

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – August 28, 2018

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 William Ross with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Licence No. 00369196-00-00 to Terry and Catherine Gilbertson.

Cite as: Costs Decision: *Ross v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: Gilbertson (28 August 2018), Appeal No. 16-005-CD (A.E.A.B.).

BEFORE:

Mr. Eric McAvity, Q.C., Panel Chair;
Mr. Jim Barlishen, Board Member; and
Dr. Brenda Ballachey, Board Member.

SUBMISSIONS BY:

Appellant: Mr. William Ross.

Licence Holders: Mr. Terry and Ms. Catherine Gilbertson,
represented by Mr. Ryan O'Connor, Nickerson
Roberts Holinski & Mercer.

Director: Mr. Todd Aasen, Director, Red Deer-North
Saskatchewan Region, Alberta Environment
and Parks, represented by Ms. Lisa
Semenchuk, Alberta Justice and Solicitor
General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued a Licence under the *Water Act* to Mr. Terry and Ms. Catherine Gilbertson allowing for the diversion of water for stock watering.

Mr. William Ross appealed the decision to issue the Licence to the Environmental Appeals Board (the Board). The hearing was scheduled for March 24, 2017. On March 23, 2017, Mr. Ross withdrew his appeal.

The Gilbertsons applied for final costs in the amount of \$17,335.91. Mr. Ross applied for costs in an amount equivalent to the costs claimed by the Gilbertsons for their legal counsel, which totaled \$16,628.21.

The Board denied both costs applications. Costs are awarded after a hearing to recognize the assistance the parties' evidence and submissions provided to the Board in determining its recommendations to the Minister. As no hearing was held, the Board declined to award costs to either party.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's reasons for its decision regarding the costs applications filed in respect of an appeal of Licence No. 00369196-00-00 (the "Licence") issued to Mr. Terry and Ms. Catherine Gilbertson (the "Licence Holders"). Alberta Environment and Parks ("AEP") issued the Licence under the *Water Act*, R.S.A. 2000, c. W-3, for the purpose of diverting water for stock watering. Mr. William Ross (the "Appellant") appealed the decision to issue the Licence.

[2] The Environmental Appeals Board (the "Board") scheduled a hearing for March 24, 2017. On March 23, 2017, the Appellant withdrew his appeal and, accordingly, the hearing was cancelled.

[3] The Licence Holders filed a costs application in the amount of \$17,335.91 for legal costs and consultant fees. The Appellant also filed a costs application requesting the same amount claimed by the Licence Holders for their legal fees (\$17,335.91).

[4] After reviewing the submissions, the Board determined it would not award costs as no hearing was held.

II. BACKGROUND

[5] On May 2, 2016, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued the Licence under the *Water Act* to the Licence Holders. The Licence allows the Licence Holders to operate a works and divert up to 3400.00 cubic metres of water annually from a groundwater well for the purpose of stock watering. The site is located in the County of Paintearth.

[6] On June 10, 2016, the Board received a Notice of Appeal from the Appellant appealing the Licence.

[7] On June 13, 2016, the Board wrote to the Appellant, Licence Holders, and the Director (collectively, the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and Director of the appeal.

[8] On July 6, 2016, the Board received a copy of the documents upon which the Director made his decision (the “Record”), and copies were provided to the Appellant and Licence Holders on July 8, 2016.

[9] On August 18, 2016, the Board held a mediation meeting in Coronation, Alberta. Discussions continued among the Parties after the mediation meeting. However, no resolution was reached, and the Board proceeded to schedule the hearing.

[10] Submissions for the hearing were received from the Licence Holders and Director on March 16, 2017, and from the Appellant on March 17, 2017.

[11] On March 20, 2017, the Appellant requested an adjournment of the hearing. The Board requested the Licence Holders and Director provide responses to the adjournment request.

[12] On March 21, 2017, the Board notified the Parties it was denying the Appellant’s adjournment request.

[13] The hearing was scheduled for March 24, 2017, in Edmonton. The issue that was to be heard by the Board was:

1. Do the terms and conditions of the licence for the supply well adequately protect the Appellant’s domestic well? This includes consideration of:
 - a. the impact of the operation of the supply well, if any, on the quantity of water taken from the domestic well;
 - b. the impact of the operation of the supply well, if any, on the quality of water taken from the domestic well;
 - c. protecting the domestic well from potential contamination; and
 - d. the location of the supply well in relation to the domestic well.

[14] On March 23, 2017, the Appellant notified the Board he was withdrawing his appeal.

[15] On March 23, 2017, the Licence Holders requested the Board provide timelines for written submissions in respect of costs.

[16] On March 30, 2017, the Board responded to the Parties, noting the Board’s normal practice is to consider costs after a party makes a request for costs in their written submission for the hearing or at the hearing in their closing submissions and, after the hearing has been held and the Board has issued the Report and Recommendations, the Board will set the

submission process for any costs application. The Board's criteria for considering costs is based on how helpful the parties' submissions and presentations were to the Board in making its decision.

[17] The Board set the schedule to receive submissions on the costs application and asked the Parties to consider the following in their submissions:

Considerations the Board may take into account when contemplating a cost application include, but are not limited to:

- Should costs be awarded for the preparation for a hearing which did not take place?
- Did the party(ies) make a substantial contribution to the hearing and focus on matters contained within the issue set by the Board?
- Were the presentations made in a timely and efficient manner so as not to unduly delay and prolong the hearing?
- Are the costs requested reasonable and reflect only the actual expenditures incurred in the preparation and presentation of the submission?
- Did the party indicate an intention to pursue a cost application prior to the conclusion of the hearing (as required in section 20 of the Environmental Appeal Board Regulation, 114/93)?
- Did the parties act in good faith in all phases of the proceeding?

[18] On April 13, 2017, the Board received costs submissions from the Licence Holders and the Appellant.

[19] On May 4, 2017, the Board received response submissions from the Licence Holders and the Director. The Appellant provided his response submission on May 5, 2017. On May 9, 2017, the Licence Holders notified the Board they objected to the Appellant's late filed submission.

III. SUBMISSIONS

A. Appellant

[20] The Appellant requested costs and that these costs be paid by the Licence Holders. The Appellant stated he spent considerable time preparing his case, but he did not keep a record of the time he spent on research and preparation because he was not aware it was possible to ask for costs for preparation time.

[21] The Appellant did not believe costs should be awarded when a hearing was not held. He said the questions of whether the parties made a substantial contribution or whether the presentations were efficient and timely were moot without a hearing. The Appellant stated the expert reports completed on behalf of the Licence Holders did not focus on his concerns so would not have been particularly helpful.

[22] The Appellant stated his submission regarding costs was his indication of his intent to ask for costs.

[23] The Appellant stated the Licence Holders did not act in good faith throughout the appeal process. The Appellant said he did not receive the Licence Holders' submission for the hearing until three days after the submission deadline. The Appellant argued the Licence Holders' failure to provide him with a copy of their submission on or before the deadline was sufficient to deny the Licence Holders' costs application.

[24] The Appellant stated his decision to withdraw his appeal was justified and not in bad faith. The Appellant believed he was denied natural justice because he did not receive USB drives at the same time as the Licence Holders' counsel, he did not receive the complete submissions on or before the deadline, he was denied additional time to cross-examine witnesses, and his request for a postponement was denied based on inaccurate information.

[25] The Appellant asked his costs claim be based on the Licence Holders' claim for legal counsel preparation time. The Appellant said his time may not be as valuable, but he spent more hours on preparation and research. The Appellant stated he spent considerable time downloading the files from email on his slow internet connection.

[26] The Appellant believed his preparation was of equal value to the Licence Holders' counsel's preparation, and the Appellant believed he was justified in asking for costs based on the Licence Holder's costs claim.

B. Licence Holders

[27] The Licence Holders noted that, in their written submissions for the hearing, they had reserved their right to address costs at the end of the appeal.

[28] The Licence Holders stated costs awarded by the Board are discretionary based on criteria set out in section 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation"). The Licence Holders noted section 20(2)(h) of the Regulation allows the Board to consider "... any further criteria the Board considers appropriate."

[29] The Licence Holders submitted the Board can exercise its discretion under the Regulation to issue an award of costs in favour of the Licence Holders. The Licence Holders were seeking costs against the Appellant for their consultant's preparation costs, totalling \$707.70, and the legal costs of \$16,628.21, for a total of \$17,225.91.

[30] The Licence Holders stated the criteria set out in the Regulation weigh in favour of awarding costs to them.

[31] The Licence Holders stated a mediation meeting was held, but no resolution was reached. The Licence Holders noted that, throughout the appeal process, they asked the Appellant to provide scientific, technical, or empirical evidence, and the Board advised the Appellant as to the type of evidence necessary to support his allegations, but the Appellant did not provide the evidence required. The Licence Holders said the Appellant did not bother to have his water quality tested, provide photographs, or provide any direct evidence relating to his water well other than speculative, anecdotal descriptions. The Licence Holders argued the Appellant should have provided actual evidence in support of his position, or he should have withdrawn his appeal well in advance of the time required to prepare for the hearing instead of at the last possible moment.

[32] The Licence Holders noted the hearing was scheduled for March 24, 2017, but the Appellant withdrew his appeal the day before. The Licence Holders stated that, by waiting until the last day to withdraw his appeal, the Appellant caused the Licence Holders to incur legal and witness costs associated with preparation for the hearing. The Licence Holders said the Appellant would have known the Licence Holders were incurring substantial costs in preparing to address his appeal. The Licence Holders argued the Appellant's conduct increased the costs they incurred, and the Appellant should therefore be responsible for those costs.

[33] The Licence Holders submitted costs should be awarded to them notwithstanding the hearing did not proceed, given the preparation had been completed and the submissions had been prepared and exchanged.

[34] The Licence Holders said the rates charged by their legal counsel were commensurate with their experience and were fair and reasonable. They noted Mr. O'Connor's rate, based on 13 years of legal experience, was \$350.00 per hour, and Ms. Flanders' rate of \$300.00 was consistent with her legal experience of eight years.

[35] The Licence Holders explained they are farmers, and since they require the well for their agricultural operation, they had to retain legal counsel to address the appeal and hearing. They stated they acted prudently in obtaining legal counsel and retaining an expert witness with technical experience related to the issues. The Licence Holders said they spent substantial financial resources to address the appeal while the Appellant pursued his appeal without providing any technical or expert evidence or expending any personal resources. The Licence Holders submitted the Appellant intended to cause the Licence Holders to incur costs and expend their resources needlessly. The Licence Holders stated this criterion weighs in favour of awarding costs to them.

[36] The Licence Holders stated their submissions followed the Board's direction and included empirical, technical, and expert information in order to assist the Board in making its recommendations. They said their submissions were succinct, related to the issues set by the Board, and addressed specific concerns raised by the Appellant. The Licence Holders said the Appellant's submissions were not based on technical or empirical evidence in relation to the well but were predicated on the Appellant's ongoing personal dispute with the Licence Holders. The

Licence Holders said the majority of the material provided by the Appellant was not relevant to the issues. The Licence Holders said the Appellant's submissions, which were large and contained mostly irrelevant information, resulted in substantial time and expense to review and respond to his approach. The Licence Holders stated the Appellant attempted to cloud the issues before the Board by including irrelevant materials in his submission. The Licence Holders submitted the Appellant's submissions made no positive contribution to the appeal process and greatly increased expenses incurred by the Licence Holders.

[37] The Licence Holders stated all of the costs claimed by them relate solely to the preparation of their submissions, preparation for the hearing, and addressing the issues set by the Board. They considered the time spent by their legal counsel was reasonable in relation to the process, issues, and materials. The Licence Holders said the expenditure for their consultant was efficient and relevant to the materials before the Board.

[38] The Licence Holders stated the Appellant should be responsible for the costs he caused the Licence Holders to incur in addressing the issues he raised and then later withdrawing his appeal.

[39] The Licence Holders submitted the Board should consider the Appellant's conduct in determining costs. The Licence Holders noted in the Notice of Appeal, the Appellant raised issues of water quality and quantity, risk of contamination, and proximity of the Licenced well. The Licence Holders noted the following regarding the Appellant's submissions:

1. there was no scientific, expert, or empirical evidence on water quality, and the Appellant did not test the water quality in his well;
2. there was no scientific, expert, or empirical evidence on water quantity or any purported drawdown effects on the Appellant's residential well. He only argued the Licence Holders overstated their water needs and personally attacked them instead of providing evidence in support of his allegations;
3. there was no scientific, expert, or empirical evidence supporting his concern the cattle operation posed a risk of contamination to his well and he barely addressed the issue;
4. there was no scientific, expert, or empirical evidence supporting his concern the proximity of the Licenced well posed a risk to the Appellant's well;

5. the submissions were speculative and not founded on any evidence. The Appellant alleged discolouration of his water but never provided any photographs, sampling, testing, or third party evidence; and
6. the submissions included a number of documents related to an ongoing personal dispute the Appellant had with the Licence Holders even though it was done contrary to the common law and his implied duty not to disclose documents obtained during the course of litigation. The material was irrelevant.

[40] The Licence Holders stated the Appellant chose to withdraw his appeal after causing them and the Director to incur substantive costs. The Licence Holders said the Appellant did not act in good faith in pursuing his appeal, and his conduct was frivolous, vexatious, and without merit. The Licence Holders stated these grounds warrant an award of costs against the Appellant.

[41] The Licence Holders stated the true intent of the Appellant's appeal was to cause the Licence Holders to expend financial resources unnecessarily, to harass and interfere with their use and occupation of their property, and to cause harm to their agricultural operation. The Licence Holders stated the Appellant's conduct constituted an abuse of the Board's process and should not be condoned by the Board.

[42] The Licence Holders said the Board may exercise its discretion to award solicitor and client costs in exceptional cases. They submitted this was an exceptional case. The Licence Holders stated the Appellant used the Board's legitimate process for improper purposes, and his conduct was an abuse of the Board's process and should not be condoned. The Licence Holders submitted the Appellant's conduct reached the threshold of "exceptional" and, therefore, costs should be awarded against him on the higher measure of solicitor and client basis.

[43] The Licence Holders said that, in the alternative, all their consultant's costs are reasonable and should be awarded, and 80 percent of the legal costs represented a reasonable allowance. The Licence Holders stated that, if the Board was not prepared to award solicitor and client costs, then the Board should award costs of \$707.70 for the consultant's account, and \$13,302.57 for legal costs, which represents 80 percent of the total legal costs claimed, for a total costs award of \$14,010.27.

C. Director

[44] The Director stated it was unclear if the Appellant was claiming costs against the Director. The Director noted the Board has consistently held that costs are not awarded against the Director if he acted in good faith while carrying out his statutory mandate. The Director stated there were no allegations of bad faith regarding the actions of the Director in relation to the Board's process.

[45] The Director took no position with respect to costs claimed by the Appellant and Licence Holders against each other.

D. Appellant's Response

[46] The Appellant stated there was no hearing so there should be no application for final costs.

[47] The Appellant said the report prepared by the Licence Holder's consultant did not add anything of substance to reports already in the Director's record and, therefore, costs should not be awarded for the Licence Holder's consultant.

[48] The Appellant did not believe the costs claimed by the Licence Holders were reasonable. He considered 46.1 hours of preparation for a one-day hearing was excessive.

[49] The Appellant did not believe counsel for the Licence Holders acted in good faith. He stated he did not receive the Licence Holders' submissions on the date the submissions were due.

[50] The Appellant noted counsel for the Licence Holders accused the Appellant of being responsible for the failure of the mediation, but the Appellant would have to break the confidentiality of mediation to defend himself.

[51] The Appellant argued this costs application proceeding may be contrary to EPEA based on section 95(7) of EPEA which states: "The Board shall discontinue its proceedings in respect of a notice of appeal if the notice of appeal is withdrawn."

[52] The Appellant stated the Licence Holders did not copy him with their submission as required by the Board's Rules of Practice and, therefore, costs should be denied.

[53] The Appellant stated there should be no costs awarded, including to himself.

E. Licence Holders' Response

[54] The Licence Holders said they reserved their right to claim costs against the Appellant in their written submission dated March 16, 2017.

[55] The Licence Holders noted the Appellant had not reserved his right to claim costs in his written submission and, therefore, he should be precluded from seeking costs against the Licence Holders. The Licence Holders stated the Appellant's costs application is not properly before the Board and should not be considered by the Board.

[56] The Licence Holders noted the Appellant asked for costs in his favour, but he did not specify the amount, only that his costs should be based on the Licence Holders' legal costs. The Licence Holders said it was up to the Appellant to provide information to the Board indicating the amount of time spent, the value of the time spent, and the amount of costs asked for. The Licence Holders said that, without the information backing up his claim and simply stating his costs should be the same as the Licence Holders, shows his costs claim was without merit and was consistent with the frivolous and vexatious conduct exhibited by the Appellant throughout the proceedings.

[57] The Licence Holders stated the Appellant made unfounded allegations without evidentiary or technical support throughout the appeal process, and compelled the Licence Holders to be a party to the Board's process and incur expenses to respond. The Licence Holders said the Appellant's conduct was frivolous and vexatious and should be sanctioned with an award of costs against him.

[58] The Licence Holders noted section 20(1) of the Regulation provides that an application for final costs can be made at the conclusion of the hearing of the appeal. The Licence Holders stated the appeal in this matter was concluded when the Appellant withdrew his appeal less than 24 hours before the hearing was scheduled to start. The Licence Holders argued

the appeal was concluded, they reserved their right to seek costs, and the Board may hear the Licence Holders' application for costs. The Licence Holders stated the Appellant is precluded from claiming costs because he did not reserve his right to do so.

[59] The Licence Holders submitted the Appellant was incorrect when he stated the questions of the contribution of the Parties to the hearing and the degree of focus on the matters in issue were moot. The Licence Holders noted the Appellant's materials contained no empirical, scientific, or relevant evidence in support of the issues and, instead, his submissions contained irrelevant and improper information which was only meant to obscure the issues, demean or embarrass the Licence Holders, and unnecessarily and improperly complicate the proceedings. The Licence Holders stated the Appellant sought to extend and delay these proceedings at every opportunity, and he made no contribution which assisted in resolving the matter. The Licence Holders submitted the Appellant pushed the matter to the last possible moment, despite having no evidence supporting his position, in order to maximize the cost, time, and expense for the Licence Holders. The Licence Holders stated this represented improper, vexatious, and frivolous conduct, and an abuse of the Board's process, which supports an award of costs against the Appellant.

[60] The Licence Holders noted the Appellant alleged his costs request was reasonable and reflected actual expenditures he incurred in the preparation of his submission. The Licence Holders stated the Appellant provided no information relating to any time spent or expenditures made in relation to the preparation of his submissions. The Licence Holders submitted the Appellant's failure to provide any information in support of his costs claim should result in the claim being denied.

[61] The Licence Holders explained they invested a substantial amount of their own time in preparing for and participating in the Board's processes, including preparing for the hearing, but they were not asking for costs for this time. They stated the costs claimed are for reimbursement of the actual costs incurred as a result of the appeal.

[62] The Licence Holders did not agree with the Appellant's contention that his April 13, 2017 written cost submission satisfied the requirements of section 20 of the Regulation. The Licence Holders said the Appellant only raised his claim after the conclusion of the hearing, and

since he did not raise the issue prior to the conclusion of the hearing on March 23, 2017, the Appellant is precluded from pursuing costs.

[63] The Licence Holders believed the Appellant was inaccurate in his allegation that the Licence Holders and their counsel did not act in good faith. The Licence Holders explained they provided their written submissions to the Board by noon on March 16, 2017, as specified by the Board, and the Board stated it would forward the submissions to the parties after they received the Appellant's submission on March 17, 2017. The Licence Holders stated they complied with the direction of the Board, and the Board subsequently provided all written submissions to the Appellant. The Licence Holders stated they and their counsel conducted themselves properly and in good faith throughout these proceedings and, therefore, the Appellant's allegations were inaccurate and should be given no weight by the Board.

[64] The Licence Holders disagreed with the Appellant's claim that he was disadvantaged in the proceedings. The Licence Holders noted the Appellant was given an extension of time to provide his submissions, and he was provided with all of the information in relation to the appeal. The Licence Holders said the Board's process was fair and, as such, is not grounds to award costs to the Appellant.

[65] The Licence Holders stated the Appellant's costs claim should be denied because he did not:

1. request costs prior to the conclusion of the hearing;
2. provide the amount he was claiming;
3. show how he calculated his costs claim;
4. provide particulars of the cost claim including time spent, tasks undertaken, or expenditures incurred; and
5. provide the hourly rate of compensation sought.

[66] The Licence Holders noted the Appellant relied on the adage "equal pay for work of equal value." The Licence Holders stated the adage is not applicable in this situation, because the Licence Holders incurred costs preparing a proper, relevant submission addressing the issues with technical, scientific, and expert evidence. The Licence Holders stated the Appellant did not take this approach and, instead, guessed, estimated, and alleged throughout the

proceedings. The Licence Holders said the “work” the Appellant claimed costs for was of no value in relation to the proceedings. The Licence Holders requested the Board deny the Appellant’s claim for costs and award costs in favour of the Licence Holders against the Appellant.

IV. LEGAL BASIS FOR COSTS

[67] 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.”¹

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.)²

[68] The sections of the *Environmental Appeal Board Regulation*,³ (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

¹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

² *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

³ *Environmental Appeal Board Regulation*, A.R. 114/93.

- (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.
- (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.”

[69] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of EPEA as stated in section 2.⁴

⁴ Section 2 of EPEA provides:

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

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

[70] 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.⁵ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.⁶ 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."⁷

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

"To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:

- (a) substantially contributed to the hearing;
- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal

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- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
 - (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
 - (e) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
 - (f) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...
 - (h) the responsibility of polluters to pay for the costs of their actions;
 - (i) the important role of comprehensive and responsive action in administering this Act."

⁵ *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.).

⁶ *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.).

⁷ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

counsel or other advisors to prepare for and make presentations at the Board's hearing."⁸

[72] 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.⁹

V. Analysis

[73] The issue before the Board is whether either or both the Appellant or the Licence Holders should be awarded costs.

[74] The Board has the authority to award interim costs or final costs. Interim costs are awarded for the preparation of submissions for the hearing and anticipated costs for appearing at the hearing. Interim costs are prospective in nature. The costs claimed in this case are not prospective since the costs have been incurred. Therefore, the costs claimed cannot be considered as interim costs.

[75] Final costs are awarded after the completion of the hearing and are awarded in recognition of the assistance provided by the parties at the hearing in order to allow the Board to prepare its recommendations. The Board's general starting point in a costs application is that all parties are responsible for their own costs. Costs are awarded when the Board considers it appropriate and based on the evidence and arguments presented at the hearing.

[76] In this case, no hearing was held, but the Parties had completed their preparation for the hearing by providing written submissions and, presumably, preparing for participation in the hearing. The Appellant withdrew the appeal the day before the hearing was to be held. The Board acknowledges the Licence Holders incurred expenses for legal counsel and a consultant in order to effectively respond to the appeal. Potentially participating in an appeal is part of the process of obtaining a Licence.

⁸ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

⁹ *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.).

[77] Much of the Appellant's costs submissions were an attempt to present additional evidence related to the substantive issues or directed to the Board's decision to deny the Appellant's adjournment request. The Appellant withdrew his appeal, and the substantive hearing was closed. Therefore, the Board will only consider the parts of the Appellant's submissions that are relevant to the costs applications. The Board cannot consider the arguments related to the substantive issues that would have been heard at the hearing in a costs application.

[78] The Appellant suggested his costs submission was his notice of his intent to make a costs application. This is not a logical process for dealing with costs. If there had been no other costs application made, the Board would not have set a process to receive submissions on costs. The Appellant cannot just arbitrarily decide to submit a costs application after the close of a hearing. The legislation clearly states the parties must express their intent to file a costs application prior to the end of the hearing.¹⁰ The Board also notes the Appellant's costs application did not include the documentation normally required in a costs application. He did not provide receipts, or a breakdown of time spent and what was done during that time. An accurate account of costs incurred would have been required in a costs application.

[79] The Appellant argued the costs application is contrary to section 95(7) of EPEA.¹¹ This is the first time a party has requested costs when a hearing was not held. One of the questions the Board asked the Parties to discuss in their costs submissions was whether the Board has jurisdiction to consider a costs application when a hearing has not been held.

[80] The Licence Holders argued they were put in the position of having to expend the costs for a hearing that was cancelled due to the Appellant's withdrawal of his appeal, the day before the hearing was to be held.

[81] The legislation is clear that final costs are awarded after the completion of the hearing. Without the hearing, the Board cannot assess the value of the Parties' participation and assistance. If the Board based its decision on costs solely on the value of the written

¹⁰ Section 20 of the Regulation states:

“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.”

¹¹ Section 95(7) of EPEA provides:

“The Board shall discontinue its proceedings in respect of a notice of appeal if the notice of appeal

submissions, the outcome of its decision in this case may be different. The Licence Holders provided data and evidence whereas the Appellant provided no firm evidence, only speculation. Although the content of the Appellant's written submission was not sufficient to discharge the onus the Appellant faced to prove the Director erred in his decision to issue the Licence, evidence presented at the hearing may have bolstered his position and provided the necessary evidence for him to meet this onus. Regardless of this, the Board cannot speculate as to the value evidence from either the Appellant or Licence Holders might have had if a hearing had been held.

[82] The Board has always held that appellants have the right to withdraw their appeal at any time in the appeal process, up to and including the date of a hearing. The Board acknowledges this may result in the parties incurring expenses they might not have incurred had an appeal been withdrawn earlier in the process, but often appellants have legitimate reasons for choosing to withdraw. This can include resolving the issue with the other party(ies) at the last minute. The Board would have difficulty in determining a deadline by which appellants must withdraw their appeal or face the possibility of costs being awarded against them.

[83] The legislation, as currently written, makes it difficult to award costs to a party if no hearing has been held. In some cases it may be warranted to assess costs against an appellant who withdraws an appeal just before a hearing, when it appears the appellant's intent is solely to cause the other party(ies) to incur expenses needlessly or continue an appeal process only to withdraw the appeal at the last moment, in order to be vindictive or vexatious.

[84] Based on the wording of the legislation, the Board must dismiss the costs applications of the Licence Holders and the Appellant. The file was closed when the appeal was withdrawn.

[85] Although the Appellant's response submission was filed late, the Board does not have to consider whether it will accept it since the Board has dismissed the costs applications.

VI. DECISION

[86] The Board denies the Appellant's and Licence Holders' costs applications.

Dated on August 28, 2018, at Edmonton, Alberta.

"original signed by"
Eric McAvity, Q.C.
Panel Chair

"original signed by"
Jim Barlishen
Board Member

"original signed by"
Brenda Ballachey
Board Member