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ALBERTA  
ENVIRONMENTAL APPEALS BOARD  
  
Decision

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Date of Decision – December 4, 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** appeals filed by Delbert Edey and Helen Edey, James Howie and Lillian Howie, and Rod Macklin and Nicole Macklin, with respect to the decision of the Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Protected Areas, to issue *Water Act* Approval No. 0041973-00-00 to the Town of High River.

Cite as: Costs Decision: *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Protected Areas*, re: *Town of High River* (4 December 2023), Appeal Nos. 19-089 & 19-093-094-CD (A.E.A.B.), 2023 ABEAB 17.

**BEFORE:**

Ms. Anjum Mullick, Panel Chair; Ms. Barbara Johnston, Board Member, and Mr. Dave McGee, Board Member.

**SUBMISSIONS BY:**

**Appellants:**

Mr. Delbert Edey, Ms. Helen Edey, Mr. James Howie, Mr. Rod Macklin, and Ms. Nicole Macklin, represented by Mr. Gavin Fitch, K.C., McLennan Ross LLP.

**Approval Holder:**

Town of High River, represented by Ms. Meaghan Conroy, MLT Aikins LLP.

**Director:**

Mr. Andun Jevne, Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Protected Areas, represented by Ms. Jodie Hierlmeier and Ms. Jade Vo, Alberta Justice.

**Intervenors:**

Mr. Peter Macklin and Ms. Sheila Macklin, represented by Mr. Gavin Fitch, K.C., McLennan Ross LLP.

## EXECUTIVE SUMMARY

Alberta Environment and Parks, now Alberta Environment and Protected Areas (EPA) issued an approval (the Approval) under the *Water Act* to the Town of High River, which authorized the construction of a berm and swale approximately 2.6 kilometres long within the floodplain of the Highwood River. The Approval resulted in the permanent alteration of flow, direction of flow, and water levels of the Highwood River.

Mr. Delbert Edey and Ms. Helen Edey, Mr. James Howie and Ms. Lillian Howie, and Mr. Rod Macklin and Ms. Nicole Macklin (the Appellants), filed Notices of Appeal with the Environmental Appeals Board (the Board) of EPA's decision to issue the Approval. The Board allowed Mr. Peter Macklin and Ms. Sheila Macklin (the Intervenors) to intervene in the hearing.

An oral hearing was held by video conference on January 12 and 13, 2021. The Board recommended the Minister vary the Approval. The Minister accepted the Board's recommendations and issued Ministerial Order 52/2022 on August 11, 2022, incorporating the recommendations into the Approval.

At the hearing the Appellants and the Intervenors reserved their right to submit costs applications. On September 6, 2022, the Board received a costs application from Mr. Delbert Edey and Ms. Helen Edey, Mr. James Howie, Mr. Rod Macklin and Ms. Nicole Macklin, and Mr. Peter Macklin and Ms. Sheila Macklin (collectively the Applicants) for legal costs of \$88,202.90 and consultant costs of \$16,890.25.

The Board reviewed the submissions from the parties and assessed the costs application against the criteria used by the Board to determine if costs should be awarded. The Board considered the extent to which the Applicants' legal counsel and expert consultant helped the Applicants present their case and their contribution at the hearing.

The Board awarded the Applicants \$17,275.78 in legal costs and \$2,622.38 in consulting costs for a total of \$19,898.16. The Board ordered the Town of High River to pay the Applicants for their final costs.

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## I. BACKGROUND

[1] On January 28, 2020, the Director South Saskatchewan Region Regulatory Assurance Division, Alberta Environment and Protected Areas (the “Director”) issued Approval No. 00419723-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c W-3 (the “*Water Act*”), to the Town of High River (the “Town” or “Approval Holder”). Notices of Appeal were filed by Mr. Delbert Edey and Ms. Helen Edey, Mr. James Howie and Ms. Lillian Howie, and Mr. Rod Macklin and Ms. Nicole Macklin (the “Appellants”). The Board also allowed Mr. Peter Macklin and Ms. Shelia Macklin to intervene in the hearing (the “Intervenors”).

[2] The hearing was held by video conference on January 12 and 13, 2021. The issues heard by the Board were:

1. the accuracy and reliability of the technical and scientific studies that informed the Director’s decision to issue the Approval, including but not limited to, any modelling that was undertaken;
2. the appropriateness of constructing a dike in a floodway or flood plain as authorized by the Approval under appeal before the Board; and
3. are the terms and conditions of the Approval appropriate having regard to the potential environmental impacts of the Approval on each of the Appellants (ie. property, business, safety)?

[3] On June 14, 2022, the Board provided its Report and Recommendations and the Ministerial Order (the “Report”) to the Appellants, Director, Approval Holder, and Intervenors.<sup>1</sup> The Minister of Environment and Protected Areas varied the Approval based on the Board’s recommendations.

[4] On August 15, 2022, the Board scheduled the submission process for the Appellants’ and Intervenors’ costs application and response submissions from the Town and the Director.

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<sup>1</sup> *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25.

[5] On September 6, 2022, the Board received a costs application from Mr. Delbert Edey and Ms. Helen Edey, Mr. James Howie, and Mr. Rod Macklin and Ms. Nicole Macklin and the Intervenors (collectively the “Applicants”).

[6] On September 14, 2022, the Director wrote to the Board stating that the Director makes no submission on the Applicants’ costs application as they have not claimed any costs against the Director. On September 20, 2022, the Board received the Town’s response submissions.

## **II. CLAIM FOR COSTS**

[7] The Applicants requested final costs for their preparation and participation in the appeal. The Applicants applied for an award of legal costs of \$88,202.90 and consultant costs of \$16,890.25.

## **III. DECISION**

[8] For the reasons which follow, pursuant to section 96 of the *Environmental Protection and Enhancement Act*, R.S.A 2000, c. E-12 (“EPEA”), the Board awards costs to the Applicants in the amounts of \$17,275.78 for legal costs and \$2,622.38 for consultant costs for a total award of final costs of \$19,898.16.

[9] The Board orders the Town to pay the costs awarded by the Board to counsel for the Applicants, in trust, within 60 days from the date of this decision.

## **IV. LEGAL BASIS FOR COSTS**

### **A. Legislation**

[10] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA, which provides, “The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to

whom any costs are to be paid.” This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen’s Bench in *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board) (2000)* (“*Cabre*”):

“Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs ‘of and incidental to any proceedings before it...’. The legislation gives the Board broad discretion in deciding whether and how to award costs.”<sup>2</sup>

Further, Mr. Justice Fraser also stated:

“I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board ‘*may* award costs ... and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid...’”<sup>3</sup> (Emphasis in the original.)

[11] Sections 18, 19 and 20 of the *Environmental Appeal Board Regulation*, A.R. 114/93 (the “Regulation”) more specifically govern the award of costs. Section 18 provides:

“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.”

It should be noted that the elements set forth in section 18(2) of the Regulation are also set out in section 20(2) of the Regulation and are not discretionary but a precondition to the Board’s authority to award costs.<sup>4</sup>

[12] Section 19 of the Regulation applies to interim costs and as the Applicants are requesting final costs, it need not be considered here.

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<sup>2</sup> *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board) (2000)*, 33 Admin. L.R. (3d) 140, at paragraph 23 (Alta. Q.B.).

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

<sup>4</sup> *New Dale Hutterian Brethren (2001)*, 36 C.E.L.R. (N.S.) 33, at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).



[13] Section 20 of the Regulation provides for matters to be considered by the Board when awarding final costs. Section 20 states:

“20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

- (a) whether there was a meeting under section 11 or 13(a);
- (b) whether interim costs were awarded;
- (c) whether an oral hearing was held in the course of the appeal;
- (d) whether the application for costs was filed with the appropriate information;
- (e) whether the party applying for costs required financial resources to make an adequate submission;
- (f) whether the submission of the party made a substantial contribution to the appeal;
- (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party's submission;
- (h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

- (a) any other party to the appeal that the Board may direct;
- (b) the Board.

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

[14] The Board has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.<sup>5</sup> The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.<sup>6</sup> In *Cabre*, Mr. Justice Fraser noted that section "...20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs..." and concluded, "...the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."<sup>7</sup>

[15] When the Board is exercising its authority to award costs, the Board evaluates each costs application against the criteria in EPEA and the Regulation and the following criteria:

"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>8</sup>

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<sup>5</sup> *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.*) (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.).

<sup>6</sup> *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

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

<sup>8</sup> *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.), at paragraph 9. See also *Costs Decision: Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (4 February 2022), Appeal Nos. 17-069-070 and 18-013-CD (A.E.A.B.), 2022 ABEAB 6.

[16] Finally, when applying these criteria to the specific facts of this appeal, the Board must also remain cognizant of the purposes of the *Water Act*, stated in section 2.<sup>9</sup>

**B. Tribunals vs. Courts**

[17] In applying the costs provisions referred to above, it is important to remember there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is a factor in all proceedings before the Board, it must be taken into consideration when the Board makes its final decision or recommendations. The Board's role is not simply to determine a dispute between parties. Therefore, the Board is not bound to apply the "loser-pays" principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the purposes identified in section 2 of the *Water Act*.

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

"The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a

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<sup>9</sup> Section 2 of the *Water Act* provides:

"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."

successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.”<sup>10</sup>

[19] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it. This jurisdiction was recognized by the Court in *Mizera*:

“Section 88 (now section 96) of the Act and section 20 of the Regulation give the Board the ability to award costs in a variety of situations that may exceed the common law restrictions imposed by the courts. Since hearings before the Board do not produce judicial winners and losers, the Board is not bound by the general principle that the loser pays, as outlined in *Reese*. [*Reese v. Alberta (Ministry of Forestry, Lands and Wildlife)* (1992) Alta. L.R. (3d) 40, [1993] W.W.R. 450 (Alta. Q.B.).] The Board stresses that deciding who won is far less important than assessing and balancing the contributions of the Parties so the evidence and arguments presented to the Board are not skewed and are as complete as possible. The Board prefers articulate, succinct presentations from expert and lay

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<sup>10</sup> *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to express the fundamental differences between administrative agencies and courts:

“Nowhere, however, is the difference more fundamental than in relation to the public interest. To serve the public interest is the sole goal of nearly every agency in the country. The public interest, at best, is incidental in a court where a court finds for a winner and against a loser. In that sense, the court is an arbitrator, an adjudicator. Administrative agencies for the most part do not find winners or losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it.”

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

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

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

spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”<sup>11</sup>

[20] The Board has generally accepted the starting point in a costs determination is that costs incurred in an appeal are the responsibility of the individual parties.<sup>12</sup> There is an obligation for members of the public to accept some responsibility of bringing environmental issues to the forefront. Part of this obligation is for the party to pay their own way in an appeal.

[21] As discussed, the Board is not bound to apply the Court’s ‘loser-pay’ principle used in civil litigation. However, like the Courts, in determining an award of legal costs the Board does apply an independent objective standard. As stated by the Board in *Cherokee*:

“Both the Board and the Courts have traditionally used an objective standard for awarding legal costs. For example, when a party is successful in Court and is awarded costs, the award of costs is based on a schedule of costs provided for in the Rules of Court. [(See Alberta Rules of Court, Alta. Reg. 124/2010, Schedule C.)] The Tariff in the Rules of Court provides for five different levels of costs depending on the complexity of the case, with the complexity of the case influenced by the value of the claim.”<sup>13</sup>

Further, the Board stated:

“Using an objective, independent standard to determine costs results in a level playing field for all participants. It avoids the Board having to compare rates from larger versus smaller firms or legal counsel with differing levels of experience at environmental matters. It also ensures that all costs awards between appeals are based on the same principles”.<sup>14</sup>

[22] If the Board finds an award of legal costs is appropriate, the Board uses the total hearing hours as the basis for its determination. Total hearing hours are objective and easily

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<sup>11</sup> *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) (“*Mizera*”). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C, at paragraph 9 (A.E.A.B.).

<sup>12</sup> *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

<sup>13</sup> Costs Decision: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, re Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeals Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 48.

<sup>14</sup> Costs Decision: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, re Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeals Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 51.

verifiable. To the total hearing hours, the Board then adds the amount of preparation time that is warranted. To ensure that awards of costs are based on the same principles between appeals and depending on the complexity of the case, the Board determines the amount of preparation time by applying a multiplier of 1X, 2X, 3X or 4X (representing hours of preparation time for each hour of hearing time) to the total hearing hours. It is the Board's practice that the preparation time covers work done by others that support the counsel that appeared at the hearing and includes disbursements.

[23] The final step in its determination of an award of legal costs is for the Board to determine an applicable hourly rate that is applied to the total hearing hours and preparation time. The Board has determined that the hourly rate for an award of legal costs is based on the Alberta Justice tariff rate for legal fees as it is an independent, objective standard. It is the standard practice of the Board to adjust the applicable Alberta Justice tariff rate downward to 50% of the applicable Alberta Justice tariff rate to reflect the principle that costs are considered the responsibility of the individual parties and there is an obligation on the public to accept some responsibility of bringing environmental issues to the forefront. However, the Board may also further adjust the hourly rate up or down based on the extent to which the legal arguments and submissions provided by the party assisted the Board.<sup>15</sup>

[24] It is the Board's practice to apply this same framework to the determination of consulting fees.<sup>16</sup>

## **V. SUBMISSIONS AND ANALYSIS**

### **A. The Applicants**

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<sup>15</sup> Costs Decision: *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (4 February 2022), Appeal Nos. 17-069-070 and 18-013-CD (A.E.A.B.). 2022 ABEAB 6, at paragraph 40.

<sup>16</sup> Costs Decision: *Cherokee Canada Inc. et al. v. Director, Regional Compliance, re Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks* (18 March 2020), Appeals Nos. 16-055-056, 17-073-084, and 18-005-010-CD (A.E.A.B.), 2020 ABEAB 10, at paragraph 63.

[25] The Applicants applied for costs of \$88,202.90 for legal fees, and consultant costs of \$16,890.25. The Applicants submitted these costs were directly and primarily related to the matters contained in the Notices of Appeal and the preparation and presentation of the Applicants' submission. The Applicants stated these costs were reasonable having regard to all the circumstances and the contribution made.

[26] The Applicants stated they presented evidence and provided submissions and argument that greatly assisted the Board in developing its recommendations to the Minister. They said that the substantial contribution made by the Applicants to the hearing was reflected in the recommendations made by the Board and accepted by the Minister. Specifically, the Applicants noted that the Board recommended the Approval be varied by making the Applicants' lands appurtenant to the Approval and that the Board recommended the Approval be varied by requiring the Town to obtain their written consent, having regard to the impact of the project on their land.

[27] The Applicants also stated it is an important principle that the citizens of Alberta share in the responsibility to protect the environment and, therefore, there is a responsibility on every Albertan to bring environmental issues forward. However, it is also important to recognize that it is prohibitively difficult and expensive for individual citizens to effectively bring forth environmental concerns without legal and technical experts to assist.

1. Legal Costs

[28] The Applicants submitted that the legal costs claimed of \$88,202.90 pertain to the period February 5, 2020, to May 21, 2021.

[29] The Applicants requested the Board not use the Alberta Justice tariff rate as a starting point to assess legal costs as it is less than the hourly rate charged in 2020 by their legal counsel. It is also submitted that their legal counsel charged the Applicants a discounted rate of \$450.00 per hour and that the Alberta Justice tariff hourly rate is extremely outdated.

[30] The Applicants submitted that they had much more at stake in this appeal than the average Albertan, so it would not be appropriate to apply the Board's practice of reducing legal

fees by 50% to account for the fact that parties are responsible for their own costs. However, if the Board does not agree, they further submitted that the ensuing adjustment should be upwards to reflect that contribution made by the Applicants.

[31] The Applicants also submitted:

1. their participation in the hearing clearly assisted the Board in determining its recommendations and made a substantial contribution to the hearing;
2. they acted efficiently and in good faith in the proceeding including meeting deadlines set by the Board, being transparent and helpful in the course of the hearing and seeking to arrive at a reasonable and workable solution going forward;
3. given the legal costs were incurred over 15 months that the total quantum of legal costs was very reasonable; and
4. the amount of legal costs claimed is appropriate or, in the alternative, the award should be at the high end of what the Board has historically allowed.

2. Consulting Costs

[32] The Applicants requested an award of \$16,890.25 for the costs of their consultant, Dr. Michael Bender, Senior Water Resources Engineer with Millennium EMS Solutions Ltd. (“Millennium”).

[33] The Applicants stated the Millennium report and Dr. Bender’s evidence at the hearing was clear, concise, and focused on the relevant issues before the Board. The Applicants cited the Board’s Report, which recognized Dr. Bender’s evidence that the primary or fundamental flaw in the design of the SW Dike is that it relies on uncontrolled overland water flow towards the Applicants’ properties.<sup>17</sup>

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<sup>17</sup> See *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25, at paragraph 365:

“The Board heard evidence from Dr. Bender the primary flaw in the design of the SW Dike is the redirection of a significant amount of overland flow towards the Appellants and others’ properties downstream in an uncontrolled manner, without a proper hydraulic connection to the Little Bow River.”



[34] The Applicants submitted Dr. Bender's evidence was concise, relevant, applicable, and formed the basis for several of the Board's recommendations. They further submitted that this case is analogous to *Sears Canada et al. v. Director, Southern Region Operations Division, Alberta Environment and Parks*,<sup>18</sup> and *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region Operations Division, Alberta Environment and Water*,<sup>19</sup> where 100%, or essentially 100%, of consulting costs were awarded.

**B. Town of High River**

[35] The Town submitted that the Applicants were not entitled to any costs as the recommendations made by the Board and accepted by the Minister regarding changes to the Approval were not a result of any material contribution by the Applicants. The Town noted that no written submissions were provided by the Applicants on expanding the lands appurtenant to the Approval and only minimal oral evidence was provided on this point at hearing.

[36] The Town stated the Board should follow its usual practice of awarding no costs and deny the claim for costs in full.

[37] The Town submitted that the Board has consistently confirmed that parties in appeals should not expect to receive costs as there is an obligation of each member of the public to accept some responsibility for bringing environmental issues to the forefront. The Town further asserted that this obligation included the presumption that a party will be required to pay their own way in an appeal. The Town argued that this cost claim is no exception.

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and at paragraph 368:

“The Board heard from the Appellants' expert, who raised the fundamental flaw with the SW Dike is that it relies on uncontrolled overland drainage between the end of the SW Dike and the Little Bow River.”

<sup>18</sup> Costs Decision: *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (4 February 2022), Appeal Nos. 17-069-070 and 18-013-CD (A.E.A.B.), 2022 ABEAB 6.

<sup>19</sup> Costs Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd. v. Director, Southern Region Operations Division, Alberta Environment and Water* (11 July 2012), Appeal Nos. 10-0345, 11-002, 008, & 023-CD (A.E.A.B.).

[38] The Town stated that the Applicants should bear their own costs because the Applicants:

1. contributed no more than what could be expected by those advocating for their own private interest; and
2. did not raise significant issues in the public interest.

1. Legal Costs

[39] The Town submitted the Applicants are not entitled to legal costs of \$88,202.90. In the alternative, the Town stated any award for legal costs should be limited to a maximum of \$5,575.00.

[40] The Town claimed the Applicants' submissions were of minimal help to the Board because:

1. the Applicants did not provide the Board with material or substantial assistance in developing its recommendations to the Minister; and
2. the Town succeeded on two of the three issues before the Board.

[41] The Town submitted it should not bear the cost of the appurtenance issue for the following reasons:

1. there was minimal time spent at the hearing on the discussion of the issue of appurtenance and the portion of the third issue relating to appurtenance was minor and was raised by a Board member not the Applicants;
2. the legal costs claimed by the Applicants does not relate to the preparation or presentation of written or oral submissions on this issue that they were partially successful on; and
3. the Town sought direction from the Director about which lands were considered appurtenant to the Dike and followed the Director's guidance in this regard and should not be penalized for doing so.

[42] The Town stated the Town's and Director's submissions provided greater assistance to the Board than the Applicants' submission. The Applicants spent significant time discussing their personal experiences in the 2013 flood and arguing that the Town's models were insufficient and that construction of the SW Dike in a floodplain was contrary to Alberta

Environment and Protected Areas (“EPA”) policy and not prudent. The Town noted the Board determined that the Town’s models were comprehensive, accurate and reliable, it was appropriate for the SW Dike to be built in a flood plain, the terms and conditions of the Approval were appropriate in principle, and the evidence provided in the modelling by the Town was held to be accurate and was relied on by the Board to determine the likely path of the overland flow of water. The Town also noted the Board did not include in its conditions an engineered breach and filling in of the swale as requested by the Applicants.

[43] The Town submitted its contributions to the hearing were materially helpful to the Board in coming to the bulk of its conclusions in the Report, its arguments and evidence were clear, concise, and relevant to the issues, and its submissions assisted the Board in finding that the terms and conditions of the Approval were appropriate in principle.

[44] The Town stated the Applicants’ legal costs are unreasonable because:

1. the legal costs lacked credibility as they are not directly and primarily related to the matters contained in the Notice of Appeal and the preparation and presentation of the parties’ submissions;
2. the legal costs identified as preparation of written and oral submissions in the invoices totaled 61.2 hours (of 178.5 total hours). The remaining 117.3 hours did not provide enough detail to discern whether they are primarily related to the preparation and presentation of the parties’ submissions; and
3. there was a significant delay in the closing of the hearing by the Board and delivery of the Report to the Minister, and the Town should not have to bear the Applicants’ additional costs claimed because of the delay.

[45] The Town submitted that if the Board decides to award legal costs:

1. it should be at the Alberta Justice Tariff Rate of \$250.00 per hour as the tariff being “outdated” is not a compelling reason to change its practice;
2. the Board should not deviate from its standard practice of not awarding costs for disbursements and fees charged by others conducting work on the file as there is no compelling reason to do so;
3. the award should be subject to the 50% presumptive reduction, as the assertion that the Applicants have more at stake than an average Albertan conflates the criteria for standing in an appeal and an entitlement to costs;

4. the award should be subject to a further 75% reduction as the Applicants provided no material assistance on two of the three issues at the hearing and only minimal assistance on the third issue; and
5. the Applicants did not provide any evidence that they required financial resources to participate at the hearing, or that they tried to access funding from other means.

[46] The Town stated the maximum legal cost amount that would be awarded is \$5,575.00 as set out in Schedule C to the Town's submission.

2. Consulting Costs

[47] The Town stated the Applicants' consultant, Dr. Bender, did not contribute to the hearing significantly enough to justify overcoming the presumption against awarding consulting costs for the following reasons:

1. Dr. Bender's report and evidence at the hearing was overbroad, focused on irrelevant issues and was not materially helpful to the Board in coming to its recommendations;
2. Dr. Bender's report was written before the Board determined the issues and, therefore, could not have been tailored to the issues the at hearing;
3. the Town's expert, Advisian/WorleyParsons, was more effective than Dr. Bender as the Board was satisfied that the modelling was accurate and reliable and was relied upon by the Board in forming its recommendation, offsetting any costs necessitated by Dr. Bender's participation;
4. Dr. Bender's costs claim lacked credibility; and
5. Dr. Bender overcomplicated the issues and spent an unreasonable amount of time on theories not supported by engineering analysis.

[48] The Town stated the number of hours Dr. Bender spent preparing for the hearing was unreasonably high because:

1. it exceeds the standard range of one to four hours preparation time for each hour of actual participation in the hearing; and
2. Dr. Bender did not provide material assistance to the Board on either day of the hearing.

[49] The Town submitted the Applicants are not entitled to claim costs for staff fees, travel, or other disbursements, which should be captured in the expert's hourly rate.

**C. ANALYSIS**

[50] The Board appreciates the extensive submissions provided by the parties regarding this costs application.

[51] The Board accepts the evidence of the Applicants that the legal and consulting costs presented by the Applicants are reasonable and are directly and primarily related to the matters contained in the Notices of Appeal, and the preparation and presentation of the parties' submission. The Board notes the period for which legal and consulting costs are claimed by the Applicants begins after the issuance of the Approval, ends on or before the last submission to the Board by the Applicants, and all invoices are addressed to the Appellants and the Intervenors, jointly.

[52] The Board also notes and appreciates that the Applicants reasonably and efficiently combined their resources to jointly retain counsel to prepare and submit joint submissions and represent them at hearing. Their legal counsel had the task of organizing three Appellants and one Intervenor and did so effectively with minimal duplication in its presentation and submissions. This created not only financial efficiencies for the Applicants, but financial and time efficiencies for the Board, the Town, and the Director in reviewing and responding to the Applicants' submissions and the amount of time spent at the hearing. If each party had retained its own legal counsel and experts, it would not be unreasonable to conclude that the costs associated with their individual advisors would likely total more than those claimed in this joint costs application.

[53] The Board finds the contribution of the Applicants significantly assisted the Board in developing the Report for the Minister. The Applicants, with the assistance of their legal counsel and expert, provided information that contributed to the hearing and the Board's recommendation

that the Approval be varied to include the Applicants' lands as appurtenant to the Approval and that the Town obtain their written consent as owners of the appurtenant lands.<sup>20</sup>

[54] The Board found that the Town had transferred its flood risk to the Applicants and others downstream of the SW Dike. The Board heard from the Director that the Appellants were impacted by the activity, but those impacts were not significant because they were to bare land..." and that "... the choice was to impact bare land or for critical infrastructure in the Town to remain unprotected." The Board also heard that the Applicants were provided with flood easement agreements by the Town, but the Director did not appear to require their execution prior to his decision to issue the Approval.<sup>21</sup>

[55] The Board noted that it had concerns regarding the adequacy of the Town's engagement with the Applicants. The Board heard evidence the Applicants "had questions about the flood easement agreements provided by the Town and the associated information outlining the impacts of the SW Dike, but the Town's consultants were not able to address their questions". The Board found that the Applicants had uncertainty arising about the SW Dike's construction, impacts arising from it and questions left unanswered by the Town.<sup>22</sup>

[56] The Board was also troubled by the Director not requiring the Applicants' consent to the redirection of overland water flow over their lands. The Board found that the potential impacts to the Applicants "are greater than those faced by bare land".<sup>23</sup> The Board noted the Applicants made their concerns known through their statements of concern, submissions, and during the hearing. It was the Board's view "the Director was overly narrow in his interpretation

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<sup>20</sup> *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25, at paragraphs 411 to 414.

<sup>21</sup> See *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25, at paragraph 354, 396 and 351.

<sup>22</sup> See *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25, at paragraph 360 and 361.

<sup>23</sup> See *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks, re: Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB 25, at paragraph 385 and 401.

of appurtenance, his minimization of the impact to the Appellants' and Intervenors' properties and whether landowner consent was required.”<sup>24</sup>

[57] The Board is of the view that the Applicants succinctly and in an organized and efficient manner presented to the Board a clear picture of the Applicants' concerns as individuals and the potential impact on their quality of life and use of their lands due to the redirection of the overland flow of flood waters from the SW Dike. Information that either could not be found in the record or, if included in the record, was not considered to be of significant concern by either the Town or the Director. It was the provision by the Applicants of this information that assisted the Board in making its recommendations to the Minister to vary the Approval to include the Applicants land as appurtenant and require the Town to obtain their consent because of the impact of the Approval on their lands.

[58] The Board also acknowledges the financial burden faced by the Applicants in participating in the hearing but confirms there is an obligation for members of the public to accept some responsibility of bringing environmental issues to the forefront. Part of this obligation is for the party to pay their own way in an appeal. The Board finds that no evidence was presented that the Applicants required financial resources to make their submissions.

[59] The Board finds an award of reasonable legal costs is appropriate. The oral portion of the hearing was 16 hours and 45 minutes (16.75 hours). As the Appellants and Intervenors were jointly represented by legal counsel, the Board finds it is appropriate to award 4 hours of preparation time for each hour of participation in the hearing. Therefore, preparation time at four hours per each hour of hearing is determined as 67 hours. As well, as additional written submissions were requested by the Board after the oral portion of the hearing was concluded, the Board's view is that an additional award of four hours is reasonable for a total of 71 hours of preparation time. Total hearing time plus preparation time was 87.75 hours.

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<sup>24</sup> See *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division*, Alberta Environment and Parks, re: *Town of High River* (14 June 2022), Appeal Nos. 19-089 and 19-093-094-R (A.E.A.B.), 2022 ABEAB, 25 at paragraph 394.

[60] The Applicants requested legal costs at the rate of \$450.00 per hour for their legal counsel. However, the Board finds no compelling reason to change its practice and will apply the Alberta Justice Tariff rate. The Applicants and Town agree that the applicable Alberta Justice Tariff rate for the Applicants' legal counsel is \$250.00 per hour. The Board concurs. The Board's view is that the usual practice of adjusting the Alberta Justice Tariff rate downward to 50% of the Alberta Justice Tariff rate does not reflect the contribution of the Applicants. The Board finds the appropriate hourly rate for the Applicants' legal counsel should be adjusted to 75% (not 50%) of the Alberta Justice Tariff rate, as the Applicants' submissions and evidence provided significant insight into the impact that the redirection of overland water flow from the SW Dike would have on the use of their individual lands and quality of life. This was helpful to the Board and assisted them in making its recommendations regarding appurtenance.

[61] The Board awards legal costs to the Applicants of \$16,453.13 plus GST of \$822.66, for a total of \$17,275.78.

Lawyer	Hourly Rate	Adjustment Factor	Adjusted Hourly Rate	Hearing Time (hours)	Prep. Time (x4) (hours)	Total Hours	Legal Costs
Mr. Fitch	\$250.00	0.75	\$187.50	16.75	71	87.75	\$16,453.13
						GST @ 5%	\$822.66
							\$17,275.78

[62] The Board finds that a reasonable award of consulting costs is also appropriate. The Board acknowledges the expertise of Dr. Bender and the importance of an additional independent expert opinion and evidence in an appeal of this nature where there are numerous, and highly technical reports. The Board finds that during the oral portion of the hearing, the Applicants' consultant contributed by assisting the Board in understanding that the design of the SW Dike relies on the uncontrolled release and redirection of water across the Applicants' lands. This assisted the Board in making its recommendations regarding appurtenance. The Board finds that an award of costs in respect of Dr. Bender's attendance at the oral portion of the hearing is appropriate.



[63] The Board acknowledges that Dr. Bender faced financial and time constraints in preparing his engineering report. Given these constraints, Dr. Bender could not have completed a comprehensive engineering analysis in support of his proposed re-design options. The Board also acknowledges that it is not unreasonable for the Applicants to want technical support for a hearing of this nature and the Board appreciates Dr. Bender’s contributions to the hearing, including his report. However, the Board finds that the report prepared by Dr. Bender did not contribute beyond that expected by any party and its contribution was of no greater significance than the other parties to the appeal and as such the Board will not award costs with respect to Dr. Bender’s preparation time for the hearing.

[64] The Board accepts the Town’s evidence that Dr. Bender attended the oral portion of the hearing for a total of 13.5 hours. The Board finds the hourly rate to be applied to Dr. Bender’s participation at the oral portion of the hearing is \$370.00 per hour.<sup>25</sup> The Board further finds that the hourly rate should be adjusted by 50% as there is no compelling reason to deviate from its usual practice. The Board awards consulting costs to the Applicants of \$2,497.50 plus GST of \$124.88, for a total of \$2,622.38.

Consultant	Hourly Rate	Adjustment Factor	Adjusted Hourly Rate	Hearing Time (hours)	Prep. Time (x4) (hours)	Total Hours	Consulting Costs
Dr. Bender	\$370.00	0.50	\$185.00	13.5	0	13.5	\$2,497.50
						GST @ 5%	\$124.88
							\$2,622.38

[65] The Board reiterates its appreciation for the detailed submissions of the parties in respect of this costs application. The Board finds that the Town pay the award of final costs of \$19,898.16, to counsel for the Applicants, in trust, within 60 days of the date of this decision.

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<sup>25</sup> Consulting Engineers of Alberta, 2022 Rate Guide; and the Association of Professional Engineers and Geoscientists of Alberta Responsibility Level F+.

Dated on December 4, 2023, at Edmonton, Alberta.

“original signed by”  
Anjum Mullick  
Board Member and  
Panel Chair

“original signed by”  
Dave McGee  
Board Member

“original signed by”  
Barbara Johnson  
Board Member