ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 16, 2020

IN THE MATTER OF sections 91, 92, 96, and 101 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Jeff Brookman and Allison Tulick with respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks, to issue Water Act Approval No. 00388473-00-00 to KGL Constructors (A Partnership).

Cite as: Reconsideration Decision: *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks,* re: *KGL Constructors, A Partnership* (16 October 2020), Appeal Nos. 17-047 and 17-050-RD (A.E.A.B.), 2020 ABEAB 26.

BEFORE:	Ms. Anjum Mullick, Panel Chair; Dr. Nick Tywoniuk, Panel Member; and Ms. Meg Barker, Panel Member.

SUBMISSIONS BY:

Appellants:	Mr. Jeff Brookman and Ms. Allison Tulick, represented by Mr. Richard Harrison, Wilson Laycraft.
Approval Holders:	KGL Constructors, A Partnership, represented by Mr. Ron Kruhlak and Mr. Sean Parker, McLennan Ross LLP.
Director:	Mr. Kevin Wilkinson, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Lisa Semenchuk and Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

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

Mr. Jeff Brookman and Ms. Allison Tulick (the Appellants) appealed the Approval to the Environmental Appeals Board (the Board). After a hearing, the Board recommended the Approval be varied. These recommendations included adding monitoring conditions to address concerns regarding water quality and quantity flowing into a wetland. The Board also recommended the Approval be varied to require an assessment of the wetlands impacted by the project using the criteria specified in the 2013 Alberta Wetland Policy. The Minister of Environment and Parks accepted the Board's recommendations to vary the Approval and issued a Ministerial Order, adding a number of her own conditions, over and above those recommended by the Board.

The Appellants and KGL each reserved their right to request costs. After the Minister's decision, the Appellants sought $378,471.67 costs. KGL did not seek costs. The Board reviewed written submissions using the Board's established criteria. It considered the participation of the Appellants in the hearing part of the obligation Albertans have to bring environmental issues forward. Much of the evidence presented by the Appellants and their witnesses addressed issues outside of those set for hearing. Therefore, the Board awarded no costs to the Appellants.

They now seek to reconsider the Board's refusal to award costs. They allege errors in fact and law, and allege new evidence involving the Appellants' retainer agreement with, and invoices from, their legal counsel.

Reconsideration involves a two-step process, the first about whether a reconsideration is justified. Written submissions identified a procedural flaw that could have resulted in the Board

changing its Costs Decision. Specifically, the Board had not provided an opportunity for the Appellants to rebut the response submissions of the other parties during the costs application.

The Board then undertook a reconsideration of the costs application in light of the Appellants' new evidence. It found the new evidence helpful in explaining the relationship between the Appellants and their legal counsel and explaining why they felt costs justified. However, it was insufficient to persuade the Board to order the costs that were requested.

The Appellants provided no exceptional or compelling reason that warranted varying the original Cost Decision, and the Board again denied the request to award legal costs.

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I. INTRODUCTION

[1] This is the decision of the Environmental Appeals Board (the "Board") on the application by Mr. Jeff Brookman and Ms. Allison Tulick (the "Appellants) for the Board to reconsider and vary its Costs Decision dated November 7, 2019 (the "Costs Decision") in Appeal Nos. EAB 17-047 and 050.[1]

[2] This decision relates to appeals filed with respect to Approval No. 00388473-00-00 (the "Approval") issued to KGL Constructors, A Partnership (the "Approval Holder"). The Director, South Saskatchewan Region, Alberta Environment and Parks (the "Director") issued the Approval under the *Water Act*, R.S.A. 2000, c. W-3 (the "*Water Act*"). It allows for the permanent disturbance (in-filling) of 24 wetlands, for a total of 22.07 hectares of wetland loss, and to change the location of water for the purpose of dewatering wetlands. Under the Approval, the Approval Holder will partially fill in 11 wetlands and completely fill in 13 wetlands as a part of the construction of the Southwest Calgary Ring Road ("SWCRR"). The project involves constructing a roadway through a Transportation Utility Corridor located on the west side of the City of Calgary. The project proponent is Alberta Transportation, but the Approval was issued to KGL Constructors as the contractor hired to complete the construction work.

[3] The Board held a public hearing. After considering the evidence and arguments, written submissions, and Director's record, the Board recommended that the Minister of Environment and Parks (the "Minister") vary the Approval. She accepted the Board's recommendations and issued a Ministerial Order incorporating the Board's recommendations, plus additional changes of her own.[2]

[4] On February 27, 2018, the Appellants applied for costs from the Approval Holder in the amount of $378,471.67. They sought costs: (1) for their legal counsel who, it was said, had acted on a *pro bono* basis, (2) for Mr. Brookman's participation in the hearing, and (3) for Ms. Tulick's costs for her participation in the hearing. The Appellants asked that that Approval Holder pay the costs.

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

[2] *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.) 2017 ABEAB 13. This Report and Recommendation includes a copy of Ministerial Order 06/2018.

[5] The Approval Holder did not file a costs application.

[6] No costs have ever been sought by or from the Director.

[7] On November 7, 2019, the Board issued a decision denying costs. It denied costs for the legal counsel acting on a *pro bono* basis. Mr. Bookman's evidence was that he personally prepared most of the submissions. The Board denied costs for Mr. Brookman as much of his evidence was unrelated to the issues identified by the Board. The Board was also of the view that Mr. Brookman's evidence did not substantially contribute to the appeal, and reasonable costs are considered to be part of participating in the appeal process. The Board denied the costs claimed by Ms. Tulick, which, though reasonable, the Board also considered to be a part of participating in the appeal process.

[8] On November 27, 2019, the Appellants wrote asking that the Costs Decision be reconsidered on the basis of alleged errors in fact, errors in law, and new evidence; in particular a retainer agreement and invoices that were not previously provided.

[9] The Board received written submissions. The Board identified a potential error in not having provided the Appellants an opportunity to submit rebuttal submissions during the original costs application. Having identified this potential error, the Board proceeded to the second step of the reconsideration process, limited to a reconsideration of the legal costs incurred by the Appellants' counsel, in light of the new evidence and arguments.

[10] The Board set a process and received submissions from March 6, 2020 to April 3, 2020. Upon reviewing the written submissions, the Board found no compelling reason to change the Costs Decision and denied the Appellants' application for costs.

II. RECONSIDERATION PROCEDURE

[11] Reconsideration involves a two-step process. The first requires the party requesting reconsideration to demonstrate that there was an error of law, the process was flawed, or that there was an error in fact sufficient to undermine the basis of the decision. The party may also demonstrate that there is new evidence that was not available at the time the decision was made or at the time of the hearing. The evidence does not have to establish that it is more likely than not to result in a change of the original decision, but there must be a reasonable possibility.

[12] If such matters are established, the Board moves to the second step, which is the actual reconsideration.

[13] The Board received submissions from the Parties on the following issues:

1. Does the reconsideration request meet the requirements for reconsideration, and should the Board reconsider?
2. Whether or not legal costs should be awarded for the Appellants' legal counsel in light of the new evidence provided.

The written submissions at each stage overlapped considerably. To the extent the submissions repeat points already made, or simply repeat the Board's established criteria, they are mentioned in the following summaries only once.

III. SHOULD THE BOARD UNDERTAKE RECONSIDERATION? – STEP 1

A. Appellants Submissions – Step 1

[14] The Appellants submitted that the Board's decision to deny costs for counsel were explained in paragraphs 135 and 154 of the Costs Decision:

> "[135] The Board questions the legal costs claimed by the Appellants. Mr. Brookman clearly stated he did 90 percent of the research for and writing of the submissions. This leaves little work required from the Appellants' counsel, yet they claimed 334.3 hours of legal time at approximately $400.00 per hour. In addition, the Appellants had stated their counsel was offering his services on a pro bono basis. Accordingly, the Board does not see how the Appellants can be requesting costs for legal services they did not have to pay for. This would result in the Appellants receiving a windfall. The intent of costs is not to provide a financial benefit for a party nor to use it to penalize a party. The Board appreciates the Appellants' counsel was responsible for preparing submissions on the issue of standard of review. With respect to the standard of review, the Board is of the view the legal arguments presented by the parties were equally helpful, and therefore it is not appropriate to consider a costs award.
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> [154] The Appellants' application for an award of costs for legal counsel is denied, given counsel was acting on a pro bono basis, and Mr. Brookman stated he prepared most of the submissions provided to the Board."[3]

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[3] Costs Decision: *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (7 November 2019), Appeal Nos. 17-047 and 17-050-CD (A.E.A.B.), 2019 ABEAB 32, at paragraphs 135 and 154.

[15] The Appellants stated that, based on these paragraphs, the Board's decision to deny costs was based this on the following findings of fact:

> "1 That Mr. Brookman did 90% of the work related to the Appeal; and
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> 2. That counsel was providing his services pro bono."[4]

[16] The terms of their retainer agreement with their counsel provided for the work to be performed pro bono, except to the extent to which a costs award may be obtained. This term prevented any "windfall" from a costs award.[5]

[17] The Appellants argued, there are compelling reasons for reconsideration when the Board erred in finding "… that the extent of the work performed by the Appellants' counsel was related to submissions on standard of review."[6] A review of their counsel's invoices indicates that counsel did considerably more work beyond preparing submissions on standard of review.[7] That work also included:

> "1. Scheduling;
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> 2. Attendance at the hearing;
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> 3. Preparing witnesses;
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> 4. Examining witnesses in chief; and
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> 5. Cross examining witnesses."[8]

According to the Appellants, without their counsel, the proceedings would have been more onerous and time consuming.

[18] While the retainer agreement and invoices were available prior to the February 27, 2018, deadline for written submissions[9] they did not know that the Approval Holder would argue that the Appellants' counsel, having acted as "pro bono counsel," were not entitled to

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4 Appellants' Initial Submissions, December 11, 2019, at page 2.

5 Appellants' Initial Submissions, December 11, 2019, at page 2.

6 Appellants' Initial Submissions, December 11, 2019, at page 3.

7 As evidence of the work provided by counsel the Appellants attached invoices from their counsel as Tab 1 to their Initial Submission, dated September 1, 2017, to November 1, 2017.

8 Appellants' Initial Submissions, December 11, 2019, at page 3.

9 The Board had set a process for the initial costs applications for the Appeals. The Appellants and the Approval Holder were asked to file any applications for costs by March 20, 2018. The Appellants, the Approval Holder and the Director were asked to file their responses by March 20, 2018.

costs. They did not know the Board would find that significant. As a result, this evidence was not available to the Board prior to its decision, and amounts to new evidence.[10]

[19] The Appellants drew attention to *1465778 Ontario Inc.* v. *1122077 Ontario Ltd.*,[11] paragraph 34, which provides:

> "[34] It is clear from the submissions of the amici representing the views of the profession, as well as from the developing case law in this area, and I agree, that in the current costs regime, there should be no prohibition on an award of costs in favour of pro bono counsel in appropriate cases. Although the original concept of acting on a pro bono basis meant that the lawyer was volunteering his or her time with no expectation of any reimbursement, the law now recognizes that costs awards may serve purposes other than indemnity. To be clear, it is neither inappropriate, nor does it derogate from the charitable purpose of volunteerism, for counsel who have agreed to act pro bono to receive some reimbursement for their services from the losing party in the litigation. To the contrary, allowing pro bono parties to be subject to the ordinary costs consequences that apply to other parties has two positive consequences: (1) it ensures that both the non-pro bono party and the pro bono party know that they are not free to abuse the system without fear of the sanction of an award of costs; and (2) it promotes access to justice by enabling and encouraging more lawyers to volunteer to work pro bono in deserving cases. Because the potential merit of the case will already factor into whether a lawyer agrees to act pro bono, there is no anticipation that the potential for costs awards will cause lawyers to agree to act only in cases where they anticipate a costs award."[12] (Emphasis added by the Appellants.)

[20] According to the Appellants, disentitling a party to costs on the basis of their counsel having acted pro bono has the effect of discouraging legal volunteerism. Deciding against costs discourages settlement, encourages vexatious litigation, and discourages economy and efficiency.[13] There was a significant expenditure of legal fees by their counsel's office to obtain a result for the Appellants.[14]

[21] The Appellants seek reconsideration on the basis of their being successful in their appeal, the expenditure of legal fees by their counsel, and the entitlement of their counsel to a costs award as a result of their retainer agreement. Without the opportunity to respond to the

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10 Appellants' Initial Submissions, December 11, 2019, at page 3.

11 *1465778 Ontario Inc.* v. *1122077 Ontario Ltd*., 216 OAC 339.

12 *1465778 Ontario Inc.* v. *1122077 Ontario Ltd*., 216 OAC 339 at paragraph 34 [emphasis added by Appellants]. See: Appellants' Initial Submission, December 11, 2019, at page 4.

13 Appellants' Initial Submissions, December 11, 2019, at page 4.

14 Appellants' Initial Submissions, December 11, 2019, at page 4.

initial costs submission in February of 2018, the Board was likely unaware of the relationship between the Appellants and their counsel. The retainer agreement was new information that warranted reconsideration.[15]

B. Approval Holder Submissions – Step 1

[22] Section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA")[16] authorizes the Board to reconsider any previously issued decision. A party's reconsideration request triggers a two-step process:

> "The first step in the process is to determine whether there are grounds sufficient enough to warrant a reconsideration. If the Board has been provided sufficient new evidence or the parties have demonstrated there has been an error in law, then the Board will proceed to the second step, the actual reconsideration of its decision [Emphasis added]."[17]

[23] The Board's ability to reconsider decisions is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider.[18] The Board discussed this point in the decision of *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Water* (*Gas Plus*).[19]

[24] The Board has framed the applicable test "…as requiring the applicant to demonstrate that '…there was an error in the Board's interpretation of the law, the process was flawed, or there was an error in fact sufficient to undermine the basis of the Board's decision.'" This means that even where an error or flaw is demonstrated, it did not necessarily "open up a

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15 Appellants' Initial Submissions, December 11, 2019, at pages 4 and 5.

16 Section 101 of EPEA provides: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

17 Approval Holder's Submissions, December 18, 2019, at paragraphs 5 and 6 citing *Tomlinson* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Evergreen Regional Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-1D2 (A.E.A.B.) at paragraph 35.

18 Approval Holder's Submissions, December 18, 2019, at paragraph 8 citing *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Water*, (8 May 2012), Appeals Nos. 10-034-11-002,008, & 023-RD (A.E.A.B.) at paragraph 29, citing *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment re Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

19 *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Water*, (8 May 2012), Appeals Nos. 10-034-11-002,008, & 023-RD (A.E.A.B.)

decision for reconsideration." An applicant for reconsideration must demonstrate that the error or flaw undermines the foundations of the Board's decision.[20]

[25] A reconsideration application is not intended to be a tool for rearguing the same issue a second time. The onus lays with the party making the request to establish exceptional and compelling reasons to reconsider.[21]

> "[F]actors the Board will consider when deciding whether an applicant has discharged this onus include the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision."[22]

[26] There is a need for finality:

> "The Board considers finality important in its decision making process and particularly when making recommendations to the Minster. It provides certainty to the approval holders, appellants, and the public that the appeal process is complete and the approval holder or appellant, as in this case, can proceed in accordance with the Minister's order."[23]

[27] According to the Approval Holder, evidence that was not available at the time the decision was made, or was not practically obtainable by the parties, may be relevant for the purposes of reconsideration. Evidence that was available at the time of the hearing, even if acquired after the decision was made, is not relevant for the purposes of consideration.[24]

[28] The information provided now is not unlike the information and reconsideration requests made in both *Tomlinson* and *Dyrholm.* In *Tomlinson*, the Board found that the

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[20] Approval Holder's Submissions, December 18, 2019, at paragraph 9 citing Reconsideration Decision: *Dyrholm* v. *Director, Central Region, Environmental Management, Alberta Environment re: Resort Development Funding Corporation* (23 February 20I0), Appeal No. 09-003-RD (A.E.A.B.) (*Dyrholm*) at paragraph 25**.**

[21] Approval Holder's Submissions, December 18, 2019, at paragraph 11.

[22] Approval Holder's Submissions, December 18, 2019, at paragraph 13 citing *Tomlinson* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Evergreen Regional Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-1D2 (A.E.A.B.) at paragraph 64.

[23] Approval Holder's Submissions, December 18, 2019, at paragraph 14 citing *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Water*, (8 May 2012), Appeals Nos. 10-034-11-002,008, & 023-RD (A.E.A.B.) at paragraph 29.

[24] Approval Holder's Submissions, Dated December 18, 2019, at paragraph 15. The Approval Holder cited *Tomlinson* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Evergreen Regional Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-1D2 (A.E.A.B.) at paragraph 65 in support of its position.

information was available to the applicant at the time of the original submissions, but the applicant did not seek it out or disclose it to the Board. Had the applicant done so, the information would have been brought to the Board's attention and the respondent would have had the opportunity to respond. To allow the applicant to "…claim the information as 'new evidence' would have gone '…against the principles of natural justice.'"[25]

[29] In *Dyrholm,* the applicant attempted to submit an agreement during the reconsideration process which had been available at the time the initial submissions. The Board held the agreement was not new evidence.[26]

[30] According to the Approval Holder, the Appellants have not discharged their onus of demonstrating exceptional and compelling reasons to reconsider. Nor have they established that the Costs Decision includes a substantial error of law or fact capable of changing its outcome.[27]

[31] The Appellants have failed to submit any new evidence with respect to either the pro bono or the counsel work issues, noting that copies of the Appellants' counsel's invoices were provided to the Board prior to the initial costs hearing and were considered at paragraph 135 of the Decision. The Appellants new reference to the invoices was an attempt to re-argue an issue, contrary to *Tomlinson.*[28]

[32] The retainer agreement is dated September 1, 2017, so was available to the Appellants prior to their February 27, 2018 costs submissions. As in the *Dyrholm* decision, the Appellants had the opportunity to submit that retainer agreement in their original submissions, but failed to do so. No adequate explanation has been given for that failure.[29]

[33] Not knowing what evidence the Board would find material, or upon which the Approval Holder would rely, does not make the retainer agreement new evidence. It was

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[25] Approval Holder's Submissions, Dated December 18, 2019, at paragraph 15. The Approval Holder cited *Tomlinson* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Evergreen Regional Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-1D2 (A.E.A.B.) at paragraph 68.

[26] Approval Holder's Initial Submissions, December 18, 2019, paragraph 18 citing Reconsideration Decision: *Dyrholm* v. *Director, Central Region, Environmental Management, Alberta Environment re: Resort Development Funding Corporation* (23 February 20I0), Appeal No. 09-003-RD (A.E.A.B.) at paragraph 28-30.

[27] Approval Holder's Initial Submissions, December 18, 2019, paragraph 19.

[28] Approval Holder's Initial Submissions, December 18, 2019, paragraphs 20 to 23.

[29] Approval Holder's Initial Submissions, December 18, 2019, at paragraphs 24 and 25.

reasonably foreseeable that the Appellants would need to justify the significant monetary claim for legal fees, particularly when they advised the Board that their counsel was acting pro bono.[30]

[34] The Appellants must also establish that the new evidence, if accepted, would give rise to an error that would undermine the basis of the Board's decision. The invoices and retainer agreement fail to meet this second threshold.[31]

[35] There is no demonstrated justification for deviating from the Board's well established practice of requiring parties to bear their own costs. This well established and principled approach to costs is a foundational element in the decision. Even if the Appellants' evidence were accepted as new evidence, it would not change the outcome with respect to legal costs in light of the Board's practice.[32]

[36] If the Board were to depart from its usual practice and revert to the "loser pays" principle used in litigation, the parties in any event had mixed success. The Board rejected the Appellants' position that they had "won the appeal."[33]

[37] The invoices were also inflated.[34]

[38] The application does not address the Board's longstanding practice that parties as a general rule bear their own costs. The Approval Holder originally argued that "…the work done was not work for which a costs award would be appropriate…"[35] That was accepted, and has not changed.

[39] The Appellants have not meet the very high threshold to establish exceptional and compelling reasons for the Board to invoke its extraordinary power to reconsider. Neither the invoices nor the retainer agreement are new evidence and even if they were accepted as such, they do not justify a departure from the Board's well-established practice of requiring the parties

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30 Approval Holder's Initial Submissions, December 18, 2019, at paragraph 26.

31 Approval Holder's Initial Submissions, December 18, 2019, at paragraph 27.

32 Approval Holder's Initial Submissions, December 18, 2019, at paragraphs 29 and 30.

33 Approval Holder's Initial Submissions, December 18, 2019, at paragraph 31.

34 Approval Holder's Initial Submissions, December 18, 2019, at paragraphs 33 and 34.

35 Approval Holder's Initial Submissions, December 18, 2019, at paragraph 36.

to bear their own costs. The Appellants failed to discharge the onus of meeting the high threshold for reconsideration and the Appellants' reconsideration request must be dismissed.[36]

C. Director's Submissions – Step 1

[40] The error at issue relates to the nature of the retainer agreement between Mr. Brookman and Ms. Tulick, and the Appellants' say this new information warrants issuing a new costs decision. This information was available to the Appellants at the time of the original application.[37]

[41] The portion of the decision rejecting costs against the Director is not an issue on this reconsideration. The written submissions do not take issue with the Board's finding that there was no bad faith on the part of the Director.[38] The Board's decision was in keeping with previous decisions. There is no apparent substantial error of fact or law.[39]

D. Appellants' Rebuttal – Step 1

[42] The Appellants have demonstrated the required error of law or fact. The Board was in error on two facts which the Approval Holder does not contest. The Approval Holder has not contested the submission that counsel, acting pro bono, is entitled to costs.[40]

[43] Retainer agreements are inherently confidential. It was not reasonable to expect the Appellants to waive the confidential nature of their retainer agreement in the first instance.[41] Section 101 of EPEA is designed to give the Board the opportunity to correct errors. Without that power, the Courts would be subject to more applications for judicial review.[42] It is a reasonable application of the Board's ability to ensure that it gets the decision right on the facts and law.[43]

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36 Approval Holder's Initial Submissions, December 18, 2019, at paragraphs 37, 38, 39, and 40.

37 Director's Response Submissions, December 18, 2019, at page 1.

38 Director's Response Submissions, December 18, 2019, at page 2.

39 Director's Response Submissions, December 18, 2019, at page 2.

40 Appellants' Rebuttal Submissions, January 2, 2020, at page 2.

41 Appellants' Rebuttal Submissions, January 2, 2020, at page 2 in support of their position, the Appellants cited: the *Law Society of Alberta's Code of Professional Conduct,* 2018 VI at 3.1-1; *LC* v. *Alberta* 2016 ABQB 491 at paragraph 57; *Alberta Rules of Court,* Alta Reg 124/2010 at Rules 10.13(2)(b) and (3)(b) and 10.15.

42 Section 101 of the EPEA provides: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

43 Appellants' Rebuttal Submissions, January 2, 2020, at page 3.

[44] The Appellants never raised the loser pays principle in their February 27, 2018, submissions: "… at no time was the word 'won' ever used nor was it ever used in Mr. Brookman's submissions." Mr. Brookman's submissions did not rely on the loser pays principle and only referred to it once.[44]

[45] Their costs submission is based on their contribution in ensuring that the Approval Holder complied with Alberta's environmental regime. This contribution that merits a costs award. The substantive environmental conditions in the Approval would not have been granted without the Appellants' evidence, submissions, and legal arguments. Legal counsel was instrumental in that contribution. The Board and Minister made numerous amendments to the Approval as sought by the Appellants. It is factually incorrect for the Approval Holder to say the Appellants were only successful on the specific question of the applicable wetland policy.[45]

[46] The Board should reconsider its decision. It was based on facts and legal analysis not available to the Board, and upon which the Appellants could not predict the Board was going to rely.[46]

IV. ANALYSIS – STEP 1

[47] Under section 101 of EPEA, "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[48] The power to reconsider "is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."[47] The Board uses this discretion with caution, as it is an exception to the general rule that decisions are intended to be final. Reconsideration is not an opportunity to revisit the issues that arose during a hearing; it is not intended as a tool for participants to reargue the same issues, or to bring evidence forward that

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[44] Appellants' Rebuttal Submissions, January 2, 2020, at page 3. Note: the Appellants quoted Mr. Brookman's submissions, wherein Mr. Brookman had commented on the uncertainty over the 'reward' type structure versus loser pays: "Given the uncertainty over the 'reward' type structure versus loser pays, there is only one option available and that is do your own work." See: Appellants Cost Submissions, February 23, 2018, at page 10.

[45] Appellants' Rebuttal Submissions, January 2, 2020, at page 4.

[46] Appellants' Rebuttal Submissions, January 2, 2020, at page 5.

[47] *Bernice Kozdrowksi* v. *Director, Chemicals Assessment and Management, Alberta Environmental Protection*, EAB Appeal No. 96-059.

could have been presented at a hearing. However, there are specific circumstances that warrant reconsidering a decision. The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider.

[49] The Alberta Court of Appeal:

> "[T]he Courts should be sparing their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings would result."[48]

Put simply, a reconsideration is not an opportunity to have a second chance to re-argue one's case.

[50] In deciding whether to reconsider the Board considers various factors including the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.[49] A new decision from the Courts, not reasonably available at the time of the hearing, might constitute another factor, however, the decision in question must demonstrate an error in law that, once corrected, would change the original result.[50]

[51] With new evidence, at Step 1 a party must demonstrate that the new evidence, if accepted, could lead to a change in the original decision. There must be a reasonable probability of the original decision being altered.

[52] The Board recognizes that Counsel's retainer agreement and invoices are evidence that the Appellants could have brought forward in the original process. They did not provide this evidence at the time. However, the Board is influenced by the fact that the

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[48] In *Alberta (Director, Child, Youth & Family Enhancement Act*) v. *M.* (*B.*) 2009 ABCA 258 (Alta. C.A.) at paragraph 11.

[49] Preliminary Motions: *Bailey et al*. v. *Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.) at paragraph 49.

[50] *Tomlinson* v. *Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Evergreen Regional Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-ID2 (A.E.A.B.) at paragraph 66. See also: Request for Reconsideration: *Bernice Kozdrowski* v. *Director of Chemicals Assessment and Management, Alberta Environmental Protection* re: *Laidlaw Environmental Services (Ryley*) Ltd. (April 7, 1998), Appeal No. 96-059 (A.E.A.B.).

Appellants had no opportunity to provide that evidence by way of rebuttal submissions once the pro bono issue was raised.

[53] The Board agrees with the Approval Holder that the retainer agreement and the invoices were available to the Appellants prior to the deadline. They had access to it even prior to their initial application for legal costs. The retainer agreement and invoices are not therefore strictly speaking 'new evidence' as it is normally understood.

[54] However, it is the Board's standard practice to have a submissions and replies for cost applications. The party seeking costs provides their submissions to the Board and the other parties are given an opportunity to respond. In the current case, the Board set this process in its correspondence dated January 29, 2018, and no one objected.

[55] However, after following submissions from the Approval Holder and the Director, the Appellants asked for a chance to provide rebuttal submissions.[51] Both the Approval Holder and the Director objected based on the proposition that the established process did not contemplate rebuttal submission. Their own submissions had been responsive to the Appellants' submission without raising new evidence and there was no basis for a rebuttal.[52]

[56] The Board at the time reviewed the parties' comments, and decided a rebuttal submissions from the Appellants was unnecessary. If the Appellants had been given that opportunity, the Board would have had additional information on which to base its decision, namely, the retainer agreement and the invoices. It is possible such information could have an impact on the original result.

V. DECISION – STEP 1

[57] The Appellants were not provided an opportunity to submit rebuttal submissions in response to the submissions of the Approval Holder and the Director. That, in retrospect, was a process lapse that denied the Appellants the opportunity to submit, as a rebuttal submission, the retainer agreement and invoices. This would have given the Board pertinent information on

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[51] The Appellants requested an opportunity to provide rebuttal comments in correspondence sent to the Board March 22, 2018.

[52] Approval Holder's Letter to the Board, March 22, 2018. Note the Director's correspondence to the Board dated March 26, 2018, contained similar reasons for denying the Appellants' request for an opportunity to submit rebuttal submissions.

which to make the Costs Decision. Because of this the Board decided to undertake a reconsideration of its decision to deny legal costs.

VI. RECONSIDERATION OF LEGAL COSTS – STEP 2

[58] The parties relied on, and at times, repeated the arguments already presented during Step 1. They also repeated arguments already addressed in the original costs decision. What follows are primarily the new points raised.

A. Appellants – Step 2

[59] The Appellants say the Board's decision to deny costs was based on the following findings of fact:

> "1. That Mr. Brookman did 90% of the work related to the Appeal; and
> 2. That counsel was providing his services pro bono."[53]

[60] The terms of their retainer agreement include a term that provided for the work to be performed pro bono, except to the extent to which a costs award may be obtained. This prevented any "windfall" from a costs award.[54]

[61] The Board made an error in its finding of fact "… that the extent of the work performed by the Appellants' counsel was related to submissions on standard of review."[55] A review of their counsel's invoices indicates that counsel did considerably more work beyond preparing submissions on standard of review which included:[56]

> "1. Scheduling;
> 2. Attendance at the hearing;
> 3. Preparing witnesses;
> 4. Examining witnesses in chief; and
> 5. Cross examining witnesses."[57]

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53 Appellants' Initial Submissions, March 6, 2020, at page 2.

54 Appellants' Initial Submissions, March 6, 2020, at page 2.

55 Appellants' Initial Submissions, March 6, 2020, at page 3.

56 As evidence of the work provided by counsel the Appellants attached invoices from their counsel as Tab 1 to their Initial Submission, dated September 1, 2017, to November 1, 2017.

57 Appellants' Initial Submissions, March 6, 2020, at page 3.

According to the Appellants, without counsel, the proceedings would have been more onerous and time consuming.

[62] The second finding of fact with respect to a prospective windfall to the Appellants was in error as the Appellants' retainer agreement with their counsel specifies that any costs award is due and owing to the Appellants' counsel.[58]

[63] In *Imperial Oil*,[59] the parties sought costs on the basis of the significant contribution made by the legal counsel at the hearing. The Appellants counsel contribution led to a significant decision and understanding as to the current Wetland Policy as well as involvement from the Minister of Environment and Parks.[60]

[64] Awarding costs:

(a) Encourages settlement by parties who may be concerned by a costs award if unsuccessful;

(b) Discourages vexatious litigation; and

(c) Compensates a party for legal fees expended to obtain a meritorious result.

The Appellants were largely successful in their appeal. The Minister's Order shows the Minister concurred with the Appellants' submissions.[61]

[65] Costs should be awarded in a principled manner as they are awarded when proceeding in a matter before a court.[62] The Board should consider the Appellants' contribution and overall success.[63]

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58 Appellants' Initial Submissions, March 6, 2020, at page 3.

59 *Imperial Oil Ltd. and Devon Estates,* (8 September 2003) Appeal No. 01-062-CD (A.E.A.B.), 2003 ABEAB 40.

60 Appellants' Initial Submissions, March 6, 2020, at page 5.

61 Appellants' Initial Submissions, March 6, 2020, at page 5. The Appellants cited paragraph [22] of the Reasons of the Minister of Alberta Environment and Parks EAB Appeals No. 17-047 and 17-050 and Minister's Order dated January 29, 2018, which provides:

> "Lastly, I want to thank the Appellants for bringing these appeals forward. These appeals have highlighted the importance of strictly applying the avoid, mitigate, and compensate hierarchy, particular for wetlands in urban areas. The appeals have made it clear that we need to do a better job in designing and approving roadways, particularly where they have been over-designed and have disproportionate impacts on wetlands. While I understand the Appellants would have wanted to see more significant changes for this project, I am hopeful they can be satisfied that they have set the stage for better projects from this point forward."

62 Appellants' Initial Submissions, March 6, 2020, at pages 5 and 6. The Appellants relied on *Alberta Treasury Branches* v. *1401057 Alberta Ltd.* (*Katch 22*), 2013 ABQB 748 at paragraphs 29-32.

63 Appellants' Initial Submissions, March 6, 2020, at page 6.

[66] The amount of time spent by Mr. Brookman was irrelevant to the consideration of the non-billed time spent by counsel for the Appellants. Their counsel made significant contributions, having participated at hearings, drafted submissions, examined witnesses in chief, cross examined witnesses, prepared expert reports, and engaged in other tasks.[64]

[67] The Appellants submitted during the hearing that the standard of review of the Director's decision ought to have been correctness. They argued that, even if the Approval Holder's submissions on the standard of review were helpful, the Appellants on this issue and should still have their costs awarded as they had to expend time and energy to make the argument.[65]

B. Approval Holder – Step 2

[68] The Appellants failed to address the flaws in their original costs application and failed to demonstrate a basis for the Board to revisit the Board's prior decision. The Appellants failed to provide a reason why an exception should be made to the Board's general practice that parties bear their own costs.[66]

[69] The Appellants failed to meet any of the criteria set by the Board for an award of final costs. The application should be dismissed for the same fundamental flaws and reasons as the original application which declined an order of costs. Those reasons were:

(a) the Appellants failed to provide justification for deviating from the well-established Board practice of requiring parties to bear their own costs;

(b) the Appellants' arguments are based on the incorrect assumption that the litigation principle of "loser pays" should apply, and that the Appellants were the successful parties, when the success of the Appeal was mixed and the only issues the Appellants were successful on were the standard of review and which wetland policy applied;

(c) the outcome of the appeal was minimally impacted by the determination of the standards of review and which wetland policy applied – a 5% reduction to 1 of the 24 wetlands impacted;

(d) the issue related to a decision made by the Director prior to the Approval Holder's involvement in the file; and

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64 Appellants' Initial Submissions, March 6, 2020, at page 6.

65 Appellants' Initial Submissions, March 6, 2020, at pages 6 and 7.

66 Approval Holder's Response Submissions, March 20, at paragraph 3.

(e) the manner in which the Appellants pursued the matter made it unnecessarily complicated, protracted and more expensive.[67]

[70] Further the claim by the Appellants' contained deficiencies:

(a) the amount of legal fees sought, which were significant and on a solicitor-client basis, which is contrary to the Board's prior guidance on costs;

(b) the Appellants seek payment of all of their legal costs from the commencement of the matter as opposed to just those necessary for the Appellants' attendance at the hearing;

(c) the Appellants' counsel's role was confined to a single legal issue and some of the work performed was not relevant to the appeal; and

(d) the Appellants are seeking reimbursement of legal costs associated with an application they withdrew and for which a court ordered legal costs against them in favour of the Approval Holder; the Approval Holder has not pursued those costs.[68]

[71] There is no justification to hold the Approval Holder responsible for the Director's decision as to which Wetland Policy to apply. The Board has consistently required parties to an appeal to bear their own costs absent a compelling reason to the contrary.

[72] Section 18(2) of the *Environmental Appeals Board Regulation*,[69] stating that the elements contained within "… are not discretionary elements, and any costs awarded by the Board must be directly and primarily related to these elements."[70]

[73] *Demenciuk*,[71] stated "…when considering the above factors in [section 18(2) of the *Environmental Appeals Board Regulation*] in the context of the appeal, 'the Board must remain cognizant of the purposes of the *Water Act* as stated in section 2'".[72] An award in costs should be founded on an application that meets the criteria contained in section 20(2) of the

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67 Approval Holder's Response Submissions, March 20, at paragraphs 4 and 5.

68 Approval Holder's Response Submissions, March 20, at paragraph 6.

69 Section 18(2) and Section 20 of the *Environmental Appeals Board Regulation*, Alta. Reg. 114/1993 (the "Regulation").

70 Approval Holder's Response Submissions, March 20, at paragraphs 10.

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

72 Approval Holder's Response Submissions, March 20, at paragraph 11, citing *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) at paragraph 89.

Regulation as discussed in *Demencuik* and should have a direct nexus to reimbursing an appellant for a particular expense.[73]

[74] The starting point in any appeal is that the parties bear their own costs.[74] The critical consideration is the 'degree to which the Parties' contributions to the hearing assisted the Board in developing its recommendations.'"[75] Costs related to disbursements such as mileage and photocopying are not typically awarded. Costs were denied to the applicant in *Demenciuk* because they did not relate to the preparation and presentation of submissions for the hearing.[76]

[75] A party seeking costs must demonstrate that the costs are both reasonable and necessary.[77] "[L]egal fees must be incurred in relation to the hearing of the appeal in order for them to be potentially recoverable"[78] and only in "exceptional cases" may solicitor-client costs "perhaps" be available.[79]

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[73] Approval Holder's Response Submissions, March 20, at paragraphs 12 and 13, citing *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) at paragraph 91, below:

> "…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."

[74] Approval Holder's Response Submissions, March 20, at paragraph 15, citing *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) at paragraph 128, citing *Costs Decision*: *Paron et al*. (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

[75] Approval Holder's Response Submissions, March 20, at paragraphs 16, citing *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) at paragraph 103.

[76] Approval Holder's Response Submissions, March 20, at paragraphs 17 and 18.

[77] Approval Holder's Response Submissions, March 20, at paragraph 19. Note the Approval Holder cited Cost Decision re: *The City of Calgary* (*Fay Ash*) (February 5, 1998), Appeal No. 97-032 (A.E.A.B.) at paragraph 13 and *Imperial Oil Ltd. and Devon Estates,* (8 September 2003) Appeal No. 01-062 CD (A.E.A.B.) 2003 ABEAB 40 at paragraph 50 in support of the Approval Holder's position.

[78] Approval Holder's Response Submissions, March 20, at paragraph 20.

[79] Approval Holder's Response Submissions, March 20, at paragraph 21.

[76] The Appellants' costs claim can be contrasted with those claimed in *Mountain View*.[80] There, a senior legal counsel ran an entire hearing for his clients and made a substantial contribution to the hearing. The Board's costs award started from 50% of the fees claimed, at the government tariff rate, with adjustments for the circumstances. The Approval Holder submitted that in the current circumstances, where Mr. Brookman advised he did 90% of the research and writing and that the Appellants' counsel limited his contribution to the standard of review, the appropriate result is to award no legal fees.[81]

[77] The Board test requires three elements for a final costs award as stated in *Demencuik* and *Cabre*[82] decisions. The test "… indicates that the Board must ask whether the party seeking costs presented valuable evidence and contributory arguments, and suitable witnesses and skilled experts, towards three ends:

(a) A substantial contribution to the hearing;

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

(c) The evidence made a significant and noteworthy contribution to the goals of the Act."[83]

[78] The standard of review issue was a dispute largely between the Appellants and the Director, and one in which the Approval Holder was not substantially engaged. It should not have to pay any costs relating to an issue with which it was minimally involved.[84]

[79] The Appellants' counsel did not engage on evidentiary issues such as cross-examination, only on the legal question of standard of review. The evidence submitted by the Appellants, with Mr. Brookman doing the vast majority of the work of the presentation of evidence and argument, was not of significant assistance, and was presented in a way which led to delay, expense, and complications.[85]

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80 *Mountain View Regional Water Services Commission et al.* v. *The Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy Ltd*. (16 December 2005), Appeal Nos. 03-116 and 03-118-123-CD (A.E.A.B.).

81 Approval Holder's Response Submissions, March 20, 2020, at paragraph 23.

82 *Cabre Exploration Ltd.* v. *Alberta* (*Environmental Appeal Board*), 2001 ABQB 293.

83 Approval Holder's Response Submissions, March 20, 2020, at paragraph 27.

84 Approval Holder's Response Submissions, March 20, 2020, at paragraph 30.

85 Approval Holder's Response Submissions, March 20, 2020, at paragraph 31.

[80] The contribution made by the Appellants "… must be seen as heavily outweighed by the sheer volume of irrelevant and extraneous issues which they introduced, unnecessarily complicating the proceeding and making it more protracted and expensive than it needed to." The Appellant further argued that the hearing ended up turning on issues that were different from those raised in the Notices of Appeal and noted if the Board wished to take into account the question of success of the parties, the Appellants were not successful on any issue other than the specific question of which wetland policy to apply and this decision was made by the Director prior to KGL's involvement in the matter.[86]

[81] The Appellants have still not met the Board's test for costs and that the Appellants' application must be dismissed; "…given the vast amount of irrelevant information, irrelevant issues, and unnecessarily protracted and expensive process…" that fact that some amount of that material could be tied to the broad goals of EPEA is not sufficient to justify deviation from the Board's standard practice of parties bearing their own costs. Nothing in the reconsideration request changes this.[87]

[82] It was inappropriate for the Appellants' counsel to claim costs which were not connected to the hearing, including work connected to failed litigation and work performed after the hearing. The Appellants seek costs on a solicitor-client basis, which is inconsistent with the Board's precedents. Mr. Brookman had indicated that he had researched and prepared 90% of the Appellants' submissions; there appears to be no basis for the amount of legal fees claimed.[88]

[83] In light of the retainer agreement between the Appellants and their counsel, there does not appear to be a windfall earned by the Appellants. However, the Appellants counsel made a business decision to appear before the Board on a pro bono basis, where it is well established that parties bear their own costs. The Appellants' counsel acting pro bono should not be a basis for the Board compensating the law firm contrary to its standard practice.[89]

[84] The "… principles that (1) the 'loser pays' is not applied by the Board and (2) costs incurred are generally the responsibility of the individual parties…" apply. The Appellants reliance on *Katch 22* is misplaced. The Court of Queen's Bench relies on the "loser pays"

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86 Approval Holder's Response Submissions, March 20, 2020, at paragraph 36.

87 Approval Holder's Response Submissions, March 20, 2020, at paragraphs 37, 38, and 39.

88 Approval Holder's Response Submissions, March 20, 2020, at paragraph 41.

89 Approval Holder's Response Submissions, March 20, 2020, at paragraphs 42.

principle, the Rules of Court, and other factors quite different to the principles established in the Board's jurisprudence.[90]

[85] *Imperial Oil* does not support the Appellants' cost application because:

> "(a) the facts are distinguishable - the current matter does not involve human health concerns from people living on contaminated lands;
>
> (b) the Appellants' participation did not promote economy and was not efficient or effective in achieving the objectives stated in the Notices of Appeal; and
>
> (c) the quantum of costs awarded in [*Imperial Oil*] represent a fraction of what the Appellants are seeking in the present matter."[91]

[86] The issue is not whether or not the Appellants' counsel worked hard, the issue is whether or not there is basis to deviate from the Board's standard practice that each party bear their own costs and there was no basis to deviate from it.[92] A restatement of the "loser pays" principle and arguing to be compensated for expending time and energy to make argument [by the Appellants] "…fails to address why the Board's usual practice with respect to costs should not be followed."[93]

[87] The Appellants were not entitled to costs because the hearings were more expensive and disproportionate to the limited issues properly addressed. This was a result of the Appellants not respecting the Board's processes and jurisdiction.

[88] With respect to the legal fees that are the focus of the reconsideration request, the Appellants have not demonstrated that the limited additional information they brought forward should defeat the well-established practice of each party bearing their own costs. The Appellants have not shown why any party should be entitled to costs, including a law firm that had taken on the matter on a *pro bono* basis. The Appellants have failed to meet the requirements of the governing legislation and Board jurisprudence with respect to final costs claims and their application should be dismissed in its entirety.[94]

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90 Approval Holder's Response Submissions, March 20, 2020, at paragraph 45.

91 Approval Holder's Response Submissions, March 20, 2020, at paragraph 50.

92 Approval Holder's Response Submissions, March 20, 2020, at paragraph 52.

93 Approval Holder's Response Submissions, March 20, 2020, at paragraph 53.

94 Approval Holder's Response Submissions, March 20, 2020, at paragraphs 56, 57, and 58.

C. Director – Step 2

[89] The Director declined to provide response submissions as no one sought costs against the Director.[95]

D. Appellants – Step 2

[90] The Appellants reemphasized several of their earlier arguments. The Board has previously "…determined that in order to meet section 2 of the *Water Act* that requires Albertans to bring matters forward, a party who makes a significant contribution is only entitled to 50% of its costs." The Appellants argued further that where the Appellants had made such a contribution, their costs ought to be compensated.[96]

[91] The Approval Holder has tried to minimize the Appellants' contribution impact on the Board's decision. With respect to the decision itself, the Appellants stated that it was significant because it:

(a) confirmed the applicability of the correct Wetland Policy;
(b) confirmed that standard of review from a Director's decision; and
(c) added additional conditions to the impugned Approval.[97]

[92] The Board ought to award costs in a principled manner. Doing so requires consideration of:

(a) awarding costs to encourage settlement, discourage vexatious litigation and compensate a party for expenditure of legal fees;
(b) a party should not be disentitled from a costs award by virtue of their counsel having acted *pro bono*; and
(c) the loser ought to pay a portion of the costs incurred by the successful litigant.

The Approval Holder was not successful on which Wetland Policy to apply or on the issue of the standard of review.[98]

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95 Director's Letter, March 20, 2020.

96 Appellants' Response Submissions, April 3, 2020, at pages 2 and 3.

97 Appellants' Response Submissions, April 3, 2020, at page 3.

98 Appellants' Response Submissions, April 3, 2020, at page 3 and 4.

[93] The Appellant stated that of the time entries contained in the invoices, of the 334.3 hours spent by counsel on this matter, only 24.5 were unrelated to the appeal and that those hours were spent appealing the Board's decision on a stay of enforcement.[99]

[94] The issues presented to the Board were significant as was the scope of the Southwest Calgary Ring Road project. The scope of the project influenced the amount of disclosure that needed to be reviewed.[100]

[95] The Appellants denied that their submissions made the appeal longer or were unrelated to the issues before the Board. A review of the recording shows that the Appellants and their counsel recognized that there were only three issues before the Board, put those three issues on the record at the outset, and only made submissions on those three issues.[101]

VII. ANALYSIS – STEP 2

[96] The Appellants have requested the Board reconsider its Costs Decision as it relates to the legal costs award. The Appellants' reconsideration request centres on their view that the Board's findings of fact and decision are found in paragraphs 135 and 154 of the Costs Decision respectively.[102] The Appellants object to the findings of fact around the work performed by the Appellant, Mr. Brookman, and Appellants' counsel, as well as the Board's

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99 Appellants' Response Submissions, April 3, 2020, at page 5.

100 Appellants' Response Submissions, April 3, 2020, at page 6.

101 Appellants' Response Submissions, April 3, 2020, at page 6.

102 Paragraphs 135 and 154 of the Costs Decision are reproduced below:

> [135] The Board questions the legal costs claimed by the Appellants. Mr. Brookman clearly stated he did 90 percent of the research for and writing of the submissions. This leaves little work required from the Appellants' counsel, yet they claimed 334.3 hours of legal time at approximately $400.00 per hour. In addition, the Appellants had stated their counsel was offering his services on a pro bono basis. Accordingly, the Board does not see how the Appellants can be requesting costs for legal services they did not have to pay for. This would result in the Appellants receiving a windfall. The intent of costs is not to provide a financial benefit for a party nor to use it to penalize a party. The Board appreciates the Appellants' counsel was responsible for preparing submissions on the issue of standard of review. With respect to the standard of review, the Board is of the view the legal arguments presented by the parties were equally helpful, and therefore it is not appropriate to consider a costs award.
>
> …
>
> [154] The Appellants' application for an award of costs for legal counsel is denied, given counsel was acting on a pro bono basis, and Mr. Brookman stated he prepared most of the submissions provided to the Board."

observations around the implications of Appellants' counsel having worked pro bono to the costs application, contained in paragraph 135.

[97] In support of their reconsideration request, the Appellants have provided their retainer agreement with their counsel. This evidence was not before the Board when it made its Costs Decision in November, 2019. The Appellants have argued that, based on paragraphs 135 and 154 of the Costs Decision, the Board held that the Appellants' counsel were not entitled to costs for the following reasons:

1. the Appellants would receive a windfall if Costs were ordered because counsel provided their services pro bono;
2. costs are not intended to provide a financial benefit nor to penalize a party;
3. Mr. Brookman stated that he did "90% of the research and writing" and therefore the Appellants' Counsel did "little work"; and
4. counsel's submissions on standard of review were equally helpful, therefore no Costs ought to be awarded to either party on that issue.[103]

[98] The retainer agreement contains a clause that provides that Appellants' counsel would work pro bono on the matter, "… except to the extent [they] may be able to obtain any amount in a costs award. To the extent that any cost award may be obtained, that amount will be paid to our firm to recover any legal fees."[104] The Board agrees with the Appellants that if a costs award had been made, it would not have been a windfall to the Appellants. Under the terms of the retainer agreement between the parties, it appears that any costs award would have been payable to the Appellants' counsel.

[99] Changing the Board's understanding and findings around the relationship between the Appellants and their legal counsel does not automatically lead to a change in the results of the Costs Decision. As stated earlier, the Board's findings regarding counsel working pro bono for the Appellants and the possibility of a costs award being a windfall to the Appellants were observations the Board made in the course of making the initial Costs Decision. However, they were not the primary reasons or foundation upon which the Costs Decision was based.

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103 Appellants' Initial Submissions, March 6, 2020, at page 2.

104 Excerpt from the Retainer Agreement between the Appellants and their legal counsel, as attached to the Appellants' Initial Submissions, December 11, 2019, at Tab 2, page 3.

[100] The Board looked to additional facts and applied the principles contained in its legislation. The Appellants have objected to two additional facts and another statement in the Costs Decision: the extent of the work performed by Mr. Brookman, the extent and characterization of the work performed by Appellants' counsel in the course of the hearings, and the statement that costs are not intended to provide a financial benefit nor penalize a party. In the Board's view, these first two objections are the substance of the reconsideration of the Costs Decision, as the work performed by the Appellants' Counsel and how this contributed to the hearings, is one of the primary factors which the Board considers when awarding costs.

[101] As a preliminary matter, the Board notes the Appellants argued that "… in deciding against awarding legal Costs [in the Costs Decision], the [Board] is discouraging settlement, encouraging vexatious litigation and discouraging economy and efficiency."[105] As with their initial costs application in 2018, the Appellants have argued an entitlement to costs on the basis of:

(a) their contribution at the hearings leading to a significant decision and understanding and the current Wetland Policy (2013);

(b) the Appellants being largely successful at the Appeal; and

(c) awarding costs on the 'loser pays principle.'[106]

[102] The Appellants rely on *Katch 22,*[107] and the principles therein to be followed by a court when deciding a costs application in support of their claim to legal costs, excerpting a paragraph from *Katch 22* which states that a court when awarding costs "…must act in a principled manner. A costs inquiry must be conducted within a logical framework."[108] In principle, the Board agrees with these statements and arguments of the Appellants. The Board must act in a principled manner and conduct the costs inquiry within a logical framework.

[103] However, as discussed in the original Costs Decision, and raised by the Approval Holder in its Response Submissions, there is a significant difference between quasi-judicial forums and civil litigation when assessing costs. The Appellants have placed much significance

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105 Appellants' Initial Submissions, March 6, 2020, at page 5.

106 Appellants' Initial Submissions, March 6, 2020, at pages 5 and 6.

107 *Alberta Treasury Branches* v. *1401057 Alberta Ltd. (Katch 22)*, 2013 ABQB 748.

108 Appellants' Initial Submissions, March 6, 2020, at page 6, citing *Alberta Treasury Branches* v. *1401057 Alberta Ltd. (Katch 22)*, 2013 ABQB 748 at paragraph 29.

on the successful outcome of their submissions regarding the standard of review for the Director's decisions. The 'loser pays' principle does not bind the Board to award costs, and in fact, the Board believes that applying the 'loser pays principle' would discourage appeals. This relationship was explained by the Board in *Demencuik.*[109]

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

[104] The Board takes a principled approach when assessing a costs application. The Board's authority to award costs arises from section 96 of EPEA, which states: "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."

[105] The *Environmental Appeal Board Regulation*[110] expands upon this jurisdiction by describing both limitations upon the costs to be awarded and the criteria the Board should consider when making an award. The relevant sections provide in part:

> "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:

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109 Costs Decision: *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) (2016 AEAB 1) at paragraph 93.

110 A.R. 114/93 as amended.

> (a) whether there was a meeting under section 11 or 13(a);
>
> (b) whether interim costs were awarded;
>
> (c) whether an oral hearing was held in the course of the appeal;
>
> (d) whether the application for costs was filed with the appropriate information;
>
> (e) whether the party applying for costs required financial resources to make an adequate submission;
>
> (f) whether the submission of the party made a substantial contribution to the appeal;
>
> (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
>
> (h) any further criteria the Board considers appropriate.
>
> (3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of
>
> (a) any other party to the appeal that the Board may direct;
>
> (b) the Board.
>
> (4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate."

[106] The Board has a broad discretion. This was noted and affirmed by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*: "Under section 88 [(now section 96)] of the Act, however, the Board has the 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.[111] Further, Mr. Justice Fraser stated:

> "I noted 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 to whom and to whom any costs are to be paid…"[112]

[107] The criteria in the EPEA and regulation do not operate in isolation. When applying those criteria to the specific facts of an appeal, the Board must look to the applicable legislation and the purpose of that legislation, in this case, section 2 of the *Water Act*, R.S.A. 2000, c. W-3, for additional guidance. This section provides:

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

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

> "2 The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing
>
> (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
>
> (b) the need for Alberta's economic growth and prosperity;
>
> (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
>
> (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
>
> (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
>
> (f) the important role of comprehensive and responsive action in administering this Act.

[108] As with assessing the original application, when reconsidering, the Board looks to its governing legislation and case law for guiding principles to make an informed decision. Two of those foundational principles remain that the parties bear their own costs in an appeal,[113] and that costs are awarded based on the party's receiving those costs contribution to the hearing and assisting the Board in making its recommendations.[114] The Board's authority to award costs is a discretionary authority. Whether or not a party is successful at appeal is not determinative of a party receiving costs. While this may be relevant, it is not necessary, nor is it the most important factor.

[109] The Board disagrees with the Appellants' argument that awarding costs would encourage settlement and discourage vexatious litigation. The Board interprets this argument by the Appellants as a suggestion that a failure to award costs would encourage the opposite to occur; that is, that the Board would be encouraging the filing of vexatious appeals. The Board notes its long standing practice of parties bearing their own costs. This principle is a starting

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113 *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) (2016 AEAB 1) at paragraph 128.

114 *Demencuik and Savitsky* v. *Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*, re: *Municipal District of Bighorn No. 8* (07 January 2016), Appeal Nos. 14-003 and 14-004-CD (A.E.A.B.) (2016 AEAB 1) at paragraph 103.

point for assessing costs applications and, in the Board's view, is a sufficient deterrence against vexatious litigation. If a vexatious appeal is filed, the Board has legislative authority and processes in place to deal with such appeals.

[110] Moreover, the Board is intended to be accessible to the public. This cannot be achieved if a prospective appellant fears that a failed appeal could automatically result in an expensive legal bill. This may act as a deterrence to legitimate appeals along with 'vexatious appeals'. The 'loser pays' principle, is not therefore, appropriate or relevant to the Board's costs applications. While the Appellants have argued this in both their original costs application and in their reconsideration, the Board does not find the arguments on the 'loser pays' principle applicable or persuasive.

[111] The Appellants have not introduced new evidence or argued against Mr. Brookman's statement that he performed 90% of the research and writing for the appeal. The Appellants do not appear to dispute the amount of work Mr. Brookman performed for the appeal or the Board's finding relative to his statement regarding the work he performed. Rather, the Appellants argue the amount of work performed by Mr. Brookman is irrelevant to the consideration of the amount of time spent by Appellants' counsel working for the Appellants in relation to the appeal.[115]

[112] The Board disagrees with the Appellants that the amount of work performed by Mr. Brookman is not related to the amount of work performed by the Appellants' counsel. The two issues are interrelated, as Mr. Brookman has stated that he performed much of the work for the submissions himself, including the researching and writing of the submissions. This leaves little space for the Appellants' counsel to have contributed substantially to the hearing. The Board agrees with the Approval Holder that it is not a question of whether or not the Appellants' counsel worked hard, but rather, whether that hard work contributed to the hearing.

[113] Nothing in the retainer agreement suggests that the Board should change its general approach to costs. With respect to the work performed by the Appellants' counsel, the

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[115] Note: the Board has chosen to use the phrasing in relation to 'the appeal' as opposed to 'the hearing', as the invoices submitted by the Appellants though itemized, contain items for work that the Appellants argue was in relation to the appeal matter, but was not in the Board's view, properly in relation to the hearing. This includes, as an example, charges related to a court application, and charges for instructing for the opening of the file and preparation of the retainer agreement, both of which were bundled in with other charges that may have been related to the hearing. See: Invoice No. 4648, dated September 1, 2017.

Approval Holder argued that it was either "a redundant effort," as Mr. Brookman had performed 90% of the work for the submissions himself, limited to the standard of review, or not related to the Board proceeding at all.[116]

[114] The Appellants have not provided any new evidence or arguments to the Board to demonstrate why the Board should vary from its finding in the Costs Decision that Mr. Brookman performed 90% of the research and writing for the submissions. The retainer agreement may explain the relationship between the parties but absent evidence to the contrary does not rebut Mr. Brookman's evidence that he performed 90% of the work for the submissions for the hearing, including the introduction of evidence and argument.

[115] In order to merit an award for costs, the Appellants' counsel must have made a substantial contribution to the hearing, provided evidence directly related to the appeal, and provided evidence that may a significant and noteworthy contribution to the goals of the *Water Act*. To some extent, this means that the Appellants would have to provide new evidence or arguments regarding Appellants' counsel's contributions and role in the hearings, to meet those requirements.

[116] The Board acknowledges that the Appellants' counsel provided arguments related to the standard of review, however, as was noted in the Costs Decision, the Appellants' counsel's participation on other aspects of the hearing were limited by Mr. Brookman. Appellants' counsel submissions on the standard of review were of assistance to the Board, but the Approval Holder also provided submissions on this point, which the Board found also found helpful in making its recommendations. The Board notes that while the Appellants' counsel has argued that it also participated in cross-examinations, those cross-examinations were limited. The Appellants have not provided any new or additional evidence outside of the retainer agreement.

VIII. DECISION – STEP 2

[117] The Board acknowledges the retainer agreement between the Appellants and their legal counsel, which appears to entitle the Appellants' counsel to any costs award that may be obtained with respect to the appeal; a costs award if made, would not therefore be a 'windfall' to the Appellants.

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116 Approval Holder's Response Submissions, March 20, page 3.

[118] The Appellants have not provided any new evidence or introduced any new arguments for the Board outside of the retainer agreement which explains the legal relationship between the Appellants and their counsel. While the retainer agreement may explain why legal costs were sought when counsel for the Appellants acted pro bono, this information is insufficient to overcome other deficiencies in the Appellants reconsideration application.

[119] The Board denies the Appellants request to vary the Costs Decision for legal costs.

Dated on October 16, 2020 at Edmonton, Alberta.

Anjum Mullick
Panel Chair

Nick Tywoniuk
Panel Member

Meg Barker
Panel Member