Record in preparation for the hearing. The initial work resulted in Dr. Guthrie reaching his conclusions with respect to the potential impacts of the project on the Trans-Canada Highway and public safety, and it formed the basis of his "will say" statement prepared for the Board. It was also this initial report that persuaded the Board to retain Dr. Guthrie as the Board's witness at the hearing. Since the Board accepted the costs for Dr.

Guthrie appearing at the hearing, the Board will pay the costs associated with the preliminary work done by Dr. Guthrie and paid for by Mr. Baumberg.

[126] The costs claimed for SNC Lavalin included \$1,368.00 plus \$68.40 GST for Dr. Guthrie and \$922.75 plus \$46.14 GST for two associates. It was Dr. Guthrie who appeared before the Board at the hearing and provided the evidence. As the Board is uncertain as to what work was done by the associates and how their work contributed to Dr. Guthrie's evidence, the Board will pay only the costs of Dr. Guthrie.

[127] Therefore, the Board will pay Mr. Baumberg \$1,368.00 plus \$68.40 GST, for a total of \$1,436.40, to compensate him for the costs associated with retaining Dr. Guthrie.

VI. WHO SHOULD PAY THE COSTS?

[128] The Board has generally accepted, as a starting point, that costs incurred in an appeal are the responsibility of the individual parties.²⁰ There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.²¹

[129] 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,²² that costs should not be awarded against the Director providing his actions in carrying out his statutory duties were done in good faith.

[130] 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:

²⁰ *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.).

²¹ 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....”

²² See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2002), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

“I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department’s officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board’s decision, that the Department should be treated differently from other parties to an appeal....

The Board states in its written submission for this application:

‘There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker’s judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.’

In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board’s decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise.”²³

[131] There was no indication the Director acted in bad faith in issuing the Approval. Therefore, the Board does not believe the Director should pay the costs.

VII. DECISION

[132] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellants, in the amount of \$16,619.10, payable by the Approval Holder. The amount is to be paid directly to Ms. Savitsky and Ms. Demencuik in equal shares.

²³ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[133] The Board orders these costs be paid within 60 days from the date of this decision. Ms. Savitsky and Ms. Demencuik are requested to provide written confirmation to the Board that payment has been made.

[134] The Board will pay Mr. Baumberg \$1,368.00 plus \$68.40 GST to compensate him for the initial costs of retaining Dr. Guthrie.

Dated on January 7, 2016, at Edmonton, Alberta.

“original signed by”

Alex MacWilliam
Panel Chair

“original signed by”

Alan Kennedy
Board Member

“original signed by”

Jim Barlishen
Board Member