

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – March 18, 2020

**IN THE MATTER OF** sections 91, 92, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** appeals filed by Cherokee Canada Inc., 1510837 Alberta Ltd., and Domtar Inc. with respect to the decisions of the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR, Amendment No. 1 to EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR, EPEA Enforcement Order No. EPEA-EO-2018/02-RDNSR, EPEA Enforcement Order No. EPEA-EO-2018/03-RDNSR, EPEA Enforcement Order No. EPEA-EO-2018/04-RDNSR, Amendment No. 2 to EPEA-EO-2018/02-RDNSR, and EPEA Enforcement Order No. EPEA-EO-2018/06-RDNSR to Cherokee Canada Inc., 1510837 Alberta Ltd., and Domtar Inc.

Cite as: Costs Decision: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10.

**BEFORE:**

Ms. Meg Barker, Panel Chair;  
Dr. Nick Tywoniuk, Board Member; and  
Mr. Dave McGee, Board Member.

**SUBMISSIONS BY:**

Appellants: Cherokee Canada Inc. and 1510837 Alberta Ltd.,  
represented by Mr. Ron Kruhlak, Q.C., Mr. Sean  
Parker, and Mr. Stuart Chambers, McLennan Ross  
LLP.

Domtar Inc., represented by Mr. Gary Letcher and  
Ms. Andrea Akelaitis, Letcher Akelaitis LLP, Mr.  
Curtis Marble, Walsh LLP, and Mr. Micah Clark,  
Aldridge & Rosling, LLP.

Director: Mr. Michael Aiton, Director, Regional Compliance,  
Red Deer-North Saskatchewan Region, Operations  
Division, Alberta Environment and Parks,  
represented by Mr. Wally Braul, Mr. Josh Jantzi, and  
Mr. Mark Youden, Gowlings WLG (Canada) LLP.

Intervenors: City of Edmonton, represented by Mr. Michael  
Gunther and Mr. Stephen Ho, City of Edmonton,  
Law Branch.

Alberta Health Services, represented by Ms. Jennifer  
Jackson and Ms. Linda Svob, Alberta Health  
Services, Law Branch.

## EXECUTIVE SUMMARY

Between December 2016 and July 2018, the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the Director) issued five enforcement orders, and a number of amendments to these orders, to Cherokee Canada Inc., 1510837 Alberta Ltd., and Domtar Inc.\* Cherokee and Domtar appealed these orders. Following a number of preliminary motions hearings, the Board held an unprecedented twelve-day hearing on the merits of the appeals in the fall of 2018.\*\*

In its Report and Recommendations, the Board held that the orders were without legal, technical, and scientific foundation, and should not have been issued. The Board found the Director's approach in issuing the orders had been both incorrect and unreasonable. The Board recommended the Director's decisions to issue the orders be reversed and the orders cancelled. The Minister accepted the findings of the Board and cancelled the orders.

Following the hearing, Cherokee and Domtar filed costs applications. The costs applications requested legal costs, expert witness costs, and corporate costs (costs incurred internally by Cherokee). The Board held that in order to award costs against the Director, there needed to be special or exceptional circumstances. The Board found, in the circumstances of this case, while there was no bad faith on the part of the Director, the Director's decisions and his behaviour were sufficiently egregious that an award of costs against the Director was appropriate.

The Board reviewed the costs applications of Cherokee and Domtar, and applied an objective approach to their request for costs and awarded costs to both Cherokee and Domtar. Cherokee was awarded \$831,625.43, and Domtar was awarded \$718,546.67 payable by Alberta Environment and Parks on behalf of the Director.

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\* 1510837 Alberta Ltd. is a subsidiary of Cherokee Canada Inc. Cherokee Canada Inc. and 1510837 Alberta Ltd. are collectively referred to as Cherokee. Domtar Inc. is referred to as Domtar. The Director also issued an environmental protection order to Cherokee and Domtar, but it was subsequently withdrawn.

\*\* The twelve-day hearing was unprecedented because almost all hearings before the Board are one or two days, and until this hearing, the longest hearing the Board has ever held was five days.

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## I. INTRODUCTION

[1] This is the costs decision of the Environmental Appeals Board (the “Board”) dealing with appeals of five enforcement orders, and two significant amendments to these orders,<sup>1</sup> issued under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”).<sup>2</sup> The orders relate to historical contamination on a former industrial site in northeast Edmonton (the “Site”).<sup>3</sup> The orders were issued by the Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”) to Cherokee Canada Inc., 1510837 Alberta Ltd., and Domtar Inc.<sup>4</sup>

[2] Cherokee was in the process of cleaning up the Site, purchased from Domtar, as a “brownfield redevelopment”<sup>5</sup> when it began having difficulties communicating with the Approvals Group<sup>6</sup> of Alberta Environment and Parks. Significant organizational changes within Alberta Environment and Parks (“AEP”) resulted in the Approvals Group being non-responsive to Cherokee for an extended period. When the Approvals Group finally reengaged with

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<sup>1</sup> The Director issued: EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR (“EO-2016/03”), Amendment No. 1 to EPEA Enforcement Order No. EPEA-EO-2016/03-RDNSR (“Amendment No. 1”), EPEA Enforcement Order No. EPEA-EO-2018/02-RDNSR (“EO-2018/02”), Amendment No. 2 to EPEA Enforcement Order No. EPEA-EO-2018/02-RDNSR (“Amendment No. 2”), EPEA Enforcement Order No. EPEA-EO 2018/03-RDNSR (“EO-2018/03”), EPEA Enforcement Order No. EPEA-EO-2018/04-RDNSR (“EO-2018/04”), and EPEA Enforcement Order No. EPEA-EO-2018/06-RDNSR (“EO-2018/06”). In addition, there were also two minor date-related amendments issued to EO-2018/02 and EO-2018/04. The Director also issued an environmental protection order on December 20, 2016, but this order was cancelled on May 18, 2018.

<sup>2</sup> The Board’s Report and Recommendations is found at: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.)

<sup>3</sup> The Site is located at 44 Street NW and 127 Avenue NW in the City of Edmonton, Alberta. The Site has four parts: Parcel X (a berm located along the south side of the Homesteader Community); Parcel C (consisting of the Verte Homesteader residential area and a berm along the south side); Parcel Y (the largest portion of the overall Site, consisting of a proposed residential area and a berm along the south side); and the Greenbelt (located along the south side of the Overlanders Community).

<sup>4</sup> 1510837 Alberta Ltd. is a subsidiary of Cherokee Canada Inc. Cherokee Canada Inc. and 1510837 Alberta Ltd. are collectively referred to as “Cherokee.” Domtar Inc. is referred to as “Domtar.”

<sup>5</sup> A brownfield site is “an abandoned, vacant, derelict, or underutilized property where past actions have resulted in actual or perceived contamination and where there is an active potential for productive community use including reuse and full redevelopment.” Brownfield Redevelopment Working Group, *Alberta Brown Field Redevelopment Practical Approaches to Achieve Productive Community Use, May 2011-April 2012* (Edmonton: Alberta Environment and Water) at page 4.

<sup>6</sup> Alberta Environment and Parks has two groups: the Approvals Group and the Compliance Group. The Approvals Group is the part of Alberta Environment and Parks that has day-to-day conduct of managing regulated facilities. The Compliance Group becomes involved when there is alleged contravention of EPEA.

Cherokee, it called in the Director to investigate an allegation that Cherokee had illegally constructed a berm on the Site. Upon being called in to investigate the “illegal berm,” the Director, for some reason, took over the regulatory management of Cherokee’s project and began an extensive investigation into the entire Site.<sup>7</sup> This resulted in five enforcement orders and two significant amendments being issued over a two-year period. Cherokee and Domtar appealed each of the orders and significant amendments.

[3] In response to appeals filed by Cherokee and Domtar, the Board held a number of preliminary hearings<sup>8</sup> and an unprecedented twelve-day merits hearing.<sup>9</sup> Following the merits hearing, the Board issued its Report and Recommendations to the Minister of Environment and Parks (the “Minister”).<sup>10</sup> The Minister substantially accepted the Board’s recommendations, which included cancelling all five orders and associated amendments. The core finding in the Board’s Report and Recommendations was that the Director’s decisions in dealing with this matter were both unreasonable and incorrect and that there was no basis for issuing the enforcement orders.<sup>11</sup> As a result, the regulatory management of the Site was returned to the

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<sup>7</sup> The evidence before the Board was that Cherokee tried to contact the Approvals Group and the request was given to the Director. The Director essentially cut off all contact between Cherokee and the Approvals Group. In doing this, the Director fettered the discretion of the statutory decision-maker in the Approvals Group, and exceeded his authority as the Director of the Compliance Group.

Further, as stated in the Board’s Report and Recommendation:

“The initial order focused on the Parcel Y Berm, but over time, the Director expanded his investigation to consider the entire Site. The subsequent orders were based on an unprecedented site sampling program undertaken by the Director. The site sampling program included drilling hundreds of boreholes and taking hundreds of samples, testing for the main chemicals of concern, which are naphthalene, dioxins, and furans. The Board has never seen a Director undertake a sampling program of this magnitude.” (Footnotes not included.)

*Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.) at paragraph 12.

<sup>8</sup> The preliminary motions hearings and case management meetings totalled 44 hours and 30 minutes. See Appendix A – Preliminary Hearings.

<sup>9</sup> The twelve-day hearing was unprecedented because almost all hearings before the Board are one or two days, and until this hearing, the longest hearing the Board has ever held was five days. The hearing totalled 105 hours and 11 minutes. See Appendix B – Hearing Days.

<sup>10</sup> See: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.).

<sup>11</sup> The Executive Summary of the Board’s Report and Recommendations provided:

“As there was no basis for issuing the enforcement orders, the Board has recommended the Minister of Environment and Parks (the ‘Minister’) reverse the enforcement orders. The Board

Approvals Group as a brownfield redevelopment. Following the release of the Board's Report and Recommendations and the Minister's Order, Cherokee and Domtar submitted costs applications to the Board seeking costs against the Director.<sup>12</sup> The Board's jurisprudence regarding an award of costs against the Director requires a finding of special or exceptional circumstances.

## II. LEGAL BASIS FOR COSTS

### A. Legislation

[4] Section 96 of EPEA provides the legislative authority to award costs:

“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.”<sup>13</sup>

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....’

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has recommended the project be returned to one of the Approvals Groups within Alberta Environment and Parks as a brownfield redevelopment. In particular, the Board has recommended that the Minister issue a Ministerial Order with a detailed series of steps to move this matter forward as a brownfield redevelopment. To ensure the required work in the Verte Homesteader and Overlanders Communities is completed, the Board is recommending that the Minister issue two environmental protection orders: one to Cherokee for the Verte Homesteader Community, and one to Domtar for the Overlanders Community.”

*Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.) at Executive Summary, page 7.

<sup>12</sup> Cherokee requested \$2,253,392.46 in legal fees, \$742,364.05 in expert fees, and \$51,769.39 in corporate fees. Domtar requested \$1,969,383.66 in legal fees, and \$435,470.79 in expert fees. See Appendix C for a full description of the costs application process.

<sup>13</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293 at paragraph 23.

I conclude 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.” (Emphasis in the original.)<sup>14</sup>

The *Cabre* decision is particularly relevant to the Board’s considerations in this case because it involved the Appellant seeking costs against the Director.

[5] 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;

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<sup>14</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* 2001 ABQB 293, at paragraph 31 and 32.



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

[6] When applying these criteria to the facts of these appeals, the Board must remain cognizant of the purposes of the EPEA, as stated in section 2.<sup>15</sup>

[7] 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.<sup>16</sup> The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.<sup>17</sup> 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....”<sup>18</sup>

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<sup>15</sup> Section 2 of the EPEA provides:

“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 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.”

<sup>16</sup> *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.).

<sup>17</sup> *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.).

<sup>18</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* 2001 ABQB 293, at paragraphs 31 and 32.

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

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

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

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

[9] 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.<sup>20</sup>

## **B. Tribunals vs. Courts**

[10] 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.

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

<sup>20</sup> *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.).

[11] The Federal Court of Appeal in *Bell Canada v. C.R.T.C.* spoke of the distinction between the costs awarded in judicial and quasi-judicial settings:

“The principal issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.”<sup>21</sup>

[12] 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

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<sup>21</sup> *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 at paragraph 4 (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)* 2001 ABQB 293 paragraph 32:

“...administrative tribunals are clearly entitled to take a different approach from that of the courts in awarding costs. In *Re Green, supra* [*Re Green, Michaels & Associates Ltd. et al. and Public Utilities Board* (1979), 94 D.L.R. (3d) 641 (Alta. S.C.A.D.)], the Alberta Court of Appeal considered a costs decision of the Public Utilities Board. The P.U.B. was applying a statutory costs provision similar to section 88 [(now section 96)] of the Act in the present case. Clement J.A., for a unanimous Court, stated, at pp. 655-56:

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

common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta.L.R. (3d) 40, [1993] W.W.R. 450 (Alta. Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties, so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”<sup>22</sup>

[13] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.<sup>23</sup> 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.

### **C. Costs Awards Against the Director**

[14] The Board and the Court expressly addressed the circumstance of a costs award against the Director in *Cabre*.<sup>24</sup> Specifically, the Board held there needs to be special or exceptional circumstances to award costs against the Director:

“The legislation protects departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the [Director] differently than the role of those proposing projects. Where, on the facts of this case, the [Director] has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs.”<sup>25</sup>

The Court agreed with this analysis, stating:

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<sup>22</sup> *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.).

<sup>23</sup> *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.).

<sup>24</sup> *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000) Appeal No. 98-251-C (A.E.A.B.), 2000 ABEAB 6, and *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* 2001 ABQB 293.

<sup>25</sup> *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000) Appeal No. 98-251-C (A.E.A.B.), 2000 ABEAB 6, at paragraph 18.

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

The Board states in its written submission for this application:

‘There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision-maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker’s judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.’”<sup>26</sup> (Emphasis added.)

[15] As identified above, the Board notes there is a protection for the Director and other Governmental Officials carrying out duties under EPEA. This is found in section 220, which provides:

“No action for damages may be commenced against (a) a person who is an employee or agent of or is under contract to the Government ... for anything done or not done by that person in good faith while carrying out that person’s duties or exercising that person’s powers under this Act including, without limitation, any failure to do something when that person has discretionary authority to do something but does not do it.”

As discussed, while this provision provides some general guidance that an award against the Director is not something to be taken lightly, this provision does not provide protection against an award of costs. An award of costs “against any party” under section 96, is not an award of damages as contemplated in section 220. In the circumstances of this case, the relevant concern is not that the Director acted in bad faith, or failed to act, but rather that the Director took excessive or egregious action that went against the purpose of EPEA as prescribed in section 2.

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<sup>26</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* 2001 ABQB 293, at paragraphs 33 and 34.

### **III. ANALYSIS**

[16] In addressing the costs applications of the Appellants, the Board has to decide two questions. The first question is whether there are special or extraordinary circumstances in these appeals that warrant an award of costs against the Director. The second question is, if an award of costs is warranted, then what the appropriate amount is to award to the Appellants.

#### **A. Special Circumstances**

[17] In the Board's view, there are at least three special or extraordinary circumstances that could form the basis for an award of costs against the Director.

[18] The first, as discussed in the *Cabre* decision and as suggested by section 220 of EPEA, is bad faith.<sup>27</sup> Under section 220, bad faith can be the basis for a damage claim against the Director; in the Board's view, it can also be a basis for a costs award against the Director. Despite very serious concerns with the Director's decisions and his conduct in this matter, the Board does not believe the Director acted in bad faith. The Director may have been over-zealous in both his decisions and his behaviour in these appeals, but his decisions were not borne of dishonesty or malicious intent.

[19] The second basis for a finding of special or exceptional circumstances is an egregious error in decision-making. As discussed by the Board in *Cabre*, and endorsed by the Court, it is not appropriate to hold a statutory decision-maker liable for costs on an appeal for a reversible but non-egregious error, because that would run the risk of distorting the decision-maker's judgment away from his statutory duty.<sup>28</sup> However, where there is an egregious error in decision-making, where the decision-maker's judgment is already distorted away from his statutory duty, then an award of costs may be appropriate. In the Board's view, the Director's errors in decision-making in these appeals were egregious, and therefore, a costs award is appropriate.

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<sup>27</sup> In Black's Law Dictionary states: "[The t]erm 'bad faith' is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will." Henry C. Black, *Black's Law Dictionary*, 6<sup>th</sup> ed. (St. Paul: West Publishing Co., 1990) at page 139.

<sup>28</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* 2001 ABQB 293, at paragraph 34.

[20] The third basis for a finding of special or exceptional circumstances is the conduct of the Director, either in events leading up to the appeal or in the appeal itself. Strongly defending his position is one thing, but there is a line that can be crossed – where the behaviour of the Director changes from that of a regulator to that of a pure litigant – where the Director steps down into the fray, and his conduct becomes potentially subject to an award of costs. In the Board’s view, in these appeals, the Director’s conduct in the period since the first orders were issued in 2016 was that of a pure and overly persistent litigant rather than that of a regulator, and as such are subject to a costs award.

1. The Director’s Decisions

[21] The fundamental concern that the Board has with the Director’s decision-making, which, in the Board’s view, result in him being liable for costs, is that he departed from the principles of natural justice that govern him as statutory decision-maker. Despite the fact the Director is charged with ensuring compliance with the legislation, and that this will always put him in some degree of an adverse position with the parties against whom he imposes enforcement action, he is still required to comply with the principles of natural justice. Specifically, as a statutory decision-maker, he is required to exercise his discretion in a fair and reasonable manner. This concept is discussed in *Principles of Administrative Law*:

“And Lord MacNaughten put it similarly in *Westminster v. London & North Western Railway*:

‘There can be no question as to the law applicable to this case. It is well settled that a public body vested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably....’<sup>29</sup>

The principle was also discussed by the Supreme Court of Canada in *Baker*:

“However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries

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<sup>29</sup> David Phillip Jones, Q.C. and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6<sup>th</sup> ed. (Scarborough: Carswell, 2014) at pages 184 and 185, citing *Westminster v. London & North Western Railway*, [1905] A.C. 426 (U.K.H.L.) at page 430.

imposed by the statute, principles of the rule of law, the fundamental values of Canadian society, and the principles of the Charter.”<sup>30</sup>

Throughout the Board’s Report and Recommendations, the Board determined that the Director’s decision-making was both unreasonable and incorrect.<sup>31</sup>

### Control and Communications

[22] The most significant example the Board has about its concerns with the Director’s decision-making is how he took over control over the entire Site and prevented the Appellants from communicating with the Approvals Group of AEP. The Director was initially called in to investigate concerns by the Approvals Group that Cherokee had illegally constructed a berm. This led to the Director taking over complete control of the Site – a Site that was still largely a former industrial site that was in the midst of a reclamation and remediation program – with the intent to drive it to “regulatory closure” regardless of the plans of the owner of the Site. As a brownfield site – a concept supported by the Government of Alberta – it is possible the Site will never see full regulatory closure; on-going monitoring may always be required.

[23] In the course of doing this, the Director cut off all communications between the Appellants and the Approval Group, who should have been in charge of this brownfield redevelopment project. For example, the evidence before the Board was that Cherokee tried to contact the Approvals Group, and the request was given to the Director. The message that came back from the Director, without explanation, was effectively that all communication from this point forward would only be with the Director. In doing this, the Director fettered the discretion of the statutory decision-maker in the Approvals Group. The Director does not have the authority to prevent communications between an approval holder such as Cherokee and the Approvals Group.

### Escalating Orders

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<sup>30</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, [1999] 2 SCR 817, at paragraph 56.

<sup>31</sup> In the Board’s Report and Recommendations, the Board held: “Based on the evidence and arguments presented at the hearing of the appeals, the Board has concluded that the enforcement orders are incorrect and unreasonable, and the Board recommends the Minister reverse the decisions to issue these orders.” *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division*,



[24] Another example that demonstrates the Board's concern with the decisions of the Director was "escalating" the decisions to avoid oversight by the Board and the Minister. Rather than focusing on the right regulatory tool that was available to him under the legislation, the Director appeared to be making decisions focused on avoiding Board oversight, and ultimately that of the Minister.<sup>32</sup> This is evidenced in the escalation of the five enforcement orders and two significant amendments, which were issued in three "sets," as described below, also considering the Director issued amendments and additional orders when stays were in place.

[25] The first set of orders included the first enforcement order (EO 2016/03), which was issued on December 16, 2016, under section 210 of EPEA. It was based on the Director's view that Cherokee had illegally constructed the Parcel Y Berm. The other order that was issued as part of this set was the companion environmental protection order, issued to Domtar and Cherokee on December 20, 2016.<sup>33</sup> This environmental protection order was subsequently cancelled on May 18, 2018.

[26] The second set of orders followed the Director's decision, in early 2017, to enter the Site and retain two engineering firms to design and implement a "Compliance Investigation Sampling Program." Under this program, hundreds of soil samples were taken and analyzed for substances of concern associated with the manufacture of treated wood products. The sampling provided the Director with additional evidence regarding the presence of certain substances on the property. This evidence led the Director on March 16, 2018, to issue a second set of orders, specifically: the first significant amendment (amending EO 2016/03) and the second (EO 2018/02), third (EO 2018/03), and fourth (EO 2018/04) enforcement orders. These orders were

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*Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.) at paragraph 4.

<sup>32</sup> For example, in response to some of the information that came in to the Director, it may have been more appropriate to issue an environmental protection order rather than an enforcement order. However, it appears the Director chose not to issue an environmental protection order because an environmental protection order is appealable.

<sup>33</sup> An enforcement order requires the Director to find the person to whom it is issued to have contravened the Act. (See section 210.) An environmental protection order requires the Director to find the person to whom it is issued to have "... caused an adverse effect." A contravention of the Act is not required for an environmental protection order. (See section 113.) The Director subsequently cancelled the environmental protection order on May 18, 2018, when the Director added Domtar to the first enforcement order (EO 2016/03) by way of the first significant amendment.

said to be issued, more specifically, under the authority of sections 210(1)(d) and 210(1)(e) – as compared to the first enforcement order, which was based more generally on section 210.

[27] The third set of orders was again issued based on the Sampling Program. In the middle of 2018, the Director received results for dioxins and furans for Parcel C and Parcel Y. These results led to the second significant amendment (amending EO 2018/02) and the fifth enforcement order (EO 2018/06) being issued. These orders were again said to be issued under section 210(1)(d) and (e) of the Act, but also under section 114, which gives the Director authority to issue an environmental protection order requiring emergency action on the part of the person to whom the order is issued. It is also significant to note that the Director chose to issue this set of orders even though a stay of the original orders was in place.

#### Provisional Guidance Documents

[28] Another example of the Board's concerns regarding the Director's decision-making was the use of the Provisional Guidance Documents (the "PGD"). The PGD developed by the Director's staff, at his request – the first of their kind ever developed by AEP – set acute exposure limits for the naphthalene and dioxins and furans found on the Site. An acute limit is an amount of a chemical that may cause an adverse health impact as the result of a one-time exposure. An acute limit contrasts with a chronic limit, where the health impacts occur as the result of exposure over an extended period of time.

[29] Until the Director's staff developed the PGD, there was no acute limit for naphthalene or dioxins and furans in Alberta. The Board heard expert evidence at the hearing that acute exposure limits are not appropriate to apply to these chemicals of concern. Given how these chemicals affect human health, only chronic limits have been developed. Based on the evidence presented at the hearing, the Board heard that the PGD were flawed, that they had neither been subject to any rigorous scientific review nor had they been formally authorized or signed-off as Government of Alberta Policy. Therefore, the Board found the PGD to be an unreasonable and incorrect foundation upon which to issue the enforcement orders. As stated in the Board's Report and Recommendations, "...for dioxins and furans, the World Health Organization concluded: 'In view of the long half-lives of [dioxins and furans], the Committee concluded that it would not be appropriate to establish an acute reference dose for these

compounds.”<sup>34</sup> As a result, in the Board’s view, the development and use of the PGD was both incorrect and unreasonable on the part of the Director.

[30] In addition, the Board heard evidence that based on criteria in the PGD, the Director made the arbitrary decision that on-site management of the contaminated material was not appropriate for this Site, and that “regulatory closure” would be the only option. Achieving “regulatory closure” in this case means cleaning up the site to meet criteria in *Alberta Tier 1 Soil and Groundwater Remediation Guidelines* (the “Tier 1 Criteria”) and, in the view of the Director, would require excavating, removing, and transporting - through the community - thousands of tons of contaminated material for disposal at an appropriately designed and approved hazardous waste landfill. The Board is concerned that this decision by the Director would potentially have created a greater risk of adverse impact on the environment and human health than by allowing the contaminated material to remain buried at significant depth and risk-managed on-site. The Board also heard evidence at the hearing that, in making this decision, neither the Director nor his staff considered whether sufficient landfill space exists in Alberta, and where sufficient volumes of appropriately clean replacement fill could be sourced. The Board is concerned that in not considering these factors, there could have been a significant adverse impact on provincial resources, which include landfill space and land that potentially would have been the source of replacement fill.

[31] Lastly, the Board heard evidence at the hearing that the Director, in deciding that regulatory closure was the only option and that the contaminated material could not be risk-managed on-site, he did not consider similar scenarios of successful brownfield redevelopment of similar industrial sites in other regions of Alberta or other regions of Canada, some of which were examples of similar wood preserving sites, and that are, in the Board’s view, directly applicable to this case. In doing so, the Board is of the view that the Director disregarded the potential implications of his decision on the future redevelopment of other industrial or abandoned sites across Alberta. By arbitrarily deciding that contaminated material cannot be risk-managed on-site in this case, which the Board heard can be cost-effective, environmentally

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<sup>34</sup> “Evaluation of Certain Food Additives and Contaminants. Fifty-Seventh Report of the Joint FAO/WHO Expert Committee on Food Additives.”

responsible, and a safe means of brownfield redevelopment, the Board is concerned that the Director's decision would have set a dangerous precedent that could have an impact on Alberta's economic growth and prosperity, by sending a message to the brownfield redevelopment industry that Alberta is "not open for business." In the Board's view, this specifically goes against section 2(b) of EPEA.<sup>35</sup>

[32] In the Board's view, the Director's decisions as outlined above demonstrated that he acted with hubris, without balance, and that he did not consider the broader consequences of his approach, and in doing so, could have created greater potential risks to the environment and public, and potentially signalling a significant deterrent for future brownfield redevelopment in Alberta.

## 2. The Director's Behaviour

[33] With respect to behaviour, one of the most significant behaviours on the part of the Director, which in the Board's view makes him liable for costs, is his dealing with the Director's Record. Problems began when the first enforcement order was issued. The Director argued that because, in his view, the Board did not have the jurisdiction to accept the appeal, there was no Director's Record. When the Director eventually provided the Board with the Director's Record, it was obvious to the Board that it was incomplete – it was limited to the documents the Director had selected to support his decision to issue the order. Until these appeals, the Board had never received a Director's Record that was so narrowly construed.

[34] The Board's initial request for a Director's Record was simple: "...what the Board means by the Director's Record is all documents upon which the Director based his decision and all documents available to the Director when he made his decision."<sup>36</sup> The Director did not comply with this request. Eventually, this led to the Board issuing a document production order against the Director. The result of this production order was a blatant attempt

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<sup>35</sup> Section 2(b) of EPEA provides:

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

(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;...."

by the Director to “drown” the Board in thousands upon thousands of documents, many of which were duplicative and many of which were produced during or after the hearing. At no time did the Director take the opportunity to seek clarification regarding the document production order or try to make it more manageable for the other participants.

[35] The Director also claimed privilege to thousands of documents and was directed to produce a privilege log to allow the Board and the Appellants to assess the claims of privilege. Despite clear direction as to what the privilege log was to contain, the Director never filed or finalized a complete privilege log. The privilege log was deficient in that it did not clearly identify the nature of the document and the basis on which the privilege was claimed. This deprived the Appellants of the opportunity to challenge the claims of privilege properly.

#### Characterization of the Report and Recommendations

[36] A second concern with the behaviour of the Director happened during the costs application process. With respect to the Board’s Report and Recommendation, the Minister clearly accepted the Board’s technical, scientific, and legal findings. However, as outlined below, the Director, in his response submission regarding costs, mischaracterized the Board’s Report and Recommendation and the Minister’s decision. The Board finds this very troubling and interprets it as a sign of the Director’s disregard for the Board. Furthermore, the Board wonders why the Director appears to be attempting to refute the Board’s Report and Recommendations to the Minister and appears to be trying to reargue his position through the costs submissions.

[37] Firstly, the Director maintains that he acted within his statutory jurisdiction. However, the Board found the opposite: the Director lacked the jurisdiction to issue the orders. The Board concluded that the orders are without foundation, and recommended the Minister reverse the Director’s decisions to issue these orders. The Board found that the Director’s approach to this matter has been both incorrect and unreasonable. The Board concluded there had been no contravention of EPEA that warranted issuing the enforcement orders and, therefore, the Director was without jurisdiction to issue the orders.

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<sup>36</sup> Board’s Letter, date June 18, 2018, at page 2.

[38] The Director argues that he provided significant and ongoing scientific data to support his decisions. However, the Board found that the orders were issued without a proper technical and scientific foundation. Furthermore, the Board explained in its Report to the Minister that many of the Director's conclusions that form the basis of the orders were flawed.

[39] The Director claims that the Board's Report and Recommendations were informed by the Director. According to the Director, but for the Director's role in the remedial compliance investigation and the Board's hearing, the Board would not have been as well equipped to recommend that the Minister adopt the clean-up standards that she, in fact, ordered. In the Board's view, this submission is not well-founded. In issuing the enforcement orders, the Director required complete removal of all contaminated material that exceeded the Tier 1 Criteria or the PGD, and prohibited on-site risk-management of the contaminated material. In contrast, the Board's Report and Recommendations and the Minister's Orders call for the establishment of site-specific remediation criteria and a risk management plan, based on appropriate modelling and risk assessments, thereby allowing for redevelopment of the Site, specifically involving management of the contaminated material on-site.

[40] The Director submits that the Minister's comment that contamination at the Site may give rise to "short-term risks" to surrounding residents means that the Minister's Order identified the same risks as the Director. However, based on the evidence presented at the hearing, the Board concluded that the historical contamination remaining on the Site does not pose an immediate danger to the residents and other people who use the area. The Board found that there is "no immediate risk" to surrounding residents and that no evidence was presented at the hearing to indicate there was an immediate threat to public safety. Notwithstanding this, the Minister's concern regarding the potential for short term risks resulted in the Ministerial Order directing specific actions be taken within specific timeframes, in order to ensure that the delineation and remediation of the Site continue in an efficient and timely manner. The Minister's concern regarding the potential for short-term risks resulting in a clear and defined schedule for completion of the delineation, the required modelling, the establishment of remediation criteria, and a management plan is, in the Board's view, different from the rather

exaggerated claims of risk suggested by the Director throughout the hearing, and which were refuted by the expert witnesses.

[41] The Director claims that in issuing the orders, he carried out his legislative mandate and a valid statutory purpose - the protection of human health. However, the Board found that the implementation of his orders – the excavation, removal and transportation of large volumes of contaminated material through the community, could have posed a greater risk to the environment and public, and could create unnecessary risks for the surrounding residents. In other words, the actions stipulated in the orders would have created exposure pathways to the contaminated material, which would not otherwise exist if the material remains buried at considerable depth on-site.

[42] The Director continues to submit that each and every enforcement order and amendment issued throughout this period was grounded in new exceedances. This is incorrect for two reasons.

[43] Firstly, the Board soundly rejected the criteria on which the Director based the orders, i.e. the PGD. The Board had a number of significant technical concerns on how the PGD had been developed. Based on the evidence presented, the Board concluded that the criteria used were not realistic, and therefore, determined that the conclusions reached in the PGD were flawed. In addition, the Board found that the PGD were not valid policies of the Government of Alberta. They were neither formally peer-reviewed nor officially sanctioned as an official government of Alberta policy. Based on all of these reasons, as outlined in the Board's Report and Recommendations to the Minister, the Board found it was unreasonable and incorrect for the Director to have relied on the PGD as a basis for issuing the orders.

[44] Secondly, as explained in the Report and Recommendations, the evidence presented at the hearing showed that exceedances, which the Director's staff originally believed were newly discovered, and which formed a basis for the original orders were not new, and were, instead, already known to the Appellants and had been incorporated into the Appellants' plans for the Site. The Board found that the Director's new sampling data had, in fact, reconfirmed the presence of known contamination that has been in place for decades, which had been sampled previously, and was not the discovery of new contamination. Furthermore, the Board found that

the Director had clear evidence, in the form of historical site data that contradicted his conclusions that there was new contamination at the Site or that non-aqueous phase liquids (NAPL) on the Site were mobile.

[45] Lastly, the Director continues to claim he exercised his discretion within his statutory mandate when he issued the enforcement orders. However, the Board found that the Director's interpretation of various statutory provisions intended to limit and guide his discretion was unreasonable and incorrect.

## **B. Award of Costs**

[46] Having found that there are special or exceptional circumstances that warrant an award of costs against the Director, the Board must now determine the appropriate amount. Cherokee has requested \$2,253,392.46 in legal fees, \$742,364.05 in expert fees, and \$51,769.39 in corporate fees.<sup>37</sup> Domtar has requested \$1,969,383.56 in legal fees and \$435,434.79 in expert fees.<sup>38</sup>

### **1. Legal Fees**

[47] With respect to the legal costs, the request has been to award costs on a “solicitor-client” basis. This means the Appellants are requesting that the Board grant a costs award for the full amount claimed, without regard for some sort of independent, objective standard to adjust the costs claim.

[48] This is in contrast to the normal practice of awarding costs for legal fees by the Board and by the Courts. Both the Board and the Courts have traditionally used an objective standard for awarding legal costs. For example, when a party is successful in Court and is awarded costs, the award of costs is based on a schedule of costs provided for in the Rules of

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<sup>37</sup> Cherokee claimed the following expert fees: Dr. Court Sandau - \$283,970.69; Dr. Mark Harris - \$78,386.35; Mr. Craig Campbell - \$172,531.73; Dr. Theresa Phillips \$38,912.58; Ms. Carla Reynolds and Mr. Travis Tan – \$94,493.02; and Dr. Walter Shields - \$74,069.68. Cherokee’s legal fees include \$32,540.27 for the court reporters and transcript. Cherokee claimed \$51,769.39 for corporate expenses for Mr. John Dill and Mr. Jim Phimister, the principles of Cherokee Canada Inc. and 1510837 Alberta Ltd. respectively.

<sup>38</sup> Domtar claimed the following expert fees: Mr. Guy Patrick - \$113,100.98; Mr. Bart Koppe and Dr. Glen Ferguson - \$258,604.62; and Dr. Stanley Feenstra - \$63,729.19. Domtar’s legal fees included: \$1,343,803.66 for Letcher Akelaitis LLP and Aldridge & Rosling LLP; and \$625,580.00 for Walsh LLP.



Court.<sup>39</sup> The Tariff in the Rules of Court provides for five different levels of costs depending on the complexity of the case, with the complexity of the case influenced by the value of the claim.

[49] While, as discussed, the Board does not follow the Court's "loser-pays" principle, the Board has followed the Court's model of using an independent, objective standard. The Board has previously looked at the number of hours of hearing time, and awarded costs based on the complexity of the case and applied a multiplier to the number of hours of hearing time to account for preparation time. For example, in a simple case, where the Board awards costs, the Board may award one hour of preparation time for each hour of hearing time. In a more complex case, the Board may award multiple times (i.e. 2x, 3x, or 4x) the number of hearing hours to account for preparation time.

[50] In addition to considering the number of hours of participation time, the Board has also used an independent, objective tariff to determine the rate to be paid. For lawyers, this Tariff is the rate paid by the Government of Alberta for outside legal counsel based on years of experience, with the maximum rate of \$250 per hour being paid for a lawyer with 15 years or more experience.<sup>40</sup>

[51] Using an objective, independent standard to determine costs results in a level playing field for all participants. It avoids the Board having to compare rates from larger versus smaller law firms or legal counsel with differing levels of experience at environmental matters. It also ensures that all costs awards between appeals are based on the same principles. Considering the circumstances of these appeals, the Board does not believe that varying from this approach is warranted. Most notably, the Board is concerned that awarding costs on a solicitor-client basis may be considered punitive. While the Board has serious concerns with the Director's decisions and conduct, so much so that it believes an award of costs is appropriate, the award should not be punitive. In the Board's view, the concept of full indemnity or solicitor-client costs should be reserved for situations where the Director acted in bad faith, and then perhaps in the most serious of situations. As previously indicated, the Board does not believe the Director acted in bad faith in these appeals.

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<sup>39</sup> See Alberta Rules of Court, Alta. Reg. 124/2010, Schedule C.

<sup>40</sup> See Appendix D – Revised Schedule of Rate, July 29, 2011.

[52] Therefore, the framework that the Board will apply to assess costs for legal fees in these appeals will be as follows: (a) use the total number of hearing hours as a baseline, (b) adding a multiplier for the number of hours of preparation time that is warranted, based on the complexity of the case, and (c) then applying an objective, independent standard for the hourly rate.<sup>41</sup> The award will be then be adjusted - by way of a percentage - based on how much assistance the Board believes the parties provided in helping the Board prepare its Report and Recommendations for the Minister.

### Cherokee Hearing Fees

[53] Counsel for Cherokee included Mr. Ron Kruhlak, Q.C. (34 years at the Bar),<sup>42</sup> Mr. Sean Parker (7 years at the Bar), and Mr. Stuart Chambers (19 years at the Bar). The hearing was 105 hours and 11 minutes long (105.18 hours). The Board is of the view that three lawyers for each party is appropriate for the complexity of the appeals. The Board notes that the Director had at least three outside counsel in attendance during most of the hearing, as well as one or two counsel from the Environmental Law Section of Alberta Justice and Solicitor General in attendance in the gallery. Further, given the very high complexity of the matter, the volume of documentary evidence, and the multiplicity of issues, there should be an award for 4 hours of preparation time for each hour of hearing time. Therefore, the starting point for legal costs to be awarded to Cherokee for the hearing is \$349,723.50.

Lawyer	Years at the Bar	Hourly Rate	Hearing Time	Prep Time (x4)	Total Hours	
Ron Kruhlak	34 years	\$250.00	105.18	420.72	525.9	\$131,475.00
Sean Parker	7 years	\$165.00	105.18	420.72	525.9	\$86,773.50
Stuart Chambers	19 years	\$250.00	105.18	420.72	525.9	\$131,475.00
						\$349,723.50
					85%	\$297,264.98

[54] As in previous costs decisions of the Board, the Board considers this a starting point. The purposes of EPEA (section 2) recognizes the shared responsibility of the parties to bring forward environmental issues, and as such, the Board will only award a portion of these costs. In the circumstances of this case, the Board is of the view that the assistance of Mr.

<sup>41</sup> The preparation time covers work done by other lawyers on the appeals to support the lawyers that appeared before the Board, writing the various submissions for the Board, and preparing the witnesses. It also accounts for the disbursements, that in the Board's view should be included as part of the hourly rate.

<sup>42</sup> Years at the Bar are calculated as of 2018, when the hearing was held.

Kruhlik, Mr. Parker, and Mr. Chambers was extremely helpful. Therefore, the Board will award 85% of these legal fees to Cherokee, which amounts to \$297,264.98 in legal fees for the hearing.

#### Domtar Hearing Fees

[55] Counsel for Domtar included Mr. Gary Letcher (42 years at the Bar), Ms. Andrea Akelaitis (18 years at the Bar), Mr. Curtis Marble (10 years at the Bar), and Mr. Micah Clark (8 years at the Bar). The hearing was 105 hours and 11 minutes long (105.18 hours). Again, the Board is of the view that three lawyers for each party is appropriate for the complexity of the appeals. Therefore, the Board will not consider Mr. Clark's hours; but to be clear, this is not intended to reflect on Mr. Clark's skill or contribution to the hearing in any way. Again, given the very high complexity of the matter, the volume of documentary evidence, and the multiplicity of issues, there should be an award for 4 hours of preparation time for each hour of hearing time. Therefore, the starting point for legal costs to be awarded to Domtar for the hearing is \$362,871.00.

Lawyer	Years at the Bar	Hourly Rate	Hearing Time	Prep Time (x4)	Total Hours	
Gary Letcher	42 years	\$250.00	105.18	420.72	525.9	\$131,475.00
Andrea Akelaitis	18 years	\$250.00	105.18	420.72	525.9	\$131,475.00
Curtis Marble	10 year	\$190.00	105.18	420.72	525.9	\$99,921.00
						\$362,871.00
					85%	\$308,440.35

[56] As in previous costs decisions, the Board considers this a starting point. The purposes of EPEA (section 2) recognizes the shared responsibility of the parties to bring forward environmental issues, and as such, the Board will only award a portion of these costs. In the circumstances of this case, the Board is of the view that the assistance of Mr. Letcher, Ms. Akelaitis, Mr. Marble, and Mr. Clark was extremely helpful. Therefore, the Board will award 85% of these legal fees to Domtar, which amounts to \$308,440.35 in legal fees for the hearing.

#### Preliminary Motion Fees

[57] Given the exceptional complexity of the appeals, the Board also believes it is appropriate to award costs for the various preliminary motions. The total time for the preliminary motions was 44 hours and 30 minutes (44.5 hours). The Board recognizes that some of the preliminary motions were, in part, caused in part by the recusal of the Board's Chair, which resulted from discovering a conflict. Therefore, the Board will discount the hours from

the preliminary motions that were used to address this conflict, which were the three days of July 24, July 25, and July 26, 2018, not including the case management time on July 26, 2018. Discounting these days reduces the time for the preliminary motions by 19 hours and 5 minutes (19.08 hours). Therefore, the costs award to the Appellants will be based on 25 hours and 25 minutes (25.42 hours).

[58] The Board is of the view that for the preliminary motions, only 2 lawyers per party was appropriate and that the total preparation time for each hour dealing with preliminary motions would be 4 hours. Again, to be clear, this decision is not intended to reflect on the skill or assistance of the other counsel for the Appellants. Therefore, the starting point for the legal fees for the preliminary motions is \$52,746.50 for Cherokee and \$63,550.00 for Domtar.

Cherokee						
Lawyer	Years at the Bar	Hourly Rate	Hearing Time	Prep Time (x4)	Total Hours	
Ron Kruhlak	34 years	\$250.00	25.42	101.68	127.1	\$31,775.00
Sean Parker	7 years	\$165.00	25.42	101.68	127.1	\$20,971.50
						\$52,746.50
					85%	\$44,834.53
Domtar						
Lawyer	Years at the Bar	Hourly Rate	Hearing Time	Prep Time (x4)	Total Hours	
Gary Letcher	42 years	\$250.00	25.42	101.68	127.1	\$31,775.00
Andrea Akelaitis	18 years	\$250.00	25.42	101.68	127.1	\$31,775.00
						\$63,550.00
					85%	\$54,017.50

[59] In the Board's view, the assistance of Mr. Kruhlak and Mr. Parker on behalf of Cherokee, and Mr. Letcher and Ms. Akelaitis on behalf of Domtar in the preliminary motions were extremely helpful, and therefore taking into account the shared responsibility of the parties to bring matters before the Board, the Board awards 85% of these costs. This results in a costs award for preliminary motions to Cherokee in the amount of \$44,834.53. Further, this results in a costs award for preliminary matters to Domtar in the amount of \$54,017.50.

#### Total Legal Fees

[60] The total award for legal costs for Cherokee is (\$297,264.98 + \$44,834.53) \$342,099.51, which includes the costs for the representation at the hearing and in the preliminary matters. The total award for legal costs for Domtar is (\$308,440.35 + \$54,017.50) \$362,457.85.

Again, this includes the costs for the representation at the hearing and in the preliminary motions.

2. Disbursements

[61] The Board generally does not award costs for disbursements. In the Board's view, most disbursements are part of the overhead of legal services and should be properly captured in a lawyer's hourly rate. In this case, the Board is of the view that there is one exception to this general rule, and that is the cost of the court reporters and transcripts. The Board understands that Cherokee was solely responsible for the costs of the court reporters and providing the transcripts to the Board. The Board found the transcripts particularly useful, and therefore, the Board will order the Director to pay one-third of the costs of the court reporter and transcripts. The Board understands the total cost of the court reporter and transcripts was \$32,540.27. Therefore, the Board orders that the Director pay Cherokee an award of costs for the court reporters and transcripts in the amount of \$10,846.76.

3. Expert Fees

[62] Cherokee claimed the following expert fees: Dr. Court Sandau - \$283,970.69; Dr. Mark Harris - \$78,386.35; Mr. Craig Campbell - \$172,531.73; Dr. Theresa Phillips \$38,912.58; Ms. Carla Reynolds and Mr. Travis Tan – \$94,493.02; and Dr. Walter Shields - \$74,069.68. Domtar claimed the following expert fees: Mr. Guy Patrick - \$113,100.98; Dr. Stanley Feenstra - \$63,729.19; and Mr. Bart Koppe and Dr. Glen Ferguson - \$258,604.62.<sup>43</sup> The Board will consider each of these in turn.

[63] As explained above, with respect to the calculation of costs for legal fees, the Board also believes it is appropriate to use a standard framework to assess expert witness fees for the costs applications. Therefore, the framework that the Board will apply to assess costs for expert witness fees in these appeals will be as follows: (a) the number of hours spent at the hearing, as determined by the invoices provided or based on the transcript where the invoices are insufficient, (b) adding a multiplier for the number of hours of preparation time that is warranted,

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<sup>43</sup> The Board notes that no claim was made for Mr. Marcel Sylvestre on behalf of Domtar. The Board understands Mr. Sylvestre is or was an employee of Domtar.

based on the complexity of the evidence presented at the hearing, and (c) applying an objective, independent standard for the hourly rate.<sup>44</sup> The award may then be adjusted – by way of a percentage - based on how much assistance the Board believes the parties provided in helping the Board prepare its Report and Recommendations for the Minister. The adjustment takes into account the shared responsibility of the parties to bring matters before the Board.

[64] With regard to the hourly rate, the Board uses the Consulting Engineers Rate Guideline (the “Guideline”).<sup>45</sup> The Guideline provides rates for engineers based on the level of work they do, ranging from an Assistant Project Engineer at a rate of \$148.00 per hour to a Senior Specialist Engineer at a rate of \$360.00 per hour. The Board notes that it is common for experts to have a number of additional staff members that support their work. In the Board’s view, the cost of the additional staff should be captured within the hourly rate of the expert and in the preparation time allocated for the expert. The same is true of the disbursements for the experts. In the Board’s view, the disbursements should be captured within the assignment of time for appearing at the hearing and for preparation time.

[65] As noted, this has been the most complex hearing the Board has held. Therefore, the Board will assess the costs of the experts by applying multipliers of 1 times, 2 times, 3 times, or 4 times the total length of the hearing as the preparation time, based on the level of complexity of the expert evidence. The hearing was 105.18 hours long. Therefore, the resulting preparation time will be either 105.18 hours (1x), 210.36 hours (2x), 315.54 hours (3x), or 420.72 hours (4x), depending on the complexity of the evidence presented. In the case, the Board is of the view the level of complexity of all the witnesses warranted 4x the length of the hearing or 420.72 hours.<sup>46</sup>

Dr. Court Sandau (Claimed Amount - \$283,970.69)

[66] Dr. Court Sandau is one of the leading experts on dioxins and furans in Alberta and has significant experience in dealing with former wood processing plants, similar to the Site.

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<sup>44</sup> The preparation time accounts for all of the work done by other staff on these appeals to support the person appearing as a witness, report writing time, and otherwise preparing for the hearing. It also includes all the overhead cost, which would otherwise be dealt with as disbursements.

<sup>45</sup> [https://www.cea.ca/files/Rate\\_guide/Rate%20Guide%20--%202019.pdf](https://www.cea.ca/files/Rate_guide/Rate%20Guide%20--%202019.pdf)

<sup>46</sup> The Board notes that Dr. Shields was retained as a rebuttal witness, and therefore the number of preparation hours for Dr. Shields will be based on the rebuttal phase of the hearing.

Among other things, Dr. Sandau provided evidence with respect to the PGD developed by the Director's staff, the appropriateness of using exposure controls and risk management as a remediation method for Cherokee's project, and the values used with respect to naphthalene in the characterization of hazardous waste. The Board found Dr. Sandau's evidence was extremely valuable in reaching its conclusions and making its Report and Recommendations to the Minister. During the hearing, the Board found that it was necessary to return to Dr. Sandau's evidence repeatedly. As a result, the Board is prepared to consider costs for preparation time at 4 times the length of the hearing (420.72 hours).

[67] For Dr. Sandau, the invoices provided indicate he attended the hearing for 69 hours.<sup>47</sup> Based on these invoices, the Board will allow 61 hours and 57 minutes (61.95 hours) for hearing time, based on the actual hearing time recorded by the Board.<sup>48</sup> For the hearing, Dr. Sandau charged a rate of \$250.00 per hour. This rate is below the rate that Dr. Sandau could charge under the Guideline, which is \$360.00 per hour for his role as Principal Scientist. For his preparation time, as stated, the Board will allow 420.72 hours at the rate that he charged of \$350.00 per hour.<sup>49</sup> This rate is in keeping with the rate that Dr. Sandau could charge according to the Guideline, which is \$360 per hour. This results in the starting point for an award of costs of \$162,739.50. Taking into account the adjustment factor of 85%, the Board will award costs in the amount of \$138,328.58 for Dr. Sandau.

Dr. Sandau	Rate	Hours	
Hearing	\$250.00	61.95	\$15,487.50
Prep Time (4x)	\$350.00	420.72	\$147,252.00
Total			\$162,739.50
		85%	\$138,328.58

<sup>47</sup> Dr. Sandau's invoices indicated he was involved in hearing matters as follows: August 27, 2018 – 12 hours; September 12, 2018 – 12 hours; September 13, 2018 – 9 hours; September 14, 2018 – 9.5 hours; September 15, 2018 – 14.5 hours; and October 11, 2018 – 12 hours. This totals 69 hours. The Board understands that this time included both the actual hearing time and hearing preparation time.

<sup>48</sup> Dr. Sandau attended the hearing as follows: August 27, 2018 – 11 hours, 17 minutes; September 12, 2018 – 10 hours, 43 minutes; September 13, 2018 – 6 hours, 51 minutes; September 14, 2018 – 8 hours, 53 minutes; September 15, 2018 – 12 hours, 38 minutes; and October 11, 2018 – 11 hours, 35 minutes. This totals 61 hours, and 57 minutes (61.95 hours).

<sup>49</sup> The costs submission filed by Cherokee indicated that Dr. Sandau's rate was reduced from \$350.00 per hour to \$250.00 per hour as of August 2018. No explanation was provided for the rate change. The Board

Dr. Mark Harris (Claimed Amount - \$78,386.35)

[68] Dr. Mark Harris is an internationally recognized expert on dioxins and furans, and he is a toxicologist. Among other things, Dr. Harris provided evidence with respect to the PGD developed by the Director's staff. The Board found Dr. Harris' evidence was extremely valuable in reaching its conclusions and making its Report and Recommendations to the Minister.

[69] For Dr. Harris, the invoices provided indicate Dr. Harris attended the hearing for 90 hours and 30 minutes.<sup>50</sup> Based on these invoices, the Board will allow 80 hours and 2 minutes (80.03 hours) for hearing time, based on the actual hearing time recorded by the Board.<sup>51</sup> During this time, Dr. Harris charged a rate of \$360.00 per hour (\$275.00 US dollars per hour). Dr. Harris' rate matches the prescribed rate in the Guideline of \$360.00 per hour. For his preparation time, the Board will allow the 420.72 hours at the rate of \$360.00 per hour. This results in a starting point for an award of costs of \$180,273.60. Taking into account the adjustment factor of 85%, the Board calculates that possible award of costs in the amount of \$153,299.50.

Dr. Harris	Rate	Hours	
Hearing	\$360.00	80.03	\$28,810.80
Prep Time (4x)	\$360.00	420.72	\$151,459.20
Total			\$180,270.00
		85%	\$153,229.50

[70] Considering the adjustment, the reduced amount for the award of costs, which is \$153,299.50, is significantly greater than the amount claimed by Dr. Harris. Therefore, the Board will use the amount claimed by Dr. Harris, which is \$78,386.35, as the costs award.

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understood this to mean that his time in the hearing was billed at \$250.00 per hour, and that his preparation time was billed at \$350.00 per hour.

<sup>50</sup> Dr. Harris' invoices indicated he was involved in hearing matters as follows: August 27, 2018 – 11 hours; August 28, 2018 – 8 hours; August 29, 2018 – 11 hours; August 30, 2018 – 8 hours; August 31, 2018 – 8 hours; September 12, 2018 – 11 hours; September 13, 2018 – 9 hours; September 14, 2018 – 10 hours; and September 15, 2018 – 14.5 hours. This totals 90 hours, 30 minutes. The Board understands that this time included both the actual hearing time and hearing preparation time.

<sup>51</sup> Dr. Harris attended the hearing as follows: August 27, 2018 – 11 hours, 17 minutes; August 28, 2018 – 6 hrs, 43 minutes; August 29, 2018 – 10 hours, 45 minute; August 30, 2018 – 8 hours, 43 minutes; August 31, 2018 – 3 hours, 29 minutes; September 12, 2018 – 10 hours, 43 minutes; September 13, 2018 – 6 hours, 51 minutes; September 14, 2018 – 8 hours, 53 minutes; and September 15, 2018 – 12 hours, 38 minutes, for a total of 80 hours, 2 minutes (80.03 hours).



Mr. Craig Campbell (Claimed Amount - \$172,531.73)

[71] Mr. Craig Campbell provided evidence on the remediation work conducted on the Site, appropriate remediation approaches for the Site, including exposure controls and risk management, and responded to the Director's Golder Reports. The Board found Mr. Campbell's evidence was very valuable in reaching its conclusions and making its Report and Recommendation to the Minister.

[72] For Mr. Campbell, the invoices provided indicate that Mr. Campbell attended the hearing for 152 hours.<sup>52</sup> Based on these invoices, the Board will allow 80 hours and 2 minutes (80.03 hours) for hearing time, based on the actual hearing time recorded by the Board.<sup>53</sup> During this time, Mr. Campbell charged a rate of \$230.00 per hour. This is less than the \$260.00 per hour that the Guideline provides for a Management Engineer/Advanced Specialist Engineer. For his preparation time, the Board will allow the 420.72 hours at the rate of \$230.00 per hour. This results in the following starting point for an award of costs \$115,172.50.

Mr. Campbell	Rate	Hours	
Hearing	\$230.00	80.03	\$18,406.90
Prep Time (4x)	\$230.00	420.72	\$96,765.60
Total			\$115,172.50
		85%	\$97,896.63

[73] The Board is of the view that Mr. Campbell's evidence was extremely helpful. However, the Board is of the view that the costs award for Mr. Campbell should be discounted to 85% of the starting point. This results in an award of costs for Mr. Campbell in the amount of \$97,896.63.

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<sup>52</sup> Mr. Campbell's invoices indicated he was involved in hearing matters as follows: for the billing period up to August 31, 2018, 87.50 hours; and for the billing period up to September 30, 2018, 64.50 hours. This totals 152 hours. The Board understands that this time included both the actual hearing time and hearing preparation time.

<sup>53</sup> Mr. Campbell attended the hearing as follows: August 27, 2018 – 11 hours, 17 minutes; August 28, 2018 – 6 hrs, 43 minutes; August 29, 2018 – 10 hours, 45 minutes; August 30, 2018 – 8 hours, 43 minutes; August 31, 2018 – 3 hours, 29 minutes; September 12, 2018 – 10 hours, 43 minutes; September 13, 2018 – 6 hours, 51 minutes; September 14, 2018 – 8 hours, 53 minutes; and September 15, 2018 – 12 hours, 38 minutes, for a total of 80 hours, 2 minutes (80.03 hours).

Dr. Theresa Phillips (Claimed Amount - \$38,912.58)

[74] Dr. Theresa Phillips presented evidence on the risk assessment process, exposure control, and the use of the berm in risk management for brownfield projects. The Board found Ms. Phillips' evidence was very valuable in reaching its conclusions and making its Report and Recommendations to the Minister. As a result, the Board is prepared to consider costs for preparation time at 4 times the length of the hearing (420.72 hours).

[75] Unfortunately, the invoices for Dr. Phillips do not provide sufficient detail to determine how long she was in attendance at the hearing. Reviewing the transcripts, the Board notes Dr. Phillips attended the hearing on August 27, 2018, which the Board records as 6 hours and 43 minutes (6.72 hours). The rate that Dr. Phillips charged was \$220.00 per hour. This rate is lower than the rate allowed by the Guideline, which is \$260.00 per hour. Therefore, the starting point for a costs award for Dr. Phillips is \$94,036.80.

Dr. Phillips	Rate	Hours	
Hearing	\$220.00	6.72	\$1,478.40
Prep Time (4x)	\$220.00	420.72	\$92,558.40
Total			\$94,036.80
		85%	\$79,931.28

[76] The Board is of the view that Dr. Phillips' evidence was very helpful. However, the Board is of the view that the possible costs award for Dr. Phillips should be discounted to 85% of this starting point. Considering the adjustment factor, the reduced amount for the award of costs, which is \$79,931.28, is significantly greater than the amount claimed by Dr. Phillips. Therefore, the Board will use the amount claimed by Dr. Phillips, which is \$38,912.58, as the award of costs.

Ms. Carla Reynolds and Mr. Travis Tan (Claimed Amount – \$94,493.02)

[77] Ms. Carla Reynolds and Mr. Travis Tan presented evidence on the risk assessment, exposure control, mobility of non-aqueous phase liquids (NAPL), and the concept of residual saturation. The Board found Ms. Reynolds' and Mr. Tan's evidence was very valuable in reaching its conclusions and making its Report and Recommendations to the Minister. As a

result, the Board is prepared to consider costs for preparation time at 4 times the length of the hearing (420.72 hours) for each of Ms. Reynolds and Mr. Tan.

[78] Unfortunately, the invoices for Ms. Reynolds and Mr. Tan do not provide sufficient detail to determine how long they were in attendance at the hearing. Reviewing the transcripts, the Board notes Ms. Reynolds and Mr. Tan attended the hearing on August 27, 2018, which the Board records as 6 hours and 43 minutes (6.72 hours). The rate that Ms. Reynolds charged was \$150.00 per hour, and the rate that Mr. Tan charged was \$100.00 per hour. According to the Guideline, this is lower than the rate the Board would expect Ms. Reynolds and Mr. Tan to charge, which would have been \$214.00 per hour and \$175.00 per hour, respectively. Therefore, the starting point for a costs award for Ms. Reynolds and Mr. Tan is \$106,860.00.

Ms. Reynolds	Rate	Hours	
Hearing	\$150.00	6.72	\$1,008.00
Prep Time (4x)	\$150.00	420.72	\$63,108.00
Mr. Tan			
Hearing	\$100.00	6.72	\$672.00
Prep Time (4x)	\$100.00	420.72	\$42,072.00
Total			<u>\$106,860.00</u>
		85%	\$90,831.00

[79] The Board is of the view that the evidence of Ms. Reynolds and Mr. Tam was very helpful. However, the Board is of the view that the possible costs award for Ms. Reynolds and Mr. Tam should be discounted to 85% of this starting point, which is \$90,831.00. Therefore, the Board will award costs for Ms. Reynolds and Mr. Tam in the amount of \$90,831.00.

Dr. Walter Shields (Claimed Amount - \$74,069.68)

[80] Dr. Walter Shields was called as a rebuttal witness by Cherokee to speak to the fate and transport of dioxins. Dr. Shields' evidence was of significant assistance to the Board. Dr. Shields only became involved in this matter late in the process. As a result, it would not be appropriate to use the full length of the hearing as the basis for an award of costs for Dr. Shields. According to the invoices provided by Dr. Shields, it appears that he was retained on September 19, 2018. Therefore, the Board will use the length of the hearing after this date as the basis for

the preparation time for the hearing. This is 25 hours and 9 minutes (25.15 hours). In the Board's view, the preparation time should be based on 4 times this length of time or 100.6 hours.

[81] With respect to his attendance at the hearing, Dr. Shields' invoices indicate that he attended the hearing on October 11, 2018, for 12 hours. The Board's records indicated the hearing day on October 11, 2018, was 11 hours and 34 minutes (11.57 hours). The Board will use the recorded time for its award of costs for Dr. Shields. With respect to the rate charged by Dr. Shields, the invoices indicate he charged \$470.00 (US) per hour or \$611 (CDN) per hour. The Guideline used by the Board suggests the maximum fee should be \$360.00 for a Senior Specialized Engineer. Therefore, the starting point for the award of costs for Dr. Shields is \$40,381.20.

Dr. Shields	Rate	Hours	
Hearing	\$360.00	11.57	\$4,165.20
Prep Time (4x)	\$360.00	100.6	\$36,216.00
Total			\$40,381.20
		85%	\$34,324.02

[82] The Board believes that Dr. Shields' evidence was of very significant assistance to the Board in preparing its Report and Recommendations for the Minister. However, the Board is of the view that the costs award for Dr. Shields should be discounted to 85% of the starting point. This results in an award of costs for Dr. Shields in the amount of \$34,324.02.

Mr. Guy Patrick (Claimed Amount - \$113,100.98)

[83] Mr. Guy Patrick was called as a witness to speak to contaminated site remediation and hydrology. Topics that he addressed at the hearing included contaminating migration, source control, exposure control, and the fate and transport of chemicals of concern on the Site. The Board found Dr. Patrick's evidence very valuable for the purposes of preparing its Report and Recommendations to the Minister. As a result, the Board is prepared to consider costs for preparation time at 4 times the length of the hearing (420.72 hours).

[84] For Mr. Patrick, the invoices indicated that he attended the hearing for 108 hours.<sup>54</sup> Based on the Board's records of the hearing, some of this time must have related to preparation for the hearing (as the Board recorded the hearing as being 105.18 hours long). The Board will base an award of costs on the hours according to the Board's records, which indicated the hearing for the period Mr. Patrick attended was 100 hours and 5 minutes (100.08 hours).<sup>55</sup> The rate that Mr. Patrick charged was \$250.00 per hour. This rate is slightly less than the Advance Specialist Engineer rate of \$260.00 per hour suggested by the Guideline. This results in the starting point for an award of costs is \$130,200.00.

Mr. Patrick	Rate	Hours	
Hearing	\$250.00	100.08	\$25,020.00
Prep Time (4x)	\$250.00	420.72	\$105,180.00
Total			\$130,200.00
		85%	\$110,670.00

[85] The Board of the view that Mr. Patrick's evidence was extremely helpful. However, the Board is of the view that the costs award for Mr. Patrick should be discounted to 85% of this starting point. Considering the adjustment factor, the amount for the award of costs is \$110,670.00.

Dr. Stanley Feenstra (Claimed Amount - \$63,729.19)

[86] Dr. Stanley Feenstra was called as a witness to speak to contaminated site remediation, and in particular with respect to non-aqueous phase liquids (NAPL) and dense non-aqueous phase liquid (DNAPL). The Board found Dr. Feenstra's evidence very valuable for the purposes of preparing its Report and Recommendations to the Minister. As a result, the Board is prepared to consider costs for preparation time at 4 times the length of the hearing (420.76 hours).

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<sup>54</sup> Mr. Patrick's invoices indicate 36.5 hours of hearing time for August, 47 hours of hearing time for September, and 24.5 hours of hearing time for September.

<sup>55</sup> Combining Mr. Patrick's invoices and the Board's record of time for the hearing, the Board will award costs based on 36.5 hours of hearing time for August, 39.08 hours of hearing time for September, and 24.5 hours of hearing time for October. This totals 100.08 hours.

[87] For Dr. Feenstra, the invoices indicated that he attended the hearing for 24 hours.<sup>56</sup> Based on the Board's records of the hearing, some of this time must have related to preparation for the hearing (as the Board's records for the hearing for these days is 18 hours long). The Board will base an award of costs on the hours according to the Board's records, which indicated the hearing for the period Dr. Feenstra attended is 18 hours.<sup>57</sup> The rate that Dr. Feenstra charged was \$295.00 per hour. This rate is less than the Senior Specialist Engineer (Ph.D.) rate of \$360.00 per hour suggested by the Guideline. This results in the starting point for an award of costs in the amount of \$129,422.40.

Dr. Feenstra	Rate	Hours	
Hearing	\$295.00	18	\$5,310.00
Prep Time (4x)	\$295.00	420.72	\$124,112.40
Total			\$129,422.40
		85%	\$110,009.04

[88] The Board is of the view that Dr. Feenstra's evidence was very helpful. However, the Board is of the view that the possible costs award should be discounted by 85% of the starting point, which is \$110,009.04. Considering the adjustment factor, the reduced amount for the costs award is significantly greater than the amount claimed by Dr. Feenstra. Therefore the Board will use the amount claimed by Dr. Feenstra as the costs award, which is \$63,729.19

Mr. Bart Koppe and Dr. Glen Ferguson (Claimed Amount - \$258,604.62)

[89] Mr. Koppe was called to testify on the Human Health Risk Assessment that he conducted. Dr. Ferguson testified in the areas of toxicology, epidemiology, human health and ecological risk assessment. The Board found the evidence of Mr. Koppe and Dr. Ferguson very valuable in making its Report and Recommendations to the Minister. As a result, the Board is prepared to award costs for preparation time for the hearing at 4 times the length of the hearing (420.72 hours) for each of Mr. Koppe and Dr. Ferguson.

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<sup>56</sup> MD. Feenstra's invoices indicate that he attended the hearing for 12 hours on August 27, 2018, and 12 hours on August 28, 2018.

<sup>57</sup> Combining Mr. Patrick's invoices and the Board's record of time for the hearing, the Board will award costs based on 18 hours of hearing time, which is 11 hours and 17 minutes on August 27, 2018, and 6 hours and 43 minutes on August 28, 2018.

[90] The invoices provided for Mr. Koppe and Dr. Ferguson did not provide sufficient detail to determine the length of time they spent at the hearing. According to the Board's records, Dr. Ferguson testified before the Board on August 28, 2018 (which was 6 hours and 43 minutes). Further, Mr. Koppe testified before Board on September 13, 2018 (which was 6 hours and 51 minutes). The rate that Mr. Koppe and Dr. Ferguson charged was \$250.00 per hour. This is slightly less than the rate in the Guideline for an Advanced Specialist Engineer at \$260.00 per hour. This results in a starting point for an award of costs for Mr. Koppe and Dr. Ferguson of \$213,752.50.

Mr. Koppe	Rate	Hours	
Hearing	\$250.00	6.72	\$1,680.00
Prep Time (4x)	\$250.00	420.72	\$105,180.00
Dr. Ferguson			
Hearing	\$250.00	6.85	\$1,712.50
Prep Time (4x)	\$250.00	420.72	\$105,180.00
Total			\$213,752.50
		85%	\$181,689.63

[91] The evidence of both Mr. Koppe and Dr. Ferguson was very helpful to the Board in preparing its Report and Recommendations to the Minister. However, the Board is of the view that the costs award for Mr. Koppe and Dr. Ferguson should be discounted to 85% of the starting point. This results in an award of costs for Mr. Koppe and Dr. Ferguson in the amount of \$181,689.63.

4. Director's Witness – Ms. Jillian Mitton

[92] The Director did not make an application for costs. However, the Board wants to include a comment about one of the witnesses provided by the Director: Ms. Jillian Mitton, Senior Environmental Engineer, Golder Associates. The Board found Ms. Mitton's evidence to be very helpful, and it made a significant contribution to the Board's Report and Recommendations to the Minister. The Board has no information on the costs of Ms. Mitton's participation in the hearing, but the Board has accounted for Ms. Mitton's contribution, in part, by the discounts applied to the witnesses for the Appellants.

5. Corporate Fees

[93] Cherokee also claimed Corporate Fees, the cost internal to its business. With respect to the costs of an appellant, the Board does not generally award these costs. The Board does not believe it is appropriate to vary from that practice in this case. First, this position is based on the shared responsibility of all parties to bring environmental matters before the Board. Second, based on the evidence, the Board is of the view that Cherokee and Domtar are not completely without blame for how these appeals came to be. In the Board's view, both Cherokee and Domtar made mistakes with respect to effective communications. The Board understands the approach of a party wanting to limit communication with a Director when they be are being investigated, but there were opportunities for both Cherokee and Domtar to be more forthcoming with the Director.

#### **IV. DECISION**

[94] As stated, the Board finds there are special and exceptional circumstances in these appeals to award costs against the Director. While the Board does not believe the Director acted in bad faith, the Board has concluded the Director's decisions and his behaviour have been sufficiently egregious errors that have distorted his judgment away from his statutory duty.

[95] Further, the Board has found it is appropriate to award costs as follows:

1. legal fees for Cherokee in the amount of (\$297,264.98 hearing fees + \$44,834.53 preliminary motions fees) \$342,099.51;
2. legal fees for Domtar in the amount of (\$308,440.35 hearing fees + \$54,017.50 preliminary motions fees) \$362,457.85;
3. expert fees for Dr. Sandau in the amount of \$138,328.58 payable to Cherokee;
4. expert fees for Dr. Harris in the amount of \$78,386.35 payable to Cherokee;
5. expert fees for Mr. Campbell in the amount of \$97,896.63 payable to Cherokee;
6. expert fees for Dr. Phillips in the amount of \$38,912.58 payable to Cherokee;
7. expert fees for Ms. Reynolds and Mr. Tan in the amount of \$90,831.00 payable to Cherokee;
8. expert fees for Dr. Shields in the amount of \$34,324.02 payable to Cherokee;
9. expert fees for Mr. Patrick in the amount of \$110,670.00 payable to Domtar;
10. expert fees for Dr. Feenstra in the amount of \$63,729.19 payable to Domtar;
11. expert fees for Mr. Koppe and Dr. Ferguson in the amount of \$181,689.63 payable to Domtar; and



12. fees for the court reporters and transcripts in the amount of \$10,846.76 payable to Cherokee.

**V. Order of the Board**

[96] The Board awards costs to Cherokee in the amount of \$831,625.43, payable by Alberta Environment and Parks on behalf of the Director, in trust to McLennan Ross LLP on or before May 1, 2020. Counsel for Cherokee is requested to advise the Board upon this requirement being satisfied.

[97] The Board awards costs to Domtar in the amount of \$718,546.67, payable by Alberta Environment and Parks on behalf of the Director, in trust to Letcher Akelaitis LLP on or before May 1, 2020. Counsel for Domtar is requested to advise the Board upon this requirement being satisfied.

Dated on March 18, 2020, at Edmonton, Alberta.

*-original signed-*

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Meg Barker  
Panel Chair

*-original signed-*

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Nick Tywoniuk  
Board Member

*-original signed-*

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Dave McGee  
Board Member

Appendix A

Preliminary Hearings

Date	Description	Time
June 7, 2017	Preliminary motion hearing by conference call with Alex MacWilliam	2 hrs
August 3, 2017	Preliminary motions hearing with Alex MacWilliam, Nick Tywoniuk, and Chris Powter	4 hrs, 30 min
September 19, 2017	Preliminary motions hearing with Alex MacWilliam, Nick Tywoniuk, and Meg Baker	6 hrs, 15 min
March 29, 2018	Preliminary motions hearing by conference call with Alex MacWilliam	20 min
April 3, 2018	Preliminary motions hearing by conference call with Alex MacWilliam	1 hr, 50 min
April 6, 2018	Preliminary motions hearing by conference call with Alex MacWilliam	35 min
May 23, 2018	Preliminary motions hearing by conference call with Alex MacWilliam	2 hrs, 35 min
June 8, 2018	Preliminary motions hearing by conference call with Alex MacWilliam	1 hr, 10 min
July 24, 2018	Preliminary motions hearing with Meg Barker, Nick Tywoniuk, and Dave McGee	7 hrs, 30 min
July 25, 2018	Preliminary motions hearing with Meg Barker, Nick Tywoniuk, and Dave McGee	7 hrs, 20 min
July 26, 2018	Preliminary motions hearing with Meg Barker, Nick Tywoniuk, and Dave McGee	4 hrs, 15 min
July 26, 2018	Case management meeting with Meg Barker, Nick Tywoniuk, and Dave McGee	1 hr, 20 min
August 14, 2018	Preliminary motions hearing with Meg Barker, Nick Tywoniuk, and Dave McGee	4 hrs
August 14, 2018	Case management meeting with Meg Barker, Nick Tywoniuk, and Dave McGee	50 min
14 days	Total Hours	44 hrs, 30 min

Appendix B

Hearings Days

Date	Run Time	Lunch	Hearing Time
August 27, 2018 Monday	8:00 am to 7:50 pm (11 hrs, 50 min)	12:01 pm to 12:34 pm (33 min)	11 hrs, 17 min
August 28, 2018 Tuesday	8:05 am to 3:32 pm (7 hrs, 27 min),	11:54 am to 12:38 pm (44 min)	6 hrs, 43 min
August 29, 2018 Wednesday	8:03 am to 7:31 pm (11 hrs, 28 min)	12:32 pm to 1:15 pm (43 min)	10 hrs, 45 min
August 30, 2018 Thursday	8:10 am to 5:33 pm (9 hrs, 23 min)	11:58 am to 12:38 pm (40 min)	8 hrs, 43 min
August 31, 2018 Friday	8:35 am to 1:32 pm (4 hrs, 57 min)	11:42 am to 1:10 pm (1 hr, 28 min)	3 hrs, 29 min
September 12, 2018 Wednesday	8:04 am to 7:33 pm (11 hrs, 29 min)	12:54 pm to 1:40 pm (46 min)	10 hrs, 43 min
September 13, 2018 Thursday	7:52 am to 3:19 pm (7 hrs, 27 min),	12:34 pm to 1:10 pm (36 min)	6 hrs, 51 min
September 14, 2018 Friday	8:03 am to 5:34 pm (9 hrs, 31 min)	12:20 pm to 12:58 pm (38 min)	8 hrs, 53 min
September 15, 2018 Saturday	8:03 am to 10:30 pm (14 hrs, 27 min),	10:48 am to 12:37 pm (1 hr, 49 min)	12 hrs, 38 min
October 11, 2018 Thursday	7:35 am to 7:47 pm (12 hrs, 12 min)	12:15 pm to 12:53 pm (38 min)	11 hrs, 34 min
October 12, 2018 Friday	7:33 am to 7:38 pm (12 hrs, 5 min)	12:40 pm to 1:10 pm (30 min)	11 hrs, 35 min
October 13, 2018 Saturday	9:03 am to 11:03 am (2 hrs)	N/A	2 hrs
12 days		Total Hearing Time	105 hrs, 11 min

## Appendix C

### Costs Procedure

[1] In the Board's Report and Recommendation, the Board noted that Cherokee, Domtar and the Director reserved their right to costs, and stated that a "...process for any costs application[s] will be established after the Minister makes her decision in these appeals."<sup>58</sup> The Board made her decision on March 12, 2019, by issuing Ministerial Order 18/2019.

[2] On March 13, 2019, the Board provided the Parties with the Board's Report and Recommendations and the Minister's Order and advised that any costs applications should be filed by April 5, 2019, and that any response submissions should be filed by April 29, 2019. The Board also stated:

"As the parties are likely aware, past decisions of the Board have suggested that an award of costs against the Director is unlikely unless the Director's actions out of scope with his statutory authority. Any costs applications that are filed, where the request is to have costs awarded against the Director, should expressly deal with this issue."<sup>59</sup>

[3] At the request of Cherokee, the deadline for filing costs applications was extended to April 12, 2019. Cherokee and Domtar also requested the right of reply to any response filed by the Director.<sup>60</sup> On April 11, 2019, the Board stated:

"The Board has decided, at this time, it will not grant the request to provide rebuttal submissions. For now, the Board will continue to follow its standard practice with respect to costs. This standard practice provides for any parties to file costs applications and then for any parties to file response submissions to the costs applications.

However, any of the parties are free to make application to the Board to allow for rebuttal submissions, once any response submissions have been filed."

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<sup>58</sup> See: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (26 February 2019), Appeal Nos. 16-055-056, 17-073-084, and 18-005-010-R (A.E.A.B.), at paragraph 126.

<sup>59</sup> Board's letter, dated March 13, 2019. The Board's letter also noted that on June 1, 2018, counsel for Cherokee had asked when it would be appropriate to bring a final costs application with respect to the appeals of the Environmental Protection Order (Environmental Protection Order No. EPO-2016/05-RDNSR) that had been issued in this matter. In a letter dated June 1, 2018, the Board advised that it would be preferable to bring one final costs applications after all the matters between the Appellants and the Director had been addressed.

<sup>60</sup> Cherokee's letter, dated April 4, 2019, and Domtar letter, dated April 4, 2019.

Costs applications were received from Cherokee and Domtar on April 12, 2019. Cherokee requested \$2,253,392.46 in legal fees, \$742,364.05 in expert fees, and \$51,769.39 in corporate fees. Domtar requested \$1,969,383.66 in legal fees, and \$435,434.79 in expert fees.

[4] On May 1, 2019, the Director wrote to the Board and advised that it was requesting a four-week extension to its deadline to file its response submission. The basis for this request was that a new government had just been sworn, and the additional time was required to obtain proper instructions.

[5] On June 3, 2019, the Director provided his response submission.

[6] On June 4, 2019, Cherokee wrote to the Board asking for the opportunity to provide a rebuttal submission to the Director's response submission, citing the raising of new issues and evidence that was outside the record of proceedings. On June 7, 2019, Domtar wrote to the Board making the same request.

[7] On June 7, 2019, the Board wrote to the parties stating:

“While the Board does not want to protract these proceedings, the Board has conducted an initial review of [the Director's] June 3, 2019 response submission to the Appellants cost applications and determined that allowing [Cherokee] and [Domtar] to file limited rebuttal submissions would be appropriate, as new arguments and evidence were advanced in [the Director's] submission. Further, the Board is of the view that limited rebuttal submissions from [Cherokee] and [Domtar] would assist the Board by ensuring all of the arguments presented are fully canvassed. However, in order to preserve procedural fairness, the Board will also allow [the Director] to provide a limited rebuttal to any submissions filed by [Cherokee] and [Domtar]. In providing these opportunities, the Board wants to emphasize that the rebuttals should be limited to a proper rebuttal - meaning the rebuttal should be limited to responding to comments in the previous submissions and the rebuttal should not include any new arguments or evidence that is not connected to the previous submissions.

The Board requests that [Cherokee] and [Domtar] provide their written rebuttal by 4:30 pm (Alberta time) on Friday, June 28, 2019. Further, the Board requests submissions that [the Director] provide his written rebuttal submission by 4:30 pm (Alberta time) on Monday, July 22, 2019. (The extra day is to accommodate the Canada Day long weekend.)”

[8] On June 28, 2019, Cherokee and Domtar provided their rebuttal submissions to the Director's response submission on costs dated June 3, 2019.

[9] On July 22, 2019, the Director provided its final rebuttal submission to the Appellants' costs submissions. The Director requested that the Board delay any findings on the costs submissions until the Director has had an opportunity to engage in the Appellants in settlement discussions. On July 23, 2019, the Board granted this request and asked for a status report on August 9, 2019.

[10] On July 24, 2019, the Appellants both wrote to the Board and advised that did not agree to have the Board defer its deliberation on costs as requested by the Director. On July 25, 2019, the Board wrote to the Parties and advised that it would proceed to make its decision on the costs submissions as soon as possible.

Appendix D  
Revised  
Schedule of Rates  
(July 29, 2011)

<b>Years to the Bar</b>	<b>Per Hour Rate</b>
Paralegals	\$55
Students	\$65
Lawyer just admitted to the Bar	\$90
Lawyer – 1 year	\$95
Lawyer – 2 years	\$110
Lawyer – 3 years	\$125
Lawyer – 4 years	\$140
Lawyer – 5 years	\$150
Lawyer – 6 years	\$160
Lawyer – 7 years	\$165
Lawyer – 8 years	\$175
Lawyer – 9 years	\$180
Lawyer – 10 years	\$190
Lawyer – 11 years	\$200
Lawyer – 12 years	\$205
Lawyer – 13 years	\$215
Lawyer – 14 years	\$220
Lawyer – 15 years and more	\$250