ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 7, 2019

IN THE MATTER OF sections 91, 92, 95, 96, and 97 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 Jeff Brookman and Allison Tulick with respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue *Water Act* Approval No. 00388473-00-00 to KGL Constructors (A Partnership).

Cite as: Costs Decision: *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (7 November 2019), Appeal Nos. 17-047 and 17-050-CD (A.E.A.B.), 2019 ABEAB 32.

BEFORE: Mr. Alex MacWilliam, Board Chair;
Mr. Eric McAvity, Q.C., Board Member; and
Ms. Anjum Mullick, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Jeff Brookman and Ms. Allison Tulick, represented by Mr. Tyler Shandro and Mr. Richard Harrison, Wilson Laycraft.

Approval Holders: KGL Constructors, A Partnership, represented by Mr. Ron Kruhlak and Mr. Sean Parker, McLennan Ross LLP.

Director: Mr. Kevin Wilkinson, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Lisa Semenchuk and Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Approval under the *Water Act* to KGL Constructors, A Partnership (KGL) to disturb (in-filling) 24 wetlands permanently, for a total of 22.07 hectares of wetland loss and to change the location of water for the purpose of dewatering wetlands. The work allowed under the Approval is part of the Southwest Calgary Ring Road project.

Mr. Jeff Brookman and Ms. Allison Tulick (the Appellants) filed appeals with the Environmental Appeals Board (the Board) of AEP's decision to issue the Approval.

The Board held a hearing and recommended the Approval be varied. Specifically, the Board determined the appropriate standard of review to apply in the circumstance of this case is correctness, with no deference to the Director. Further, the Board recommended the Approval be varied to include monitoring conditions to address concerns regarding impacts on water quality and water quantity flowing into a wetland, locally known as the Beaver pond. Finally, the Board recommended the Approval be varied to require the Approval Holder to complete an assessment of the wetlands impacted by the project using the criteria specified in the 2013 Alberta Wetland Policy. The Minister of Environment and Parks accepted the Board's recommendation to vary the Approval and issued a Ministerial Order, adding a number of her own conditions over and above those recommended by the Board.

At the hearing, the Appellants and KGL reserved their right to request costs. After the Minister released her decision, the Appellants filed a costs application totalling $378,471.67. KGL did not file a costs application.

The Board reviewed the submissions from the parties and assessed the costs application with the criteria used by the Board to determine if costs should be awarded. The Board considered the participation of the Appellants in the hearing was part of the obligations Albertans have to bring environmental issues forward. The Board found much of the evidence presented by the Appellants and their witnesses related to matters outside of those set for the hearing. Therefore, the Board awarded no costs to the Appellants.

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I. INTRODUCTION

[1] This is the costs decision of the Environmental Appeals Board (the "Board") in regards to appeals filed with respect to Approval No. 00388473-00-00 (the "Approval") issued to KGL Constructors, A Partnership (the "Approval Holder" or "KGL"). Alberta Environment and Parks ("AEP") issued the Approval to the Approval Holder under the *Water Act*, R.S.A. 2000, c. W-3 (the "*Water Act*"). The Approval allows for the permanent disturbance (in-filling) of 24 wetlands, for a total of 22.07 hectares of wetland loss and to change the location of water for the purpose of dewatering wetlands. Eleven wetlands will be partially infilled, and 13 wetlands will be completely infilled as part of the construction of the Southwest Calgary Ring Road ("SWCRR"). The project involves the construction of a roadway through a Transportation Utility Corridor located on the west side of the City of Calgary. The project proponent is Alberta Transportation, but the Approval was issued to KGL, the contractor hired to complete the construction work.

[2] Mr. Jeff Brookman and Ms. Allison Tulick (collectively, the "Appellants") appealed the decision to issue the Approval.

[3] The Board held a public hearing to hear evidence and arguments on three issues.[1]

[4] After considering the oral evidence and arguments, written submissions, and the AEP record, the Board recommended to the Minister of Environment and Parks (the "Minister") the Approval be varied. The Minister accepted the Board's recommendations to vary the

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[1] The following issues were heard by the Board at the hearing:

"1. What is the standard of review the Board should apply in the circumstances of this case?

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:

   a. the terms and conditions in the Approval;

   b. the impact of disturbing the wetlands included in the Approval; and

   c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.

3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?"

Approval. She issued a Ministerial Order incorporating the Board's recommendations, and included additional changes of her own to the Approval.[2]

[5] At the hearing, the Appellants and KGL reserved their right to apply for costs. After the Minister's decision was released, the Appellants filed a costs application requesting a total of $378,471.67. KGL did not file a costs application.

II. BACKGROUND

[6] On August 11, 2017, the Director, South Saskatchewan Region, Alberta Environment and Parks (the "Director") issued the Approval to the Approval Holder. The Approval was issued with respect to the SWCRR on lands legally described as NW 04-24-02-W5M, SE 03-24-02-W5M, W½ 25-23-02-W5M, E½ 26-23-02-W5M, NW 24-23-02-W5M, SE 24-23-02-W5M, W½ 18-23-01-W5M, E½ 13-23-02-W5M, W½ 31-22-01-W5M, SE 31-22-01-W5M, E ½ 30-22-01-W5M, SW 29-22-01-W5M, NW 20-22-01-W5M, S½ 28-22-01-W5M, W½ 21-22-01-W5M, SW 27-22-01-W5M, and N½ 22-22-01-W5M in the City of Calgary (the "Site"). The Approval allows the Approval Holder to permanently fill in all or portions of 24 wetlands and change the location of water for the purpose of dewatering the wetlands.

[7] On August 11, 2017, the Board received a Notice of Appeal from Mr. Jeffery Brookman appealing the Approval and asking for a stay of the Approval.

[8] On August 12, 2017, the Board acknowledged Mr. Brookman's Notice of Appeal and notified the Approval Holder and Director of the appeal. The Board also issued a temporary stay of the Approval in its entirety to allow the Board to establish a written submission process to consider the stay application more fully and to consider the validity of Mr. Brookman's appeal. The Board set a schedule to receive written submissions on the stay request and the directly affected status of Mr. Brookman.

[9] On August 12, 2017, Mr. Brookman requested the schedule be amended to allow him extra time to file his written submission regarding the stay application and the directly affected motion. The Board granted Mr. Brookman additional time.

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[2] See: *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.) 2017 AEAB

[10] On August 13, 2017, Mr. Brookman asked for an additional extension to file his written submissions. The Board granted a further extension for Mr. Brookman to provide his written submissions. The timeline for the other parties was also extended.

[11] On August 14, 2017, the Approval Holder provided its comments regarding the extension, stating it objected to the extension given the critical timing of the project and the potential cost consequences of a stay.

[12] On August 15, 2017, the Board received a Notice of Appeal from Ms. Allison Tulick appealing the Approval and requesting a stay.[3] The Board set a schedule to receive written submissions on the stay application and whether Ms. Tulick was directly affected.

[13] Written submissions were received regarding the stay requests and the directly affected issue between August 16, 2017 and August 18, 2017.

[14] On August 16, 2017, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively, the "Parties") asking them to include comments in their written submissions on whether the stay, if it was maintained, should apply to all the wetlands or whether it could apply to only wetlands W06, W07, W08, and W09.[4]

[15] On August 18, 2017, the Board notified the Parties that Mr. Brookman and Ms. Tulick were found to be directly affected, and their appeals would be heard. The Board notified the Parties that the stay would remain in place but would be limited to wetlands W06, W07, W08, and W09.[5]

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13. This Report and Recommendation includes a copy of Ministerial Order 06/2018.

[3] The Board also received Notices of Appeal from Mr. Barry Lester, Ms. Maureen Bell, Mr. Kevin Bon Bernard, Mr. Leon Nellissen, Mr. Peter Sziraky, Mr. Marek Bartlomowicz, Ms. Sherie Angevine, Ms. Jacquie Hansen-Sydenham as President of the Discovery Ridge Community Association, Mr. Tim Dixon, and Mr. Brent Javra. The Board found these appellants were not directly affected, and their appeals were dismissed. Ms. Diane Stinson also filed a Notice of Appeal and was found to be directly affected. However, she withdrew her appeal on August 28, 2017.

[4] In this report, the wetlands will be referred to by "W" and a corresponding number (i.e. W06).

[5] The Board initially included a watercourse (WC01) in the stay. However, on September 5, 2017, the Approval Holder wrote to the Board advising the watercourse was not included within the work authorized by the Approval. Therefore, according to the Approval Holder, the watercourse should not be included in the stay. The Board requested comments from the Parties on the Approval Holder's request to reconsider the stay with respect to the watercourse. After receiving comments from the Parties, on September 11, 2017, the Board notified the Parties the stay was varied to exclude the watercourse as it was not covered by the Approval.

[16] On August 28, 2017, the Board proposed two issues for the hearing and asked the Parties to provide their comments.[6]

[17] On August 28, 2017, Mr. Brookman requested an extension to provide comments on the proposed hearing schedule to meet with legal counsel. The Board granted the extension and extended the deadline to receive comments on the hearing issues.

[18] On August 28, 2017, the Board received comments from the Appellants and the Director regarding the prospect of holding a mediation meeting. On August 29, 2017, the Approval Holder provided its comments regarding the possibility of holding a mediation meeting.

[19] On August 30 and 31, 2017, the Board received comments from the Parties regarding the proposed issues for the hearing.

[20] On August 31, 2017, the Board advised the Parties that neither the Approval Holder nor the Director were interested in participating in mediation.

[21] On September 5, 2017, the Approval Holder and Director provided comments on the proposed revised issues for the hearing.

[22] On September 14, 2017, the Parties provided additional comments on the proposed issues for the hearing.

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[6] The Board suggested the following issues:

"1. Was the decision to issue the Approval reasonable having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:

   a. the terms and conditions in the Approval;

   b. the role of wetlands in attenuating flooding;

   c. the impact of disturbing the wetlands specified in the Approval in the overall context of all of the wetlands impacted by the development of the Southwest Calgary Ring Road; and

   d. the impact of disturbing the wetlands specified in the Approval on the environmental resources outside the Transportation Utility Corridor.

2. In making the decision to issue the Approval was the Director required to apply the Provincial Wetland Policy (avoid, mitigate, or compensate, in that order), and if so, did the Director properly apply this policy? This issue includes, but is not limited to, consideration of the relationship between the Provincial Wetland Policy and the agreements entered into and the legislation passed to establish the Transportation Utility Corridor."

[23] On September 19, 2017, the Approval Holder requested the Board reconsider its stay with respect to W07, W08, and W09 and remove these wetlands from the stay. The Board set a schedule to receive comments from the Parties regarding the Approval Holder's request.

[24] On September 19, 2017, the Appellants applied for interim costs. The Board advised the Parties of the schedule to receive comments on the interim costs application.

[25] On September 20, 2017, the Board notified the Parties that, based on the Parties' availability, the hearing would be held from October 23 to October 25, 2017. The Board determined the issues for the hearing to be the following:

1. What is the standard of review the Board should apply in the circumstances of this case?

   In consideration of this issue, the Board has used the word "appropriate" in the remaining issues. The meaning of appropriate will be based on the standard of review determined by the Board.

2. Was the decision to issue the Approval appropriate having regard to the potential environmental impacts of the work authorized by the Approval? This includes, but is not limited to:

   a. the terms and conditions in the Approval;

   b. the impact of disturbing the wetlands included in the Approval; and

   c. the impact of disturbing the wetlands specified in the Approval in the context of all the wetlands impacted by the development of the Southwest Calgary Ring Road.

3. In making the decision to issue the Approval, was the Director required to apply relevant provincial wetland policies? If so, what are the relevant provincial wetland policies and did the Director appropriately apply these policies?

   This issue includes, but is not limited to, consideration of the relationship between the relevant provincial wetland policies and the agreement entered into between the Crown and the Tsuut'ina, and the relationship between the relevant provincial wetland policies and the legislation passed to establish the Transportation Utility Corridor. For example, does the agreement or the legislation affect the applicability or interpretation of the policies?

[26] On September 25, 2017, the Appellants asked the Board to reconsider its decision to exclude WC01 from the stay and asked the Board to add WC01 and the remaining 20

wetlands covered by the Approval to the stay. The Board set a schedule to receive comments from the Parties regarding the reconsideration request.

[27] On September 25, 2017, the Appellants submitted their interim costs application.

[28] On September 26, 2017, the Appellants and the Approval Holder provided submissions regarding the requests to reconsider the stay.

[29] On September 28, 2017, the Board notified the Parties that the Appellants' interim costs application was denied.

[30] On September 29, 2017, the Board received response submissions from the Parties regarding the stay requests.

[31] On October 2, 2017, the Board notified the Parties that the Appellants' and the Approval Holder's applications for reconsideration of the stay were denied. The stay remained in place with respect to W06, W07, W08, and W09.

[32] The initial hearing submissions were received from the Parties and intervenors between October 1 and October 4, 2017.

[33] On October 11, 2017, response submissions were received from the Parties.

[34] On October 13, 2017, the Appellants notified the Board of their intent to have two expert witnesses present at the hearing. The Director raised concerns regarding the Appellants' decision to bring two experts to the hearing so late in the process and requested the witnesses not be permitted to participate in the hearing. The Approval Holder supported the Director's motion stating there was no indication of the role or testimony of the witnesses.

[35] The Board had indicated in its letter dated October 5, 2017, to the Parties that the names of witnesses the Parties intended to bring to the hearing were to be provided as part of the written submissions, which were to be filed on October 11, 2017. The Appellants did not provide the names of their witnesses with their submissions.

[36] The Board notified the Parties on October 20, 2017, that it would hear the evidence of the Appellants' witnesses, and if the Approval Holder or Director had any concerns, they could raise their concerns after the evidence of the Appellants was complete. The Board

stated that if it determined the evidence of the Appellants' experts was inadmissible, it could disregard the evidence.[7]

[37] The public hearing was held on October 23 to 25, 2017, in Calgary.

[38] On January 29, 2018, the Board provided its Report and Recommendations and the Ministerial Order to the Parties.[8] The Minister of Environment and Parks varied the Approval based on the Board's recommendations.

[39] At the hearing, the Appellants and Approval Holder reserved their right to ask for costs.

[40] On January 29, 2018, the Board scheduled the submission process for the Parties seeking costs. On February 27, 2018, the Board received a costs application from the Appellants.

[41] On March 20, 2018, the Board received response submissions from the Approval Holder and the Director. The Approval Holder confirmed it did not intend to seek costs.

[42] On March 22, 2018, the Appellants requested the Board provide them with the opportunity to provide rebuttal comments.

[43] On March 22 and March 26, 2018, the Board received response submissions from the Approval Holder and the Director, respectively, regarding the Appellants' request to provide rebuttal comments.

III. PRELIMINARY MATTER

[44] The Appellants had requested the Board provide them with an opportunity to file rebuttal comments in response to the submissions provided by the Approval Holder and Director. Neither the Approval Holder nor the Director agreed to the Appellants' request.

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[7] At the hearing, neither the Approval Holder nor the Director raised concerns regarding the evidence presented by the Appellants' experts. Therefore, the Board weighed this evidence presented in the same manner as evidence provided by the other witnesses at the hearing.

[8] See: *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.).

[45] The Board set the schedule to receive costs applications from the Parties who reserved their right to ask for costs and for receiving response submissions. None of the Parties expressed concerns about the schedule. It was not until after the Appellants received the response submissions of the Approval Holder and Director that they asked for the opportunity to provide rebuttal comments.

[46] The Board's standard practice is to have a two-step process for costs applications, where the parties seeking costs provide their submissions and then the other parties are then given the opportunity to respond. The Appellants did not provide sufficient reasons as to why the Board should not follow its standard two-step process. The Board did not believe any additional comments from the Appellants would affect the Board's decision. Therefore, the Appellants' request to provide rebuttal comments was denied.

IV. SUBMISSIONS

A. Appellants

[47] The Appellants asked the Board to award costs to them and that these costs be paid by the Approval Holder.

[48] The Appellants, referring to a decision of the Alberta Court of Queen's Bench, stated that costs should be awarded in a principled manner, and the successful party is entitled to an amount of indemnification.[9]

[49] The Appellants stated the Board is required to award costs in accordance with section 2 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA").[10]

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9 *Alberta Treasury Branches* v. *14010507 Alberta Ltd. (Katch 22)*, 2013 ABQB 748.

10 Section 2 of EPEA provides:

> "2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
>
> (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
>
> (c) the principle of sustainable development, which ensures that the use of resources

[50] The Appellants stated the appeal involved two private citizens who provided insight into the Approval Holder's conduct and the impact of that conduct on certain wetlands covered by the Approvals. The Appellants said the Board determined the Approvals should be varied, and the Minister made further amendments to the Approvals.

[51] The Appellants stated the determinations of the Board and the Minister could not have occurred without the efforts and involvement of the Appellants.

[52] The Appellants claimed legal fees, totalling $123,980.00 for time spent for hearing preparation ($82,000.00), document production and review ($34,500.00), hearing attendance ($7,400.00), and post-hearing discussions ($80.00). The Appellants also included the following "disbursements" in their costs claim:

Courier Fees	$148.40
Search Fees	$250.00
Corporate Registry Fees	$14.00
Photocopy Fees (at $0.25 per page)	$460.25
Barry Lester Professional Fees	$25,950.00
Allison Tulick Professional Fees	$972.00
Jeffrey Brookman Professional Fees	$198,150.76
Michael Kostashuk Professional fees	$10,523.80
Total	$236,469.21

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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 need for Government leadership in areas of environmental research, technology and protection standards;

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

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

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

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

[53] In addition, the Appellants claimed $6,199.00 GST on the legal fees claimed, and $11,823.46 GST on the disbursements claimed.

[54] The total costs claimed by the Appellants were $378,471.67.

[55] The professional fees of $198,150.76 claimed by Mr. Brookman included:

1. expert time - $197,622.00 (based on 548.95 hours at $360.00 per hour);
2. mileage - $76.76 (based on $0.505 per kilometre);
3. parking - $52.00;
4. meals - $45.00; and
5. office-related costs - $355.00 (included photocopying, paper and ink, and memory sticks for the hearing).

[56] Mr. Brookman explained his decision to file a Notice of Appeal and his participation in the appeal was motivated by the purposes of the *Water Act*, the Water for Life: Alberta's Strategy for Sustainability (2003), and the Alberta Wetland Policy, and his desire to advocate for the preservation of the wetlands along the SWCRR corridor. He was specifically concerned about those related to the Weaselhead Natural Environment Park. According to Mr. Brookman, the Appellants made a noteworthy contribution to the goals of the *Water Act* and EPEA and, therefore, he argued the stewardship aspect of the costs criteria was met.

[57] Mr. Brookman noted the Board confirmed the Approval should have been based on the 2013 Alberta Wetland Policy and not the 1993 Interim Policy. He said that without the appeals and the Appellants' research and arguments, the status quo would have been maintained. Mr. Brookman stated that, because of the appeals, wetlands are now given a higher level of protection. Mr. Brookman viewed this as a major contribution by the Appellants.

[58] Mr. Brookman said the Appellants raised the concerns about the SWCRR being overbuilt, which the Minister confirmed in her reasons. Mr. Brookman believed that, through the Appellants' efforts, future infrastructure projects will be managed differently.

[59] Mr. Brookman noted the Board did not recommend a full reversal of the Director's decision, but it recommended 90 percent of the suggested changes brought forward by the Appellants, except for the protection of Wetland 11.

[60] Mr. Brookman said the Board included in its recommendations the Appellants' request to have water quality and quantity monitored. Mr. Brookman explained YYC Cares requested it be awarded the multi-year contract to conduct the monitoring as it has the knowledge and expertise. (YYC Cares is an organization established to the SWCRR, including the wetlands that are found in the area.)

[61] According to Mr. Brookman, the Appellants' actions resulted in the Beaver Pond being protected forever. Further, any amendments to the ECO plan require approval from AEP before the amended plan is implemented. Mr. Brookman noted the wetland compensation ratio for the SWCRR will be adjusted because of the efforts of the Appellants.

[62] Mr. Brookman said the Appellants' efforts contributed to improvements with the SWCRR wetlands and set the stage for improved wetland management and better projects across Alberta. Mr. Brookman believed the Appellants met the criteria for a "reward" under the Board's compensation model.

[63] Mr. Brookman did not consider the Board's longstanding position that parties should cover their own costs was fair or reasonable. He believed it might work when "public sector" companies are involved but that, in these appeals, taxpayer dollars were used to defend the Director and were potentially used to defend Alberta Transportation and its contractor, KGL. Mr. Brookman said the only parties without access to taxpayer funding were the Appellants, who caught the errors, omissions, and breaches in legislation, policy, procedures, plans, and guides, which resulted in harm to the environment and an overbuild of the project. Mr. Brookman stated that having appellants be responsible for the cost of their appeals does not motivate any member of the public to challenge decisions. Mr. Brookman believed the average citizen does not have the time or resources to challenge breaches of legislation, but governments and large corporations have multiple resources to challenge or defend decisions.

[64] Mr. Brookman explained he is a retired qualified professional geologist and runs public and private companies. Mr. Brookman said he is an expert in fluvial river systems and subsurface fluid flow and has managed multi-billion dollar infrastructure projects. Mr. Brookman stated that with his project management experience, his billable rate is $8,00.00 to $10,000 per day, and based on his technical capability, his billable rate is $360.00 per hour,

according to the Consulting Engineers Rate Guide for Alberta. According to Mr. Brookman, his invoice indicating a rate of $360.00 per hour is a substantial discount relative to what he could normally charge.

[65] Mr. Brookman said that, if AEP hired a firm to analyze what was working within the *Water Act* and the Alberta Wetlands Policy (2013), what was broken, the cause of deficiencies, and make recommendations regarding corrective actions, it would cost between $1 million and $2.5 million. Mr. Brookman stated AEP received this information at a fraction of this cost because of the efforts of the Appellants, intervenors, experts, and legal counsel.

[66] Mr. Brookman said the 550 hours he allocated to the appeals is understated, given the accelerated appeal became a 7-day a week project with up to 12 hours a day with tight deadlines. Mr. Brookman stated most of the Appellants' submissions were researched and prepared by him personally.

[67] Mr. Brookman said that the hours he spent on the appeals came at the expense of running his own businesses, but the Appellants did not have an alternative of hiring their own experts when there were no guarantees the experts' fees would be reimbursed.

[68] Mr. Brookman stated the uncertainty over the "reward" type structure used by the Board versus a "loser pays" system required the Appellants to do their own work instead of hiring experts.

[69] Mr. Brookman stated that over 90 percent of the Appellants' submissions were researched and written by him. Mr. Brookman believed it was his "systemic approach to demonstrate how the Director had erred on issues 2 and 3 that led to the variance decision."[11]

[70] Mr. Brookman stated that the Appellants' legal counsel made convincing arguments on the issue regarding the standard of review.

[71] Mr. Brookman asked the Board to consider what the appeals and hearing would have been like if he had not dedicated so much professional time to the appeals that was beyond the intent of "shared responsibility." He explained the Appellants were willing to accept or incur financial loss associated with making their case and proving they were correct until he heard at

the hearing about "backroom deals" between Alberta Transportation and AEP and that AEP was there for developers and not the public or the environment.

[72] Mr. Brookman stated the Board could send a strong message to all involved that these actions will not be tolerated by awarding the Appellants' 100 percent of the costs claimed or even a multiple of the costs requested, such as 3:1 or 8:1. Mr. Brookman argued awarding any costs to the Approval Holder or the Director would be a "travesty" as they were already compensated through taxpayer dollars.

[73] Mr. Brookman stated that the Appellants should be properly rewarded for their substantial and meaningful contributions throughout the appeal process and hearing. Mr. Brookman noted their contributions resulted in a variance to the Approval and changes to the "avoid, minimize, relocate hierarchy" and how linear projects will be managed.

[74] Ms. Tulick claimed $972.00, including $900.00 for attending the hearing, $27.00 for mileage, and $45.00 for meals.

[75] The Appellants also claimed costs for their consultants. Costs claimed for Mr. Michael Kostashuk totalled $10,523.80, including $23.20 for meals, $60.60 for mileage to attend the hearing and site visits, and $10,440.00 attending the hearing and site visits. Mr. Kostashuk charged $360.00 per hour.

[76] Costs claimed for Mr. Barry Lester totalled $25,950.00 for providing his engineering opinion regarding the design of the roadway. Mr. Lester claimed 86.5 hours of time, including 15 hours reviewing the submissions, 37.5 hours preparing a response to the Approval Holder's submission, four hours attending the site visit, and 30 hours attending the hearing.

B. Approval Holder

[77] The Approval Holder stated the Appellants' application for final costs was inadequate, inflated, and failed to meet the criteria set by the Board for an award of final costs. The Approval Holder argued costs should be denied for the following reasons:

1. there was no justification for deviating from the Board's practice of requiring parties to appeals to bear their own costs;

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[11] Mr. Brookman's submission, dated February 23, 2018.

2. the Appellants assumed the litigation principle of "loser pays" should apply, and the Appellants believed they were the successful parties. At most, success was mixed, and the only issue the Appellants were successful on was which wetland policy applied. This was a decision made by AEP prior to the Approval Holder's involvement in the matter, and AEP was acting pursuant to regulatory instructions by adhering to the 1993 Interim Wetland Policy;

3. the Appellants engaged in an unnecessarily protracted, complicated, and expensive manner. Mr. Brookman relied on recognition provided to him as a well-intentioned private individual, but then sought to claim expert rates in connection with his involvement in the appeals.

[78] The Approval Holder raised a number of other issues with respect to the application for costs, including the following:

1. legal fees claimed were significant, and there were numerous deficiencies:

   a. the Appellants asked for payment for nearly the full amount of the invoices tendered, which is contrary to the Board's prior guidance on costs awards;

   b. the Appellants asked that all legal costs be paid from the start of the appeals as opposed to costs necessary for the Appellants' attendance at the hearing;

   c. Mr. Brookman stated he researched and wrote "over 90 percent" of the Appellants' submissions, but the costs application seeks a large award of legal fees for what must be redundant effort;

   d. the Appellants sought reimbursement for legal costs associated with their failed litigation, which they withdrew and were subject to a court order of legal costs against them, which the Approval Holder did not pursue; and

   e. the Appellants said they were receiving legal services on a pro bono basis and no evidence was provided to substantiate that any costs awarded for legal costs would reimburse an actual payment made or would be directed to their counsel;

2. Mr. Brookman's claim for professional fees should be disregarded. He acknowledged he was not an expert in any relevant sense and had no relevant qualifications to advance the claim for costs as if he were an expert in the matter. Mr. Brookman included time and expenses in connection with the litigation and for time that went beyond preparation for the hearing. Mr. Brookman's invoices extended back to April 2017, but the Approval was not issued until August of that year. Mr.

> Brookman's claim for professional fees contradicted his assertion that he engaged in this appeal out of his desire to protect wetlands; and
>
> 3. The costs applications for the "experts" Mr. Lester and Mr. Kostashuk should be dismissed since neither were qualified as experts. There was no indication their evidence was of assistance to the Board in its decision, and neither provided relevant information during the hearing. Both individuals were clearly not impartial, as Mr. Lester applied to intervene in opposition to this matter, and Mr. Kostashuk previously provided correspondence objecting to the project.

[79] The Approval Holder noted the Appellants argued the litigation principle of having the unsuccessful party paying some portion of the proceeding to the successful party should apply to proceedings before the Board. The Approval Holder stated this was based on the incorrect assumption the Appellants were the successful party.

[80] The Approval Holder noted the Board has consistently required parties to appeals to bear their own costs unless there is some compelling reason to the contrary. The Approval Holder said the Appellants did not provide any such reason.

[81] The Approval Holder submitted the Parties should bear their own costs in these appeals.

[82] The Approval Holder stated an application for an award of costs should meet the criteria as stated in the Board's decision in *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Development*, re: *Municipal District of Bighorn No. 8*, specifically:

> "[T]he Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and 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."[12]

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[12] *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016) Appeal Nos. 14-003 and 14-004-CD (A.B.E.A.B.) at paragraph 9.

[83] The Approval Holder stated the costs claimed should have some direct nexus to reimbursing an appellant for a particular expense, as opposed to rewarding an appellant for participating on a level equivalent to that of a professional.

[84] The Approval Holder noted the Board does not typically award costs related to disbursements such as mileage and photocopying. The Approval Holder said the party seeking costs must demonstrate the costs are reasonable, necessary, and associated with the issues in the Notice of Appeal.

[85] The Approval Holder argued the Appellants failed to establish any reason for the Board to deviate from its general practice to require parties to bear their own costs.

[86] The Approval Holder confirmed it was not bringing its own costs application forward even though it incurred costs greater than the amounts provided by the Appellants, including costs associated with retaining legal counsel, experts, attendance of employees and consultants at the hearing, and preparation for the hearing. The Approval Holder explained it incurred additional costs because of the stay, including subcontractor delay claims and costs necessitated by restrictions and impediments to the work schedule.

[87] The Approval Holder stated the Appellants' counsel argued incorrectly for the application of the litigation principle of costs awards, while Mr. Brookman acknowledged the approach followed by the Board for parties to bear their own costs, but asserts it should not be used in this case. The Approval Holder noted Mr. Brookman did not agree with the Board's approach not to award costs to an appellant for their time attending or to prepare for the hearing, but he did not explain why it did not apply in these appeals. The Approval Holder said Mr. Brookman listed his professional experience and expertise as reasons to distinguish his efforts from previous appellants. The Approval Holder noted the Board's practice of denying costs to previous appellants was not because they did not bring professional expertise to the appeal process.

[88] The Approval Holder stated the Board must ask whether the party seeking costs presented valuable evidence and contributed arguments that: (1) made a substantial contribution

to the hearing; (2) were directly related to the matters contained in the Notice of Appeal; and (3) made a significant contribution to the goals of the *Water Act*.

[89] The Approval Holder argued the Appellants did not meet the "substantial contribution" requirement. The Approval Holder reminded the Board the only witnesses presented by the Appellants, other than themselves, were Mr. Lester and Mr. Kostashuk, both of whom lacked independence required to provide expert evidence. The Approval Holder stated the Board's finding that it cannot assess the need or size of a project essentially disposed of any contribution Mr. Lester may have made. The Approval Holder argued neither Mr. Lester nor Mr. Kostashuk provided a substantial contribution to the hearing, and costs claimed associated with them should be rejected.

[90] The Approval Holder acknowledged Mr. Brookman provided a significant amount of information to the hearing, but noted much of the information was irrelevant and related to issues outside the scope of the hearing. The Approval Holder said the Appellants caused delays, added expenses, and complicated the process more than the value of their relevant evidence.

[91] The Approval Holder noted the following actions taken by the Appellants that resulted in protracting the proceedings:

1. the appeals sought to revoke the Approval in its entirety;
2. the Appellants continued to refer to the bridge and alleged *Water Act* approvals or authorizations were necessary even after being advised the bridge spanning the Elbow River was not relevant to the appeals;
3. the Appellants made allegations about Watercourse 01 even after the Board determined Watercourse 01 was not within the scope of the Approval and was irrelevant to the appeals;
4. the Appellants unsuccessfully applied for a stay regarding Wetland 11 after the close of the hearing; and
5. the Appellants unsuccessfully sought permission to admit additional evidence after the close of the hearing.

[92] The Approval Holder argued Mr. Brookman used the wetland policy and expressed concern for the preservation of wetlands to advance his opposition to parts of the project that were not subject to appeal, especially the construction of the bridge.

[93] The Approval Holder said it was required to respond repeatedly to the Appellants' concerns with the design of the bridge and the multiple *Water Act* applications required for the project, even though these concerns were outside the scope of the hearing.

[94] The Approval Holder stated the Appellants' contribution to the hearing was outweighed by the volume of irrelevant and extraneous issues they introduced, thereby complicating the proceeding and making it more protracted and expensive than needed.

[95] According to the Approval Holder, the hearing turned on issues different from those raised in the Notices of Appeal and had almost nothing to do with whether or not the correct wetlands policy was applied.

[96] The Approval Holder noted the Appellants were not successful on any issue except the specific question of the applicable wetland policy, which was a decision made by the regulator prior to the Approval Holder's involvement in the project.

[97] The Approval Holder acknowledged the evidence and information provided can be tied generally to some of the goals of the *Water Act*, but given the amount of irrelevant information, irrelevant issues, and unnecessarily protracted and expensive process, it is not sufficient to justify deviating from the Board's standard practice with respect to costs.

[98] The Approval Holder noted there is no precedent for the Board awarding costs for carrying out the obligation of Albertans to bring environmental matters forward.

[99] The Approval Holder noted most of Mr. Brookman's concerns related to the conduct of the Director, and although the Approval Holder does not consider the concerns valid or substantiated, the concerns do not support a claim for costs against the Approval Holder.

[100] The Approval Holder argued the Appellants; claim for Mr. Brookman's costs should be denied for the following reasons:

1. this claim was not for reasonable out-of-pocket costs but was seeking a personal windfall based on an alleged expert's hourly rate;
2. he included costs associated with litigation, which he withdrew, and which was subject to a cost order;
3. he included costs back to April 2017, prior to filing his Statement of Concern and before the Approval was issued in August;

4. he claimed for time after the hearing had concluded;
5. he tried to substantiate his claim for personal costs, including an hourly rate of $360.00, by referring to his personal experience, which was irrelevant to the hearing, and Mr. Brookman acknowledged he was not an expert;
6. he was seeking to be compensated as an expert even though he was not qualified and did not bring any relevant engineering expertise to the hearing, and the only issue he succeeded on at the hearing, the application of the newer wetland policy did not require consulting engineer expertise; and
7. he submitted claims for mileage and meals, for which the Board does not award costs.

[101] The Approval Holder noted the total legal fees reflected in the three separate invoices did not match the total in the summary provided by the Appellants. The Approval Holder said the invoice for disbursements, totalling $981.59, appeared to be the only invoice paid by the Appellants. The Approval Holder stated the discrepancy was approximately $10,000.00 based on the three invoices or approximately $3,000.00 based on the fee totals only.

[102] The Approval Holder stated the costs claimed for legal fees was improper for the following reasons:

1. the Appellants were seeking essentially solicitor-client costs, which is inconsistent with the Board's practice, and there was no basis to award any legal fees;
2. the Appellants were seeking costs for all activities of counsel, which goes beyond what was necessary to prepare for and appear at the hearing, and which included costs related to litigation, private prosecution, post-hearing activities, the proposed site visit, and proposed interventions;
3. the claim included counsel's time in connection with the failed litigation; and
4. given Mr. Brookman advised he researched and wrote approximately 90 percent of the Appellants' submissions, there was no basis for such a significant claim for legal fees since counsel's efforts were either duplicative or not used.

[103] The Approval Holder noted the Appellants previously acknowledged their counsel was retained on a *pro bono* basis, and the invoices indicated only the invoice for disbursements was paid out of a $1,500.00 retainer.

[104] The Approval Holder noted Ms. Tulick's modest claim was primarily for attendance at the hearing. However, the Approval Holder objected to paying anything to the Appellants since they failed to demonstrate any basis for the Board to deviate from its general approach of requiring parties to bear their own costs. The Approval Holder said Ms. Tulick also claimed for meals and mileage, expenses the Board does not consider in a costs application.

[105] The Approval Holder stated there was no basis for Mr. Brookman's costs claim to be so different from Ms. Tulick's given each had similar roles at the hearing, and Mr. Brookman was not qualified as an expert.

[106] The Approval Holder noted the Appellants did not provide receipts for the disbursements claimed and did not explain how those costs related to the issues in the appeal or the preparation for the hearing. The Approval Holder argued none of the disbursement costs should be awarded.

[107] The Approval Holder stated these appeals were expensive and disproportionate to the limited issues addressed, primarily due to the Appellants' failure to respect the Board's processes and jurisdiction.

[108] The Approval Holder disputed the Appellants' assessment that they were the successful parties given they were almost entirely unsuccessful in their goal to overturn the Approval. The Approval Holder said the Appellants succeeded on one specific point regarding a decision that the Approval Holder was not involved in. It was a decision made by the regulator.

[109] The Approval Holder stated the Appellants did not meet the requirements of the legislation and the Board's jurisprudence with respect to final costs, and their costs claim should be dismissed in its entirety. The Approval Holder submitted that, if the Board considers a reasonable honorarium for the individual Appellants, the hours and hourly rate associated with Ms. Tulick's claim would be a more reasonable basis for such honoraria.

[110] The Approval Holder stated the Appellants' application for costs should be dismissed.

C. Director

[111] The Director noted in the Appellants' costs submission, they only claimed costs against the Approval Holder, but in subsequent correspondence, they intended to leave it up to the Board to determine whether any portion of the costs should be paid by the Director.

[112] The Director stated he should not be responsible for paying costs as the Director acted in good faith.

[113] The Director stated the Appellants' costs claimed were not in the nature and amount of the Board's previous costs decisions.

[114] The Director noted the Board has held in previous decisions that costs are not awarded against the Director as long as the Director was acting in good faith and carrying out his or her statutory mandate, even when the Director's decision was reversed.

[115] The Director pointed out his decision was varied, not reversed, in these appeals. The Director stated the Appellants did not establish any special circumstances that would warrant that costs be payable by the Director. The Director noted the Board's Report and Recommendations did not indicate the Director who made the decision, nor the Director who appeared at the hearing, was not acting in good faith. The Director stated both he and the Director, who issued the Approval, acted in good faith throughout the decision-making process leading to the issuance of the Approval and the appeal process.

[116] The Director stated there were items included in the Appellants' costs applications that did not meet the criteria of section 18(2) of the *Environmental Appeal Board Regulation*, A.R. 114/1993 (the "Regulation"), specifically that costs must be directly and primarily related to the matters raised in the Notice of Appeal and for the preparation and presentation of the party's submissions. The Director provided the following examples:

1. Mr. Brookman included a number of entries from April 2017 until August 2017, but his appeal was filed in August 2017. Matters predating the submission of his Notice of Appeal cannot relate to matters in the Notice of Appeal or the preparation and presentation of the party's submission;
2. invoices for legal fees and Mr. Brookman's invoice include entries related to an application before the Court of Queen's Bench. The Court application was not part of the Board's process, and neither the Director

nor the Board participated in that application. The Board cannot make a contrary cost finding in relation to the application which was before the Court;

3. invoices for legal fees also included entries related to private prosecution and related advice, which were not related to matters in the Notice of Appeal or the preparation and presentation of the party's submission;

4. legal invoices and Mr. Brookman's personal invoice contained entries related to a request for documents from the Federal Department of Fisheries and Oceans, but such matters were outside provincial jurisdiction and were not related to matters in the Notice of Appeal or the preparation and presentation of the party's submission; and

5. there was significant overlap between the legal invoices and Mr. Brookman's invoices.

[117] The Director submitted there are no special circumstances, and no bad faith on the part of the Director was established by the Appellants to warrant departing from the Board's practice, which was upheld by the Court, that the Director should not pay costs.

[118] The Director stated the costs should be borne, primarily, by each individual party.

V. LEGAL BASIS FOR COSTS

A. Legislation

[119] 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."[13]

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

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.)[14]

[120] The sections of 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.

(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.

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

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

[121] 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.[15]

[122] 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.[16] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[17] 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."[18]

[123] 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:

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

"2 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 residents of Alberta 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 trans-boundary water management;

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

[16] *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.).

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

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

(a) substantially contributed to the hearing;

(b) directly related to the matters contained in the Notice of Appeal; and

(c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."[19]

[124] 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.[20]

B. Tribunals vs. Courts

[125] In applying the costs provisions referred to above, 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 a factor in all proceedings before the Board, it must be taken into consideration when the Board makes its final decision or recommendations. The Board's role is not simply to determine a dispute between parties. Therefore, the Board is not bound to apply 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 purposes identified in section 2 of EPEA.

[126] 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

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

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

> have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[21]

[127] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. 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

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[21] *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."

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

> "…administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green*, *supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:
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> > 'In the factum of the appellants a number of cases were noted dealing with the discretion exercisable by Courts in the matter of costs of litigation, as well as statements propounded in texts on the subject. I do not find them sufficiently appropriate to warrant discussion. Such costs are influenced by Rules of Court, which in some cases provide block tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"

> spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[22]

[128] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[23] There is an obligation for members of the public to accept some responsibility of bringing environmental issues to the forefront. Part of this obligation is for the party to pay their own way.

VI. ANALYSIS

[129] When determining if costs should be awarded, the Board recognizes the role legislators placed on Albertans to ensure environmental issues are brought to the forefront. Given this obligation, the Board accepts the starting position when assessing any cost application is that parties who appear before the Board do so without receiving costs.

[130] The Board also recognizes the importance of receiving relevant, succinct evidence at the hearing that will assist the Board in formulating its recommendations for the Minister. The Board will consider awarding costs if the evidence and submissions provided were directly and primarily related to the matters contained in the Notices of Appeal and were related to the preparation and presentation of the party's submissions at the hearing. Costs are not punitive in nature.

[131] It is also important to remember that costs are not awarded on the basis of whether a party "won or lost."

[132] The Appellants argued they "won" the appeal and, therefore, they should be awarded costs. However, the level of success in the hearing is not the most relevant factor in the assessment of costs. Although the Board recommended the Approvals be varied because of the

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

[23] *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.).

appeals being filed, this does not mean the Appellants either "won" or "lost" in their appeals. Their participation in the appeal process is one of the purposes identified in the *Water Act*.[24]

[133] Although Mr. Brookman argued the Board is "required" to award costs pursuant to section 96 of EPEA, in fact, the awarding of costs is in the Board's discretion. As stated by Justice Fraser, the Board has broad discretion in determining the costs that should be awarded. There is no "requirement" to award costs. As the Board has repeatedly stated, its starting point in that all parties pay their own way.

[134] When the Board refers to "rewarding" a party for the assistance the Board received from the party's participation in the hearing, it is not presenting a reward. It recognizes the value of the submissions and evidence provided by the party.

[135] The Board questions the legal costs claimed by the Appellants. Mr. Brookman clearly stated he did 90 percent of the research for and writing of the submissions. This leaves little work required from the Appellants' counsel, yet they claimed 334.3 hours of legal time at approximately $400.00 per hour. In addition, the Appellants had stated their counsel was offering his services on a pro bono basis. Accordingly, the Board does not see how the Appellants can be requesting costs for legal services they did not have to pay for. This would result in the Appellants receiving a windfall. The intent of costs is not to provide a financial benefit for a party nor to use it to penalize a party. The Board appreciates the Appellants' counsel was responsible for preparing submissions on the issue of standard of review. With

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[24] Section 2 of the *Water Act* states:

"2 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 residents of Alberta 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 trans-boundary water management;

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

respect to the standard of review, the Board is of the view the legal arguments presented by the parties were equally helpful, and therefore it is not appropriate to consider a costs award.[25]

[136] Legal counsel for the Appellants also claimed $981.59 for disbursements, such as photocopying, courier services, and fax fees. Included in the disbursements were costs associated with the court order, such as fees for the court reporter, court runner, and courthouse searches, which will not be considered by this Board as being relevant to the costs claimed. When there are costs associated with different actions on the same invoice, the party should clearly identify those costs that are relevant to the appeal and those which are not. Costs associated with non-appeal files should not be included in the costs claimed by any party. There is no indication if the photocopying and faxing were done in-house or externally and whether these expenses and courier expenses, were the result of the appeal or the court action. In either case, the Board generally does not award costs related to photocopying, faxing, and courier services. The Appellants have not demonstrated there is any reason the Board should vary from this position.

[137] Although the Appellants' counsel did provide arguments regarding the standard of review, the rest of his participation appeared to be significantly limited by Mr. Brookman. The Board's questioning of the witnesses presented by the Approval Holder and the Director brought forward the evidence the Board required to make the best recommendations possible. It was not the result of cross-examination conducted by the Appellants' counsel.

[138] Therefore, the Board will not award any costs for the Appellants' legal counsel.

[139] Mr. Brookman claimed costs based on his professional qualifications and experience as a geologist. He claimed for 548.95 hours at a rate of $360.00 per hour, totalling $197,622.00. At the hearing, he presented evidence as an appellant, not as an expert. The Board appreciates his background was beneficial to him while preparing his submissions, but the provision of expert evidence must be neutral. Clearly, as an appellant, Mr. Brookman was not neutral when presenting his evidence. The role of an appellant is to provide evidence and

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[25] Costs Decision: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment,* re: *Town of Strathmore* (22 April 2008), Appeal Nos. 05-053-054-CD (A.E.A.B.) at paragraph 96.

arguments to persuade the Board to see the appellant's position. In considering any costs application by Mr. Brookman, the Board cannot apply rates charged by experts.[26]

[140] The Board notes Mr. Brookman asked for costs related to the time he spent on the file prior to filing the Notice of Appeal and time spent after the hearing closed. Time spent before a Notice of Appeal is filed or time spent after the hearing closes clearly cannot be related to the preparation and presentation of submissions at the hearing.

[141] Mr. Brookman also included time spent with respect to the filed court order and included mileage and parking for attending matters in relation to the court order. Again, this time does not relate to the preparation and presentation of submissions and evidence at the hearing.

[142] Mr. Brookman requested reimbursement for photocopying, paper and ink, and memory sticks. No receipts were attached to show these expenses were incurred, and there is no indication all of these costs were spent on the hearing matters. Given there are numerous entries related to the court order, the Board cannot consider these expenses in a costs application. The Board cannot determine if the expenses were related to the hearing submissions or some other matter. In addition, in most cases, the Board considers the costs related to office supplies as costs the party should bear. Without receipts verifying the costs, the Board will not depart from its usual practice of not awarding costs for office expenses.

[143] The Board notes Mr. Brookman charged $0.505 per kilometre with no explanation as to how this rate was determined. A clear explanation of how these costs were determined is required in any costs application. The Board generally does not award costs for mileage.

[144] The Board appreciates the time and effort Mr. Brookman spent on preparing his submissions and evidence for the hearing. However, his submissions did not remain focused on

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26 The Appellants attempt to distinguish Mr. Brookman's participation in this hearing from the participation of Mr. Hayes in the *Maga* decision or Ms. Walsh in the *Walsh* decision. While the Board notes the arguments about Mr. Brookman's background; respectfully, he is in the same position as Mr. Hayes and Ms. Walsh, and there is no distinction in Mr. Brookman's role as an appellant. See: *Maga et al*. (27 June 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047, and 074-CD (A.E.A.B.) and *Walsh* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Turner Valley* (22 December 2008), Appeal No. 06-071-CD (A.E.A.B.) at paragraph 168.

the issues identified by the Board and included arguments relating to the size of the project and the type of bridge that should be constructed. The Board clearly stated prior to the hearing that it could not consider these issues. The Board finds the costs claimed by Mr. Brookman unreasonable given the submissions did not remain focused on the issues identified by the Board and resulted in additional time spent by the Board and the other Parties on irrelevant matters.

[145] Ms. Tulick asked for costs associated with her time appearing at the hearing and for meals. Although the costs claimed by Ms. Tulick are reasonable, the Board considers these costs as part of the costs for participating in the appeal process.

[146] Although the Appellants provided some evidence the Board considered in preparing its recommendations, this evidence was limited in nature and was what the Board would expect from any appellant. Therefore, the Board will not depart from its initial starting point that parties to an appeal should bear their own costs.

[147] Mr. Brookman's suggestion that the costs claimed should be increased by a factor of 3 times or 8 times is essentially an argument that the Board should use its power to award costs to punish the Approval Holder and the Director. Costs are not meant to be punitive in nature. Moreover, there is no evidence indicating the Approval Holder or the Director acted in bad faith in the appeal process. This includes the suggestion from the Appellants that there was a "backroom deal" regarding the policy to be applied. In the Board's view, there was no "backroom deal." Any errors the Director may have in selecting the appropriate policy to apply were not made in bad faith.

[148] The Board acknowledges the direction in the Ministerial Order that the current Wetland Policy apply would not have occurred had it not been for the Appellants filing their Notices of Appeal. However, the use of the previous wetland policy was a policy decision made by AEP at the time the project was proposed and before the Approval was issued. The Director followed the directives given to him, and it was the Minister's prerogative to require the project to proceed under the current Wetland Policy.

[149] Costs were claimed for the participation of Mr. Barry Lester, who appeared as a witness for the Appellants as well as an intervenor. Details of these costs were provided by Mr.

Lester to Mr. Brookman on February 22, 2018. Mr. Lester claimed 86.5 hours for reviewing the Approval Holder's submission and preparing a response, attending the site visit, and attending the hearing. His rate was $300.00 per hour, for a total of $25,950.00. It is the Board's view that Mr. Lester could not be considered as an expert witness since he did not present unbiased evidence. He presented evidence on the need for a project of the size approved. Although the Board understood why he presented the information, it did not assist the Board in making its recommendations to the Minister since the size of the project was not relevant to the issues before the Board.

[150] The invoice submitted by Mr. Kostachuk, dated February 22, 2018, included expert witness hours, charged at $360.00 per hour for 29 hours for a total of $10,440.00, mileage totalling $60.60, and $23.20 for meals. Mr. Kostashuk expensed meals and mileage according to the Alberta Government policy. Mr. Kostachuk did not present unbiased evidence and, therefore, cannot be considered an expert witness.

[151] In addition to the Board's conclusion that Messrs. Lester and Kostachuk were not expert witnesses, it appears the invoices provided by them were prepared specifically for the costs application, and there was no indication of any retainer agreement between Mr. Kostachuk and Mr. Lester and the Appellants to provide evidence. It is unclear if the Appellants actually paid Mr. Lester and Mr. Kostachuk to appear as consultants. Without some indication these invoices represented actual expenses paid by the Appellants, the Board will not consider these invoices in the Appellants' costs application.

[152] The Board notes Mr. Lester did not submit an application for costs for appearing as an intervenor. Intervenors are usually not awarded costs unless they play a major role in the hearing process.

[153] The evidence provided by Mr. Lester and Mr. Kostachuk provided little assistance to the Board in making its recommendations, and no costs will be awarded for Mr. Lester's or Mr. Kostachuk's participation at the hearing.

VII. CONCLUSION

[154] The Appellants' application for an award of costs for legal counsel is denied, given counsel was acting on a pro bono basis, and Mr. Brookman stated he prepared most of the submissions provided to the Board.

[155] The Board will not award costs for the participation of Mr. Brookman, as much of his evidence did not relate to the issues identified by the Board. The Board is of the view this evidence did not make a substantial contribution to the appeal, and any reasonable costs are considered part of participating in the appeal process.

[156] The costs claimed by Ms. Tulick, although reasonable, are costs the Board considers part of participating in the appeal process.

[157] The costs claimed for the participation of Mr. Kostachuk and Mr. Lester are denied given their evidence was not provided in an unbiased manner, which would be expected from any expert witness and their evidence primarily related to matters outside the issues in the appeal.

VIII. DECISION

[158] The Board denies the costs application submitted by the Appellants.

Dated on November 7, 2019, at Edmonton, Alberta.

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Alex MacWilliam
Board Chair

-original signed-

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Eric McAvity, Q.C.
Board Member

-original signed-

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Anjum Mullick
Board Member