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ALBERTA  
ENVIRONMENTAL APPEALS BOARD

Decision

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Date of Decision – March 3, 2023

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

-and-

**IN THE MATTER OF** an appeal filed by Zaia Abraham and Romy Tittel of the decision by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Protected Areas to issue Enforcement Order No. WA-EO-2018/08-SSR under the *Water Act*.

Cite as: Costs Decision: *Abraham and Tittel v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Protected Areas* (3 March 2023), Appeal No. 18-015-CD (A.E.A.B.), 2023 ABEAB 4.

**BEFORE:**

Ms. Anjum Mullick, Panel Chair, Mr. Dave McGee, Board Member, and Mr. Kurtis Averill, Board Member.

**SUBMISSIONS BY:**

**Appellants:** Mr. Zaia Abraham and Ms. Romy Tittel, represented by Mr. Chris Jones, McLeod Law LLP.

**Director:** Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Environmental Law Section, Alberta Justice.

## EXECUTIVE SUMMARY

Alberta Environment and Protected Areas (EPA) issued an Enforcement Order (the Order) under the *Water Act* to Mr. Zaia Abraham and Ms. Romy Tittel (the Appellants). The Order required the Appellants to stop using the water well (the Well) they drilled on their residential property. The Appellants appealed the Order to the Environmental Appeals Board (the Board). The Board found the Order was properly issued. The Board recommended the Minister confirm the Order except for changing the deadlines for when the Well must be reclaimed and the final report submitted to EPA. The Minister of Environment and Protected Areas issued an order varying the dates as recommended by the Board and confirming the remainder of the Order.

The Appellants applied for costs against the Director, alleging the Director improperly prolonged the hearing by not following appropriate procedure in determining matters related to appurtenance and making arguments that were not necessary.

The Board considered the written submissions from the Appellants and the Director, and determined the Director acted in good faith, did not make an egregious error in decision-making, and conducted himself appropriately as a regulator. As the Board found no special circumstances to warrant a costs award against the Director, the Board dismissed the Appellants' costs application.

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## I. INTRODUCTION

[1] This is the costs decision of the Environmental Appeals Board (the “Board”) regarding an appeal filed by Mr. Zaia Abraham and Ms. Romy Tittel (collectively, the “Appellants”) of Enforcement Order No. WA-EO-2018/08-SSR (the “Order”) issued under the *Water Act*, R.S.A. 2000, c. W-3. The Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Protected Areas (the “Director”), issued the Order on October 31, 2018. The Order required the Appellants to stop using the water well (the “Well”) they drilled on their residential property.<sup>1</sup> After holding an oral hearing with written submissions on October 10, 2019 and January 27, 2021, the Board recommended the Minister, Environment and Protected Areas (the “Minister”) confirm the Order except for changing the deadlines for when the Well must be reclaimed and the final report submitted to Environment and Protected Areas (“EPA”)<sup>2</sup>. The Minister issued a Ministerial Order<sup>3</sup> confirming the Order and making the changes as recommended by the Board. After receiving the Ministerial Order, the Appellants applied to the Board for costs against the Director.

## II. BACKGROUND

[2] In 1996, the Appellants purchased a residential property in NE 2-24-3-W5M, in the Elbow River Estates subdivision on the east side of the City of Calgary. The property was subject to a restrictive covenant, which required the Appellants to become members of the Elbow River Estates Co-operative (the “the Co-op”). The Co-op’s purpose was to provide municipal water to homes in the subdivision.

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<sup>1</sup> The Order required the Appellants to:

1. immediately cease diverting water from the Well;
2. render the Well ineffective by removing the pump and installing a locking well cap; and
3. reclaim (fill in) the Well so that it can no longer be used.

<sup>2</sup> *Abraham and Tittel v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (16 May 2022), Appeal No. 18-015-R (A.E.A.B.), 2022 ABEAB 16, at paragraphs 48 and 49.

<sup>3</sup> Ministerial Order 31/2022.

[3] In March 2016, the Appellants had the Well drilled on their property to construct a geothermal heating system for the Appellants' home. On March 16, 2016, the Co-op complained to EPA about the Well.

[4] The Appellants were members of the Co-op from 1996 until they withdrew their membership effective June 15, 2016, over a series of disputes between the Appellants and the Co-op. On June 15, 2016, the Co-op disconnected the municipal water supply from the Appellants' property.

[5] In November 2016, the Appellants began using the Well to supply their household water needs.

[6] The Director issued the Order on October 31, 2018. On November 7, 2019, the Appellants filed a Notice of Appeal with the Board appealing the Order.

[7] The Board held a two-part hearing with the Appellants, the Director, and the Co-op (collectively, the "Parties"). The first part of the hearing was held on October 10, 2019. The Board adjourned the hearing to allow the Director to locate and review documents necessary to respond to the Board's questions regarding the appurtenance of the Co-op's water licences.

[8] Although the Board intended to hold the second part of the hearing in early 2020, the COVID-19 pandemic prevented an in-person hearing. The Parties indicated they preferred to wait until an in-person hearing could be reconvened. By the end of 2020, it became apparent an in-person hearing was not foreseeable in the near future. The Board held the continuation of the hearing by videoconference on January 27, 2021. At the hearing, the Appellants reserved their right to apply for costs.

[9] The Board provided to the Minister with its Report and Recommendations on May 18, 2022. The Board recommended the Minister:

1. vary the dates in section 4 and section 6 of the Order regarding the dates by which the Well must be reclaimed and a report filed with the Director; and
2. confirm the remainder of the Order.

[10] On June 13, 2022, the Minister issued Ministerial Order 31/2022, which varied the

dates in the Order as recommended by the Board, and confirmed the remaining parts of the Order.

[11] On June 15, 2022, the Board provided the Parties with the Board's Report and Recommendations and the Minister's Order for the appeal. The Board also set dates for the Appellants to provide a costs application, responses from the Director and the Co-op, and provided information on applying for costs and the considerations the Board may take into account when making a decision on a costs application.

[12] The Appellants filed their application for costs on July 11, 2022, and the Director provided a response on July 26, 2022. The Co-op did not respond to the Appellants' application.

### **III. SUBMISSIONS**

#### **A. Appellants**

[13] The Appellants sought a costs award of \$18,298.50 against the Director, which was for legal costs. The Appellants submitted their situation was an appropriate case for an award of costs for the following reasons:

- (a) The issue on appeal was novel and the Board had not previously considered a similar issue. The Appellants stated:

“This particular appeal required the Board to determine the extent to which the right contained in section 21 of the *Water Act* for Albertans to commence and continue the diversion of groundwater for household purposes was displaced by the potential to receive water under a license issued to a group of which the Appellants had ceased to be members.”<sup>4</sup>
- (b) The Appellants were of assistance to the Board in determining the issues raised in the Notice of Appeal, substantially contributed to the hearing, and made a significant and noteworthy contribution to the purpose and goals of the *Water Act*.
- (c) The costs requested were reasonable and reflected only the actual expenditures incurred in preparing and presenting their submissions to the Board.
- (d) The Appellants complied with all the deadlines and directions from the

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<sup>4</sup> Appellants' Costs Application, July 11, 2022, at page 3.

Board.

- (e) The Appellants acted in good faith throughout the appeal.

[14] The Appellants noted the Board had previously recognized that a costs award against the Director requires special or exceptional circumstances, such as where the Director acted in bad faith, made an egregious error in decision-making, or the conduct of the Director warrants a costs award. The Appellants emphasized that they were not alleging the Director acted in bad faith or committed an egregious error in decision-making. However, the Appellants stated the Director's conduct warranted a costs award.

[15] The Appellants submitted that at the October 10, 2019 hearing, the Director acknowledged he had not followed appropriate procedure in preparing an opinion on whether the Appellants' lands were appurtenant to the water licence issued to the Co-op. The Director missed the December 2, 2019 deadline set by the Board to provide the appurtenance opinion, and did not provide the opinion until January 17, 2020. The Appellants argued that the Director's failure to address the appurtenance issue resulted in a delay in the appeal process. The Appellants stated the "... the delay resulted in the Appellants incurring additional legal fees relating to the preparation for, and hearing of, a second hearing date that could have been avoided had the Director followed the appropriate procedure."<sup>5</sup>

[16] The Appellants argued the appeal was "... unnecessarily prolonged by the Director advancing argument that the Board was not the appropriate forum and that the Appellants should have pursued an alternative complaint mechanism."<sup>6</sup> The Appellants noted the Board rejected this argument in its Report and Recommendations. The Appellants stated they incurred unnecessary legal fees and responding to the Director's argument.

[17] The Appellants referred to the Board's decision in *Cherokee Canada Inc. et al. v. Director*,<sup>7</sup> where the Board made a costs decision that allowed for legal costs at a higher rate than

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<sup>5</sup> Appellants' Costs Application, July 11, 2022, at page 5.

<sup>6</sup> Appellants' Costs Application, July 11, 2022, at page 5.

<sup>7</sup> 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-



the rate typically paid by the Government of Alberta (the “Tariff”). The Appellants submitted that the appeal was of moderate complexity and an hourly rate of \$172.50 was appropriate.

**B. Director**

[18] The Director submitted the Appellants should bear their own costs and it was not appropriate for costs to be awarded against the Director. The Director noted that the Board and the Courts have held that costs should not be awarded against the Director where the Director acts in good faith in fulfilling their statutory responsibilities.

[19] The Director submitted the Appellants did not satisfy the criteria in section 20(2) of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the “*Regulation*”),<sup>8</sup> for the awarding of costs. The Director stated the Appellants:

- (a) behaved as all parties to an appeal are expected to in meeting deadlines and following the Board’s directions;
- (b) did not provide any evidence of unreasonable financial burden or a need for financial assistance due to their participation in the appeal;
- (c) did not provide expert evidence or witnesses at the hearing to justify their argument that they made a substantial contribution to the hearing that was of assistance to the Board;
- (d) were unsuccessful in their arguments that the Order was not properly issued as the only variation recommended by the Board were to deadlines that were redundant due to the passage of time;

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056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 50.

<sup>8</sup> Section 20(2) of the *Environmental Appeal Board Regulation* states:

- (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.

- (e) served only their own interests and not the public interest, and did not further the goals of the *Water Act*, or assist in the interpretation of section 21 of the *Water Act* and section 8 of the *Water (Ministerial) Regulation*; and
- (f) had their arguments that they were entitled to receive water from a community supplier rejected by the Board.

[20] The Director submitted he was “entirely successful and made no errors”<sup>9</sup> in the appeal. The Director disputed the Appellants’ claim that he delayed the hearing unnecessarily when providing his written opinion regarding the appurtenance of the water licences to the Appellants’ lands. The Director stated that the 13 months between the first and second day of the hearing was out of his control and was due to the COVID-19 pandemic and the availability of the Parties to reconvene the hearing.

[21] The Director maintained that the Appellants had dispute resolution remedies available to them under the *Rural Utilities Act*, R.S.A. 2000, c. R-21, which if used would have removed any need for the Director to issue the Order.

[22] The Director submitted the adversarial relationship between the Appellants and the Co-op led to the issuance of the Order. The Director alleged that some of the costs claimed for legal fees were related to the Appellants’ civil trial action involving the Co-op and not to the appeal before the Board.

[23] The Director requested the Board deny the Appellants’ costs application.

#### **IV. ANALYSIS**

##### **A. Legislation and Caselaw**

[24] The Board’s legislative authority to award costs arises from section 96 of EPEA:

“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.”

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<sup>9</sup> Director’s Response Submission, July 25, 2022, at paragraph 51.

[25] In *Cabre Exploration Ltd. v. Alberta (Environmental Appeals Board)*,<sup>10</sup> the Court found section 96 granted the Board wide discretion to award costs:

“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>11</sup>

[26] The *Regulation* is instructive on when final costs are appropriate:

“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.

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<sup>10</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293.

<sup>11</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293, at paragraph 23.

...

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

[27] The Board also considers section 2 of the *Water Act*, which outlines the purposes of the legislation.<sup>12</sup>

[28] The Board reviews each costs application to determine if it meets the criteria set in the legislation. The Board also considers the following from a previous appeal, Costs Decision re: *Cabre Exploration Ltd.* (“*Cabre*”):

“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>13</sup>

[29] As noted earlier, section 18(2) of the *Regulation* requires that costs awards must

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<sup>12</sup> Section 2 of the *Water Act* states:

“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.”

<sup>13</sup> Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

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.”

[30] Costs awards in civil litigation is different from costs in quasi-judicial tribunals such as the Board. The “loser-pays” principle of civil litigation does not bind the Board. The Board must consider the public interest generally and the purposes identified in section 2 of the *Water Act* when it determines whether it is appropriate to award costs in an appeal.

**B. Costs against the Director**

[31] Section 157 of the *Water Act* protects the Director from costs awards provided the Director acted in good faith and within the Director’s statutory authority:

“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 or a Government agency,
- (b) an inspector, investigator or Director,
- (c) a person authorized in writing by the Director under section 95 or 119 or a person authorized by a Director or investigator under section 128,
- (d) a person to whom a delegation of a power, duty or function under this Act has been made by the Minister under section 9 of the *Government Organization Act*, or
- (e) a member of the Environmental Appeals Board,

for anything done or not done by that inspector, investigator, Director, person or member in good faith while carrying out that inspector’s, investigator’s, Director’s, person’s or member’s duties or exercising powers under this Act including, without limitation, any failure to do something when that inspector, investigator, Director, person or member has discretionary authority to do something but does not do it.”

[32] Special or exceptional circumstances are required for any costs award against the Director. The Board stated in *Cabre*:

“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>14</sup>

The Court confirmed the Board’s approach, stating that EPA employees are protected “... from claims for damages for all acts done in good faith in carrying out their statutory duties.”<sup>15</sup>

[33] The Board has identified three special or extraordinary circumstances where the Board would consider awarding costs against the Director:

- (a) the Director acted in bad faith, meaning the Director acted in “dishonesty of belief, purpose, or motive.”<sup>16</sup> ;
- (b) the Director made an egregious error in decision-making which was a “marked departure from normal behaviour”;<sup>17</sup> and
- (c) the Director’s conduct was on the same level as the director in *Cherokee*, where the Board found that director, “acted with hubris, without balance, and that he did not consider the broader consequences of his approach,” did not comply with the Board’s requests to provide the Director’s Record, and acted outside of his statutory jurisdiction.<sup>18</sup>

[34] The Appellants have the onus to provide evidence of special or extraordinary circumstances that would warrant costs against the Director. The Appellants specifically stated in their costs application that they were not alleging the Director acted in bad faith or made an egregious error in his decision-making, but alleged the Director’s conduct was sufficiently inappropriate as to warrant a costs award against him.

[35] The Appellants submitted the Director’s conduct was inappropriate in two instances:

1. The Director did not follow appropriate procedure in preparing an opinion on whether the Appellants’ lands were appurtenant to the water licence issued to the Co-op; and

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<sup>14</sup> Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 18.

<sup>15</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)*, 2001 ABQB 293, at paragraph 33.

<sup>16</sup> “Bad faith,” *Black’s Law Dictionary* (11<sup>th</sup> ed. 2019).

<sup>17</sup> “Egregious,” *Black’s Law Dictionary* (11<sup>th</sup> ed. 2019).

<sup>18</sup> 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 (AEAB), 2020 ABEAB 10.

2. The Director's argument that the Board was not the proper forum for the Appellants' matter and the Appellants should have pursued an alternative complaint process.

The Appellants argued the Director's conduct in these two circumstances unnecessarily prolonged the appeal, causing the Appellants to incur additional legal costs.

[36] One of the benefits of a *de novo* hearing is that a party may raise questions and concerns in a hearing and have them addressed. In the hearing of this appeal, the Board had several questions for the Director regarding the appurtenance of the water licences issued to the Co-op. The Board felt the question was significant, and adjourned the hearing so the Director could locate and review historical documents and answer the Board's questions. The Board intended to reconvene the hearing in early 2020, however, it was not possible to hold an in-person hearing due to the COVID-19 pandemic. The Board offered the Parties the option of proceeding by videoconference, but the Parties refused and chose to wait in the hopes that an in-person hearing would become feasible. As it became clear that the pandemic was not short-lived, the Board scheduled the second part of the hearing for January 27, 2021.

[37] The Director did not cause the delay in reconvening the hearing. To the extent that the Director erred in not having the information the Board sought, the hearing cured the "error". The Director provided the information requested by the Board and the Appellants had the opportunity to examine the Director on the evidence. The Board finds no evidence to support a claim that the Director did not follow procedure at the hearing and cause the Appellants to incur additional legal costs.

[38] The Appellants submitted the Director prolonged the hearing of the appeal by arguing that, "... the Board was not the appropriate forum and that the Appellants should have pursued an alternative complaint mechanism." In an adversarial hearing process, the Board is not going to agree or accept every argument the parties raise. Excessively frivolous and vexatious arguments may be a contributory factor in a costs award; however, the Board finds the Director's argument regarding the proper forum was not frivolous or vexatious. The Director did not deny that the Appellants had a right to appeal the Order, but rather noted the Board was not the proper forum to address the acrimonious relationship between the Appellants and the Co-op.

[39] While the Board agrees its hearing process is not typically the appropriate venue for the airing of multiple personal grievances, it disagrees the appeal should be dismissed because there was “an alternate forum to address the serious issues between the Appellants and the Co-op.”<sup>19</sup> The Board considered the arguments on this matter from the Parties and denied the Director’s request, stating:

“The Board is of the view the dispute between the Appellants and the Co-op and the complaint mechanism that may be available to them is irrelevant to the issues in this appeal.

The Appellants, as recipients of the Order, had a right to appeal the Order, and the issue before the Board is the proper interpretation of the *Water Act* and the Regulation.”<sup>20</sup>

The Board did not agree with the Director’s argument, but it was not frivolous or vexatious, nor was it inappropriate. The Director did not prolong the hearing by making this argument in the written submissions.

[40] The Board finds the Director acted in good faith, did not make any egregious errors in decision-making, and his conduct was professional and within his statutory jurisdiction. The Director’s conduct did not approach that of the director in *Cherokee*. The Board finds no special or extraordinary circumstances that would warrant a costs award against the Director.

[41] As the Appellants are seeking costs against the Director and not against the Co-op, it is not necessary to review costs criteria that is unrelated to the Director’s conduct.

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<sup>19</sup> Director’s Response Submission, September 30, 2019, at paragraph 131.

<sup>20</sup> *Abraham and Tittel v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (16 May 2022), Appeal No. 18-015-R (A.E.A.B.), 2022 ABEAB 16, at paragraphs 48 and 49.



**V. DECISION**

[42] The Board has determined that awarding costs against the Director is not appropriate in this appeal and, therefore, dismisses the Appellants' application for costs.

Dated on March 3, 2023, at Edmonton, Alberta.

"original signed by"  
Anjum Mullick  
Board Member and Panel Chair

"original signed by"  
Dave McGee  
Board Member

"original signed by"  
Kurtis Averill  
Board Member