

Court of Queen's Bench of Alberta

Citation: Court v. Alberta Environmental Appeal Board, 2003 ABQB 912

**Date: 20031105
Docket: 0201 17759
Registry: Calgary**

Between:

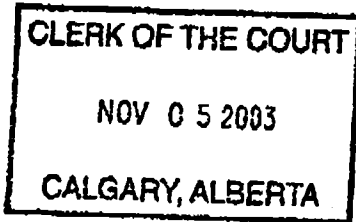
Linda J. Court

Applicant

- and -

Alberta Environmental Appeal Board

Respondent



**Memorandum of Decision
of the
Honourable Mr. Justice P.J. McIntyre**

Introduction

[1] The Applicant successfully challenged two decisions of the Alberta Environmental Appeal Board (Board) refusing her standing for the purpose of appealing the environmental approval issued for a gravel pit operating near her residence. She now seeks increased party-party costs of her judicial review application.

Facts and Arguments

Applicant

[2] In pursuing her appeal before the Board, the Applicant incurred legal and expert fees and disbursements totalling \$148,299.34. Her application to the Board for an award of costs under

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s. 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (*Act*), has yet to be decided.

[3] The Applicant estimates the legal fees incurred in pursuing her judicial review application, excluding disbursements, to be in excess of \$50,000.00, for which application she seeks increased party-party costs. Specifically, she claims double Column 5 costs from the Board and Lafarge Canada Inc. (Lafarge), with disbursements to be borne equally, or, in the alternative, double Column 5 costs from the Board plus single Column 5 costs from Lafarge and the Director (Alberta Environment) (Director), with disbursements to be borne equally. The Applicant calculates the taxable Column 5 costs of her judicial review application, excluding disbursements, to be \$9,750.00 plus GST of \$1,032.50, totalling \$10,782.50.

[4] The Applicant concedes that, under Rule 605(6) of the *Alberta Rules of Court*, she is limited to Column 1 costs, unless otherwise ordered, plus disbursements. She calculates the taxable Column 1 costs of her judicial review application, excluding disbursements, to be \$3,750.00 plus GST of \$262.50, totalling \$4,012.50. However, the Applicant argues that the sought award of increased party-party costs is reasonable in all the circumstances, having regard to the history of the proceedings and the necessity of counsel, the complexity of the proceedings and issues, the importance of the issues and case, the necessity of the judicial review application, the result of the judicial review application and the relative financial resources of the parties.

[5] The Applicant further argues that it is in the Court's discretion to award costs against the Board, Lafarge and the Director. She notes that, with her consent, Lafarge and the Director were added as parties to the judicial review application and submits that, as such, costs can be awarded to or against them. She also notes that Lafarge filed detailed and lengthy written submissions and made oral arguments challenging her directly affected status before the Board and opposing the judicial review application.

Board

[6] The Board argues that no award of costs should be made against it, given that it limited its submissions to issues of its jurisdiction in the judicial review application and that it did not act capriciously, arbitrarily, in bad faith or contrary to the principles of procedural fairness or natural justice in the proceedings under review.

Director

[7] The Director argues that no award of costs should be made against the Director, given that the Director's only involvement in the judicial review application was to make submissions on the issue of standard of review applicable to the Board's decisions, on which issue the Director was successful.

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Lafarge

[8] Lafarge argues that, in the absence of evidence that the Applicant herself has paid or will pay the incurred legal and expert fees and disbursements, she should receive no costs. In the alternative, Lafarge argues that no award of costs should be made against it for several reasons: the Applicant is only now seeking costs from Lafarge; there is no authority supportive of an award of costs against a party not initially named as a party to a judicial review application; Lafarge's questioning of the Applicant's standing is not an appropriate basis on which to award costs against Lafarge; Lafarge acted reasonably in making submissions defending its approval before the Board and in the judicial review application; and the Applicant's success in the judicial review application was in relation to the actions of the Board alone. If, however, there is an award of costs made against it, Lafarge argues that the Applicant, having been only partially successful in the judicial review application, is entitled to only a portion of her costs calculated according to Column 1. The circumstances, Lafarge says, do not warrant increased party-party costs.

Analysis

Rules and General Costs Principles

[9] Rule 605(6) states that, "[u]nless otherwise ordered", when non-monetary relief is given by judgment, costs are to be taxed according to Column 1 of Schedule C.

[10] Rule 601(1) further states that, "[n]otwithstanding anything in Rules 602 to 612", costs, as to amount and payer, are in the Court's discretion, and, when deciding on costs, the Court may consider the result in the proceeding and:

- (a) the amounts claimed and the amounts recovered,
- (b) the importance of the issues,
- (c) the complexity of the proceedings,
- (d) the apportionment of liability,
- (e) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding,
- (f) a party's denial of or refusal to admit anything that should have been admitted,
- (g) whether any step or stage in the proceedings was
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution,
- (h) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated their defence from another party, and
- (i) any other matter relevant to the question of costs.

[11] In identifying several factors that may be considered in deciding the scale of costs in *Eggertson v. Alberta Teachers' Assn.* (2003), 327 A.R. 92, 2003 ABCA 101, the Court

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approved the ruling of Mason J. in *Pharand Ski Corp. v. Alberta* (1991), 122 A.R. 395 at para. 19 (Q.B.):

[I]n principle, costs on a party and party scale are awarded on the basis of a reasonable apportioning of the litigation expenses incurred by the successful party, having regard to such factors as:

- (a) the difficulty and complexity of the issues;
- (b) the importance of the case between the parties and/or the community at large;
- (c) the length of the trial;
- (d) the position and relationship of the parties and their conduct prior to and during the course of the trial; and
- (e) other factors which may affect the fairness of an award of costs.

Costs against Board and Director

[12] There are costs principles specific to administrative decision-makers, principles on which the Board and the Director rely and to which the Applicant does not advert. The costs principles specific to administrative decision-makers are summarized by Donald J.M. Brown and the Honourable John M. Evans in *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Canvasback, 2003) at para. 5:2560:

Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part....

However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial position, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing. [Footnotes omitted.]

and by the Honourable William A. Stevenson and the Honourable Jean E. Côté in *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003) at 79-56:

A court may decline to award costs against a tribunal where it has acted in good faith, there was no suggestion of malice, and the enabling legislation is unclear; or if it made no submissions, except on jurisdiction.... Costs do not necessarily follow the event. They are awarded against tribunals in unusual or exceptional circumstances such as capricious or arbitrary conduct or a lack of good faith or circumstances otherwise contrary to rules of natural justice. [Footnotes omitted.]

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[13] So, costs are generally not awarded to or against an administrative decision-maker that, on judicial review of its decision, limits its submissions to issues of its jurisdiction and makes no submissions on the merits. In *R. v. Ontario (Labour Relations Board)*, [1969] 2 O.R. 116 at 120 (H.C.J.), aff'd [1969] 2 O.R. 501 (C.A.), Osler J. held:

Following the usual practice, when counsel for the Board confines himself to the question of the Board's jurisdiction and makes no submissions on the merits of its position, there will be no costs for or against the Board.

[14] Although costs may be awarded against administrative decision-makers, they are to be awarded only in unusual or exceptional cases and then only with caution. In *St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commission)* (1991), 93 Nfld. & P.E.I.R. 45 at paras. 6-7, 14-15 (P.E.I.S.C. (T.D.)), McQuaid J. ruled:

The Commission is a quasi-judicial tribunal, and as such it is without funds, per se. However, the Government of the day, in creating it as an instrument of government, gave it the power to sue and be sued. Inherent in this power must be deemed to be the capacity to be awarded costs, or alternatively, to have costs awarded against it. Otherwise, such a tribunal could engage in litigation, willy-nilly, without regard to the consequences, which would be judicially intolerable. Indeed, the courts of this Province have recognized this principle, implicitly, by awarding costs on occasion, against such an administrative tribunal.

It has been recognized by these same courts, however, that, contrary to the normal practise, costs do not necessarily follow the event where administrative or quasi-judicial tribunals are concerned. They may be awarded only in unusual or exceptional cases, and then only with caution....

I would conclude, on the basis of these few cases in which our courts have considered the matter, ... that costs will not be, and should not be, awarded against such a tribunal, by reason only of a loss of jurisdiction on its part. Where, however, that loss of jurisdiction resulted from conduct on the part of the tribunal which can be held to be capricious, arbitrary, lacking in good faith, or otherwise running contrary to the rules of natural justice, then unquestionably, costs should be awarded against it. In addition to the above enumerated factors, there may well be others of the same or similar ilk which may result in an adverse award of costs.

Using a broad brush, it might be said that where the tribunal has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs. On the other hand, where these characteristics have not been clearly evident, the court will cast a caustic eye upon it which will normally result in costs being awarded against it.

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[15] Having regard to the costs principles specific to administrative decision-makers, I agree with the Board that there should be no award of costs made against it. In the judicial review application, the Board limited its submissions to issues of its jurisdiction and made no submissions on the merits. Moreover, there are no unusual or exceptional circumstances justifying an award of costs against the Board.

[16] Extrapolating from the costs principles specific to administrative decision-makers, I also agree with the Director that there should be no award of costs made against the Director. In the judicial review application, the Director did not take an adversarial position, making submissions solely on the issue of standard of review applicable to the Board's decisions, on which issue the Director was successful.

Costs against Lafarge

[17] Lafarge's arguments do not persuade me that there should be no award of costs against it.

[18] Lafarge first argues that, in the absence of evidence that the Applicant herself has paid or will pay the incurred legal and expert fees and disbursements, she should receive no costs. However, the Applicant is presumed to be answerable for those fees and disbursements, which presumption Lafarge has failed to rebut. See *Calverley v. Lambe* (1908), 11 O.W.R. 398 at 401, aff'd (1908), 11 O.W.R. 474 (Div. Ct.); *Plasway v. Abraham* (1993), [1994] 4 W.W.R. 368 (B.C.S.C.); *Jacobi v. Newell No. 4 (County)* (1994), 153 A.R. 241 at paras. 19-25 (Q.B.); *Linett v. Strasberg*, [1994] O.J. No. 2732 at paras. 3-7 (Gen. Div.); and *Harach v. Schubert*, [1999] 12 W.W.R. 273 at paras. 38-42, 1999 SKQB 49.

[19] Second, Lafarge argues that no award of costs should be made against it because the Applicant is only now seeking costs from Lafarge. I disagree, given the absence of a claim for costs against Lafarge, as opposed to an express denial of such a claim, and Rule 120, which reads:

120 In any pleading costs need not be claimed and it is not necessary to ask for general or other relief, both of which may always be given to the same extent as if they had been asked for.

[20] Third, Lafarge argues that there is no authority supportive of an award of costs against a party, such as itself, not initially named as a party to a judicial review application. Specifically, it contends that *Reese v. Alberta (Minister of Forestry, Lands and Wildlife)* (1992), 133 A.R. 127 (Q.B.), on which the Applicant relies, is supportive of costs being awarded to, not against, a party added to a judicial review application. While it is true that in *Reese* costs were awarded to a party added to a judicial review application, there is nothing in that case precluding, on principle, costs being awarded against such a party.

[21] Finally, Lafarge argues that its questioning of the Applicant's standing is not an appropriate basis on which to award costs against it, that it acted reasonably in making

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submissions defending its approval before the Board and in the judicial review application and that the Applicant's success in the judicial review application was in relation to the actions of the Board alone. However, the Applicant is here seeking costs of her judicial review application, and, in the judicial review application, Lafarge carried the argument supportive of the Board's decisions refusing standing, for which decisions Lafarge had forcefully advocated before the Board. In the circumstances, I do not dispute the reasonableness of Lafarge's vigorous resistance of the Applicant's judicial review application, but, in general, unsuccessful resistance, albeit reasonable, has consequences in costs.

[22] As to quantum, Lafarge argues that the Applicant, having been only partially successful in the judicial review application, is entitled to only a portion of her costs calculated according to Column 1, the default scale for judicial review applications. In my opinion, split-issue or selective costs are not appropriate. Although, in the judicial review application, the Applicant unsuccessfully argued for a correctness standard of review, her ultimate position was that the Board's decisions on standing could not survive scrutiny on any standard.

[23] On the other hand, the Applicant argues for increased party-party costs of her judicial review application having regard to the history of the proceedings and the necessity of counsel, the complexity of the proceedings and issues, the importance of the issues and case, the necessity of the judicial review application, the result of the judicial review application and the relative financial resources of the parties.

[24] In arguing for increased party-party costs based on the history of the proceedings and the necessity of counsel, the Applicant relies on *Eggertson*. In that case, in awarding costs to the appellant in excess of the default scale for the judicial proceedings, the Court took into account the history of the proceedings and the necessity of counsel throughout, noting that the administrative decision-makers were not empowered to award costs of the administrative proceedings to the appellant. I decline to order increased party-party costs on that basis, given that the Board is empowered to award costs of its proceedings to a party, successful or not, and the Applicant has applied to the Board for an award of costs.

[25] As to the complexity of the proceedings and issues justifying increased party-party costs, I agree with Lafarge that "the complex nature of the evidence and submissions was because the hearing [before the Board] included a full hearing on the merits of the Appeal, not just the issue of standing, which was the only issue reviewed by this Court" (Lafarge's Brief at para. 52).

[26] The Applicant argues for increased party-party costs based on the necessity of the judicial review application and her ultimate vindication, apparently equating her success with the ultimate vindication justifying an increased costs award in *Eggertson*. I agree with Lafarge that success, in and of itself, is no basis for an increased costs award. Moreover, there is, I believe, a qualitative difference between the Applicant's success and the ultimate vindication in *Eggertson*, a defence of professional reputation that failed three times before succeeding before the Court of Appeal.

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[27] Furthermore, I decline to order increased party-party costs based on the relative financial resources of the parties, where the Applicant does not argue and there is no indication that Lafarge used its superior resources to "grind" the Applicant. To that end, I agree with the reasoning of Newbury J. in *British Columbia (Milk Marketing Board) v. Bari Cheese Ltd.* (1993), 23 C.P.C. (3d) 382 at para. 7 (B.C.S.C.), aff'd (1996), [1997] 2 W.W.R. 342 (B.C.C.A.):

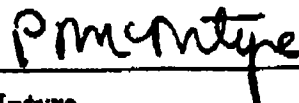
[T]he fact one party to litigation has "deeper pockets" than the other should not lead a court to award increased costs against that party more readily than it otherwise would. But ... where the wealthier party has used its superior resources to "grind" the other, a court may take notice.

[28] In my opinion, however, one factor, namely, the importance of the issues and case, does justify an award of costs in excess of the default scale. The case is legitimately characterized as one of general public importance, relating as it does to public participation in the environmental review process. The *Act*, at ss. 2(f) and 2(g), envisages a participatory role for Alberta citizens, and the case clarifies, for the benefit of Alberta citizens, how standing is achieved under the *Act*.

[29] I, therefore, award the Applicant double Column 5 costs, plus all reasonable disbursements, as against Lafarge.

Written Submissions received in June, July and September 2003.

Dated at the City of Calgary, Alberta this 5th day of November, 2003.



P.J. McIntyre
J.C.Q.B.A.

Counsel:

Grant Stapon and Bradley Gilmour
for the Applicant

Andrew Sims, Q.C.
for the Respondent

Charlene Graham
for the Director (Alberta Environment)

James Sullivan and Janice Walton
for Lafarge Canada Inc.

ACTION NO. 0201-17759

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

I hereby certify this to be a true copy of
the original Linda J. Court
Dated this 5th day of Dec 2003
[Signature]
for Clerk of the Court

LINDA J. COURT

Applicant

- and -

ALBERTA ENVIRONMENTAL APPEAL BOARD

Respondent

BEFORE THE HONOURABLE)
MR. JUSTICE P.J. McINTYRE) At the Courthouse, in the City of Calgary, in the
) Province of Alberta, on Wednesday, the 5th day of
) November, 2003.
)

JUDGMENT ROLL

UPON THIS application for judicial review coming on for hearing on February 27th, 2003; AND UPON a decision of Mr. Justice P.J. McIntyre having been rendered on May 16th, 2003; AND UPON the Applicant, Respondent, the Director (Alberta Environment), and Lafarge Canada Inc., being given leave to make submissions with respect to costs; AND UPON written submissions with respect to costs of the application for judicial review having been submitted counsel for the Applicant, Respondent, Lafarge Canada Inc., and the Director (Alberta Environment); AND UPON this Honourable Court having reserved Judgment and delivering a Memorandum of Decision dated November 5th, 2003;


IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. The Applicant is awarded costs of the judicial review application as against Lafarge Canada Inc. on the scale of Double Column 5 of Schedule C of the Alberta *Rules of Court*, plus all reasonable disbursements.
2. The Applicant's request for costs as against the Respondent, the Alberta Environmental Appeal Board, and as against the Director, Bow Region, Regional Services, Alberta Environment, is dismissed.

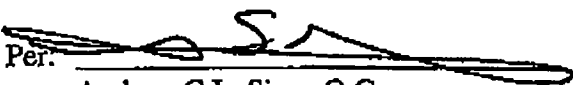
"ANISH REMTULLA"
 Clerk of the Court 

APPROVED as being the Judgment granted:

BENNETT JONES LLP

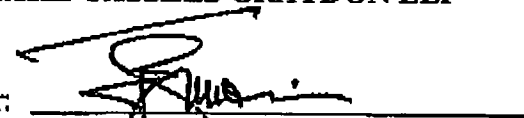
Per: 
 Grant N. Stapon
 Solicitors for the Applicant

APPROVED as being the Judgment granted:

Per: 
 Andrew C.L. Sims, Q.C.
 Solicitors for the Respondent, Alberta
 Environmental Appeal Board

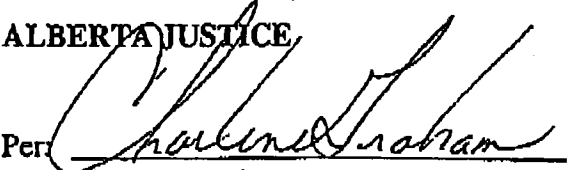
APPROVED as being the Judgment granted:

BLAKE CASSELS GRAYDON LLP

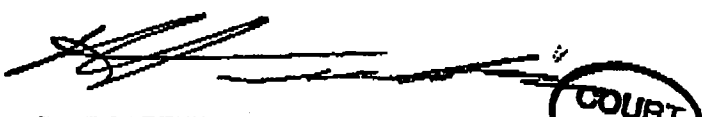

Per: 
 James Sullivan
 Solicitors for the Lafarge Canada Inc.

APPROVED as being the Judgment granted:

ALBERTA JUSTICE

Per: 
 Charlene Graham
 Solicitors for the Director (Alberta
 Environment)

ENTERED this 30 day of
December 2003.


 Clerk of the Court 

I, GRANT N. STAPON, Solicitor for the Applicant, Linda J. Court, do hereby certify that the disbursements listed above were necessary to this action and were actually paid.

BENNETT JONES LLP
Grant Stapon
GRANT N. STAPON, solicitors for
the Applicant, Linda J. Court

The above Bill of Costs has been taxed by me this 30 day of December, 2003, at Calgary, Alberta, AND ALLOWED AT: \$ 27,380.04


KEVIN HOSCHKA 
Clerk of the Court

DATED at the City of Calgary, in the Province of Alberta, this ___ day of December, 2003.

BENNETT JONES LLP
Grant Stapon
GRANT N. STAPON, solicitors for
the Applicant, Linda J. Court

~~CONSENTED TO~~
~~BLAKE CASSELS GRAYDON LLP~~

Per: *[Signature]*
James Sullivan, Solicitors for the
Respondent Lafarge Canada Inc.

TAXED WITHOUT REVIEW, PURSUANT TO RULE 200
ANISH BENTHIA 
Clerk of the Court

ACTION NO: 0201-17759

IN THE COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

LINDA J. COURT

Applicant

- and -

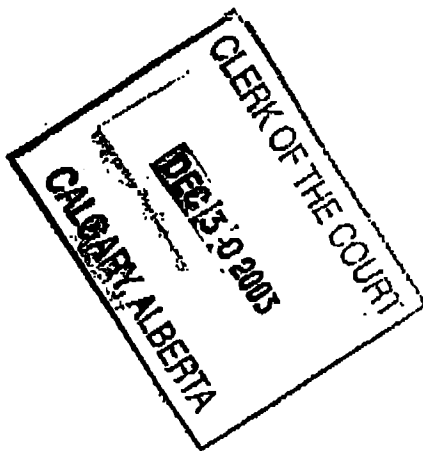
ENVIRON.
ALBERTA ENVIRONMENTAL APPEAL
BOARD

Respondent

JUDGMENT ROLL

BENNETT JONES LLP
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IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

ACTION NO: 0201-17759

BETWEEN:

LINDA J. COURT

Applicant

- and -

ALBERTA ENVIRONMENTAL APPEAL BOARD

Respondent

BILL OF COSTS
Double Column 5

Costs on Double Column 5

ITEM	DESCRIPTION	FEE	DISB.
1.(1)	Drafting Originating Notice of Motion (\$3,500.00 x 2)	\$7,000.00	
8.	Special Chambers Application – Application for Judicial Review, first ½ day (\$2,000.00 x 2)	\$4,000.00	
8.	Special Chambers Application – Application for Judicial Review, addition ½ day (\$1,000.00 x 2)	\$2,000.00	
15.	Second Counsel Fee – first ½ day (\$1,500.00 x 2)	\$3,000.00	
7.(1)	Contested Application – Written Submissions with respect to Costs (\$1,500.00 x 2)	\$3,000.00	
	Fees:	\$19,000.00	
	GST on Fees:	\$1,330.00	
	Total Fees & GST	<u>\$20,330.00</u>	

Taxable Disbursements

Long Distance Telephone Charges	\$155.18
Photocopy Charges (7125 pages x \$0.25)	\$1,781.25
Courier Charges	\$196.60
Fax Charges	\$357.25
Taxable Disbursements:	\$2,490.28
GST On Taxable Disbursements:	\$174.32
Total Taxable Disbursements:	\$2,664.60

Non-Taxable Disbursements

Filing Fee – Originating Notice of Motion	\$186.92
Non-Taxable Disbursements	\$186.92
Filing Fee – Originating Notice Of Motion	\$186.92
GST on Non-Taxable Disbursements:	\$13.08
Total Non-Taxable Disbursements:	\$200.00

Total Fees:	\$20,330.00
Total Taxable Disbursements & GST:	\$2,664.60
Total Non-Taxable Disbursements & GST:	\$200.00
Total:	\$ 24,380.04

Taxed On:
Taxed Off:
Total:

Action No. 0201-17759

**IN THE COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL DISTRICT OF CALGARY**

BETWEEN:

LINDA J. COURT

Applicant

- and -

**ALBERTA ENVIRONMENTAL
APPEAL BOARD**

Respondent

BILL OF COSTS

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