Appeal No. 03-010-CD

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 5, 2006

IN THE MATTER OF sections 91 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 Michael Monner with respect to *Water Act* Approval No. 00136848-00-00 issued to the New Dale Hutterian Brethren by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Monner* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *New Dale Hutterian Brethren* (5 January 2006), Appeal No. 03-010-CD (A.E.A.B.).

BEFORE: Mr. Al Schulz, Panel Chair,
Dr. Alan J. Kennedy, Board Member, and
Dr. Harrie Vredenburg, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Michael Monner.

Approval Holder: New Dale Hutterian Brethren Colony, represented by Mr. David Decker.

Director: Mr. Dave McGee, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Intervenors: Siksika Nation, represented by Mr. Emil Owl Child, Siksika Nation, Mr. W. Tibor Osvath, Rae and Company, and Mr. Leonard D. Andrychuk, Q.C.

EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Approval No. 00136848-00-00 to the New Dale Hutterian Brethren authorizing them to operate the drainage works on an unnamed water body, a tributary to Indian Lake, near Milo, Alberta.

The Board received a Notice of Appeal from Mr. Michael Monner appealing the Approval. A hearing was held with the Siksika Nation, Alberta Transportation, and Vulcan County participating as intervernors.

At the hearing, the Siksika Nation raised preliminary motions regarding Alberta Environment's and the Board's jurisdiction. The Board heard the arguments regarding the substantive issues under appeal, and then received extensive arguments regarding the jurisdictional issues. The Siksika Nation later withdrew their motion after an agreement was reached with Alberta Environment.

The Board recommended the Approval be upheld with two conditions added to ensure the roadbed of Secondary Highway 842 adjacent to the existing culvert and the roadbed of Township Road 202 were not impacted by the operation of the drainage works. The Minister accepted the Board's recommendations that the Approval be varied.

Mr. Monner and the Siksika Nation filed costs applications after the Report and Recommendations and the Minister's decision were released. Mr. Monner's request for costs totaling $5213.67 was denied, as all of the costs claimed pre-dated the appeal, and therefore, were not costs incurred in the preparation and presentation of his arguments at the hearing.

The Siksika Nation's application for costs totaled $56,434.16, all of which the Board denied. Most of the costs ($44,815.93) were in relation to the jurisdictional matter, which was withdrawn and not determined by the Board. Although the Board respects the value and found the traditional knowledge interesting, it did not make a significant contribution or materially assist in the Board's decision on the substantive issues.

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I. BACKGROUND

[1] On June 25, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 00136848-00-00 (the "Approval") to the New Dale Hutterian Brethren (the "Approval Holder") under the *Water Act*, R.S.A. 2000, c. W-3, authorizing them to operate the drainage works on an unnamed water body, a tributary to Indian Lake, at NW 15-20-21-W4M, 16-20-21-W4M, and 17-20-21-W4M, near Milo, Alberta.

[2] On June 30, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Michael Monner (the "Appellant") appealing the Approval.

[3] On July 2, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal.

[4] On July 2, 2003, the Board received a letter from the Appellant requesting a Stay. On July 4, 2003, the Board requested the Appellant respond to a number of questions in relation to his Stay request, and on July 7, 2003, the Board received the Appellant's response.

[5] The Board notified the Parties on July 14, 2003, that, after reviewing the Appellant's submissions, a Stay would not be granted.[1]

[6] On July 15, 2003, the Appellant provided names of other parties who may have an interest in the appeal, including the Siksika Nation, Ducks Unlimited, the Minister of Indian Affairs and Northern Development, and Vulcan County. On July 31, 2003, the Appellant notified the Board that Alberta Transportation also wanted to be informed of the appeal.

[7] A mediation meeting was held on August 6, 2003, with Mr. Ron Hierath, Board member, acting as mediator. There was no resolution at the mediation meeting, but the Parties agreed to continue discussions and a further mediation meeting was scheduled for October 7, 2003.

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[1] In its letter, the Board stated:

"The Board has determined that Mr. Monner has not presented a sufficient case to warrant a further consideration of his Stay request at this time. In addition, the Board is not yet in receipt of the record from Alberta Environment, and as such has not been able to review it. Once the record

[8] On October 6, 2003, the Approval Holder notified the Board that they would not be attending the mediation meeting on October 7, 2003. The Board notified the Parties that the mediation meeting was cancelled.

[9] On October 30, 2003, the Appellant provided a status report to the Board, indicating that settlement discussions were continuing. The Board notified the Parties on November 5, 2003, that it intended to proceed with the appeal and schedule a Hearing.

[10] The Board notified the Parties on November 24, 2003, of the issues to be heard at the Hearing.[2]

[11] On December 9, 2003, the Board received a letter from Vulcan County, stating it wanted to participate in the hearing of the appeal. On December 12, 2003, Alberta Transportation requested it be allowed to make a representation before the Board on this appeal. On December 15, 2003, the Siksika Nation requested they be permitted to make a representation intervening in the appeal. The Board requested the Parties provide comments on the participation of Vulcan County, Alberta Transportation, and the Siksika Nation. The Board gave the Siksika Nation, Alberta Transportation, and the Vulcan County (collectively, the "Intervenors") full party status.[3]

[12] The Hearing was held on January 27, 2004.

[13] At the Hearing, the Siksika Nation raised a number of jurisdictional issues, challenging the ability of Alberta Environment to issue the Approval and the ability of the Board

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has been received from Alberta Environment, and has been distributed to the parties, Mr. Monner can make a further application for a Stay at that time, if he chooses."

[2] The issues at the Hearing were:

> "1. the changing direction of water flow so that the applicants (*sic.*) water drains onto Mr. Monner's property;
>
> 2. no recourse if conditions of the Approval are not met;
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> 3. the increased water flow will raise the water level on Mr. Monner's property thereby compromising his ability to raise crops. When this happened in 1997 Mr. Monner lost the use of this land for six years;
>
> 4. perennial weeds/grasses that have built up since last unauthorized flooding; and
>
> 5. Mr. Monner would like the Approval revoked and all licenced drainage canals returned to original topographical state."

[3] In letters received on December 18 and 19, 2003, the Appellant and the Director stated they did not have any concerns with the Vulcan County, Alberta Transportation, and the Siksika Nation participating in the appeal. No response was received from the Approval Holder.

to hear this appeal. The Board decided to continue with the Hearing and hear the substantive arguments of the Parties. An extensive submission process ensued after the Hearing of the substantive issues to address the complex constitutional and aboriginal law issues.[4]

[14] As the Board did not close the Hearing on January 27, 2004, the Appellant and the Siksika Nation applied for a Stay of the Approval. The Board received submissions from the Parties between February 2 and February 25, 2004. On March 11, 2004, the Board notified the Parties that it would not grant a Stay.

[15] On September 9, 2004, the Director notified the Board that settlement discussions were continuing between the Siksika Nation, the Approval Holder, and the Director. He requested the Board make an application to the Minister for an extension of the time limit for the Board to provide its Report and Recommendations. The Board made this request, and the Minister granted the request.

[16] On October 13, 2004, the Board was notified that the Director and the Siksika Nation had reached an agreement that addressed the concerns raised by the Siksika Nation. As a result, the Siksika Nation withdrew their preliminary motions, and the Board proceeded to address the substantive issues in this appeal and prepare its Report and Recommendations. The Board submitted its Report and Recommendations regarding the substantive issues heard at the

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[4] The Parties were required to answer the following questions:

"1. Does the Siksika Nation have the right to raise jurisdictional questions in their capacity as an intervenor?

2. Does the Board have jurisdiction to hear this appeal, or is there no jurisdiction because the Approval in question may affect the *Constitution Act*, 1867, section 91(24) Indian reserve lands? …

3. Did the Director lose jurisdiction to issue the Approval because the Approval may affect the *Constitution Act*, 1867, section 91(24) Indian reserve lands?

4. Did the Director lose jurisdiction to issue the Approval because he had a "duty to consult" and that duty was not satisfied?

5. Did the Siksika Nation have an obligation to comply with section 24 of the *Judicature Act*, R.S.A. 2000, c. J-2? …

6. What is the effect of the Notice of Constitutional Questions served on the Minister of Justice and Attorney General of Canada and the Minister of Justice and Attorney General of Alberta, both dated March 25, 2004?

7. Has the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all the matters included in the Notice of Appeal filed by Mr. Monner?"

January 27, 2004 Hearing to the Minister on October 13, 2004, and the Minister accepted the recommendations on October 25, 2004.[5]

[17] At the Hearing, the Appellant and the Siksika Nation reserved their right to claim costs, and on November 2, 2004, the Board requested the Parties notify the Board if there were further applications for costs.

[18] On November 5, 2004, Vulcan County notified the Board that it was not seeking costs. Between November 15, 2004 and January 31, 2005, the Board received the submissions from the Parties regarding costs.

II. SUBMISSIONS

A. Appellant

[19] The Appellant claimed costs for legal fees incurred prior to the appeal for the amount of $2,648.24. He also submitted costs for a consultant's fee, dated March 8, 2000, in the amount of $2,565.43.

[20] The Appellant argued that, even though the costs claimed predate the appeal, "…the same subject matter issues, facts and claims are raised and dealt with."[6]

[21] Counsel for the Appellant explained he reviewed the Appellant's submission and provided comments and assistance. Counsel stated the Appellant was in a situation of financial distress brought on, in part, by the issues raised in the appeal. The Appellant's counsel stated he provided his assistance on the appeal without further costs, and he was able to provide assistance based on his familiarity with the situation and knowledge he acquired while working on the Appellant's prior file in 2001 and 2002.

[22] The Appellant stated his submissions were on point and relevant and the information presented must have been of assistance to the Board in understanding and appreciating the issues before it.

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5 See: *Monner* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *New Dale Hutterian Brethren* (13 October 2005), Appeal No. 03-010-R (A.E.A.B.).

6 Appellant's submission, dated December 14, 2004.

[23] The Appellant argued that, even though the accounts preceded the date of the appeal, "…it is directly related to a thorough presentation … and I submit therefore appropriate for consideration of reimbursement of costs."[7]

B. Siksika Nation

[24] The Siksika Nation stated it was important that the Board and the Director properly consider the potential impacts of the Approval on the Siksika Nation's environment and on Indian Lake. They submitted it was also important to determine its claim that the *Water Act* had no application to the Siksika Nation's lands and the Director had a duty to consult. The Siksika Nation submitted its involvement in the appeal with respect to the notification issue and the duty to consult "…at the very least, served the purpose of alerting the Director and the Board to these issues and will serve to provide guidance to the Director in the future."[8]

[25] The Siksika Nation argued that "…had the Director notified Siksika Nation or ensured publication in sources subscribed to by Siksika Nation, the costs incurred by Siksika Nation might well have been avoided."[9] They stated substantive issues of concern could have been addressed in the approval process.

[26] The Siksika Nation stated the jurisdictional and duty to consult issues were resolved by way of a settlement and a without prejudice withdrawal of its arguments. It argued that, had it been properly involved from the beginning, the result could have been achieved without expending considerable sums of money. It submitted that its evidence and submissions raised its concerns relating to downstream water quality and First Nation interests in respect of such approvals. Therefore, according to the Siksika Nation, it made a substantial contribution to the appeal.

[27] The Siksika Nation provided invoices from the law offices of Rae and Company and MacPherson Leslie and Tyerman, totaling $45,815.93, less $1,000.00 for the time spent transferring the file. This included fees and disbursements incurred in respect of the jurisdictional matter and related submissions. Fees related to the Approval included additional

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7 Appellant's submission, dated December 14, 2004.

8 Siksika Nation's submission, dated November 23, 2004.

costs of $3,344.59 from Siksika Environmental Ltd. for services with respect to the technical component of the Siksika Nation's submission to the Board; $1,500.00 for the attendance of Mr. Norman Running Rabbit at the Hearing; and $6,773.64 for fees and disbursements in regards to the preparation and attendance at the Hearing by legal counsel for the Siksika Nation. The total costs claimed by the Siksika Nation were $56,434.16.

[28] The Siksika Nation stated the legal fees incurred as a result of the appeal have been a substantial drain on its financial resources, and the costs were substantially paid from the capital funds obtained from its own sources. It explained they have no ability to be reimbursed for these costs from the Federal Government.

[29] The Siksika Nation requested the Approval Holder, the Alberta Government, and the Board pay its costs.

C. Attorney General

[30] As the Attorney General did not participate in the Hearing regarding the water issues, it did not provide comments on the costs claimed by the Appellant.

[31] The Attorney General stated the Siksika Nation's costs appear to be related to the jurisdictional and aboriginal issues, which were withdrawn when an agreement was reached between the Director and the Siksika Nation. The Attorney General supported and adopted the Director's submission.

[32] The Attorney General argued the factors listed in section 20 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") do not favour a cost award against the Government of Alberta, and there is insufficient reason to make a costs award in this case.

[33] The Attorney General explained his involvement in the matter was in response to the jurisdictional and aboriginal issues raised by the Siksika Nation, and the Attorney General has a right, under the *Judicature Act*, R.S.A. 2000, c. J-2, to be heard when such issues are raised. The Attorney General stated the written submissions provided were in the public interest

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[9] Siksika Nation's submission, dated November 23, 2004.

and provided assistance to the Director and ultimately the Board on the complex jurisdictional and aboriginal issues.

[34] The Attorney General submitted that special circumstances are required before costs are awarded against the Attorney General when it is responding to a Notice of Constitution Question, as it is appearing in the public interest to support the validity of the legislation. Therefore, according to the Attorney General, an order for costs should not be made against the Government of Alberta.[10]

D. Approval Holder

[35] The Approval Holder stated they "…never considered that anyone but ourselves should bear the cost of our involvement in this case which was forced on us by Mr. Monner, nor do we expect to bear the cost of other applicants who were enticed by Mr. Monner."[11]

[36] The Approval Holder stated they have complied with the Approval. They submitted a break down of the costs associated with loss of crops resulting from flooding on the area, the costs of installing the flow controls, and the fees for the services of an agronomist.

E. Director

[37] The Director submitted that "…all parties should bear their own costs and that AENV [(the Director)] should not be responsible for paying the cost claim of the Siksika Nation or Mr. Monner."[12]

[38] The Director stated the materials submitted to support the costs claimed by the Appellant did not specify how the costs incurred were directly related to the matters in the Notice of Appeal and the preparation and presentation of the Appellant's submission. He referred to the costs claimed for Matrix Solution, and questioned what work they did in 2000, and if that work was used in any form by the Appellant in his submission or oral presentation.

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10 See: Attorney General's submission, dated January 13, 2005.

11 Approval Holder's submission, dated January 28, 2005.

12 Director's submission, dated January 14, 2005, at paragraph 16.

[39] The Director summarized previous costs decisions of the Board and noted the Board's authority to award costs is a discretionary power. He referred to the specialized principles developed for costs claims as against the Director, as the Director has a unique role in these matters since it is his decision that is being appealed. The Director stated the Board and the Courts have recognized the statutory role of the Director. Both have considered it a vital factor in not ordering the Director pay costs as long as he is acting in good faith. The Director stated the Minister upheld the decision, and there was no finding that the Director acted in bad faith in reaching his decision to issue the Approval.

[40] The Director explained that the Siksika Nation and the Alberta Government filed extensive legal arguments on the jurisdictional issue, and prior to a decision being made, the Siksika Nation withdrew their jurisdictional challenges on a without prejudice basis, and therefore, there were no winners or losers on the jurisdictional challenges. The Director did not consider it appropriate for costs to be paid on an issue the Board and the Minister were not required to make a determination on.

[41] The Director noted the majority of the costs claimed by the Siksika Nation related to the jurisdictional challenges, not the environmental aspects of the Director's decision. He argued the jurisdictional challenges were regarding the Director's statutory authority and the authority of the Board. He stated these issues were not related to the issues raised in the Notice of Appeal, and therefore, it is not appropriate for the Director, the Alberta Government, or the Board to pay costs related to the jurisdictional challenges, as they undertook their statutory obligations regarding jurisdictional and constitutional questions.

[42] The Director explained the settlement agreement between Alberta Environment and the Siksika Nation has not been put before the Board, and the settlement did not result in any amendments to the Approval.

[43] The Director questioned whether the fees for Mr. Running Rabbit and Siksika Environmental Ltd. were internal fees paid to different branches of the Siksika Nation.

[44] The Director submitted all Parties should bear their own costs, including the Appellant. The Director stated the Approval was upheld, and the conditions added to the

Approval resulted from the intervenors, Alberta Transportation and the County of Vulcan, and did not relate to the issues raised in the Notice of Appeal.

III. ANALYSIS

A. Statutory Basis for Costs

[45] The legislative authority giving the Board jurisdiction to award costs is section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act") 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*:

> "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."[13]

Further, Mr. Justice Fraser stated:

> "I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board '*may* award costs … and *may*, in accordance with the regulations, direct by whom and to whom any costs are to be paid….'" (Emphasis in the original.)[14]

[46] The sections of the Regulation concerning final costs provide:

> "18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.
>
> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
>
> (a) the matters contained in the notice of appeal, and
> (b) the preparation and presentation of the party's submission.
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> …

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

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

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."

[47] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the specific act. The purpose of EPEA is found in section 2, which provides:

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

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

> (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions; …
> (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
> (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; …
> (i) the responsibility of polluters to pay for the costs of their actions;
> (j) the important role of comprehensive and responsive action in administering this Act."

[48] Similar provisions exist under section 2 of the *Water Act*:

> "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 Alberta citizens 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 transboundary water management;
> (f) the important role of comprehensive and responsive action in administering this Act."

[49] While all of these purposes are important, the Board believes the shared responsibility that section 2(f) of EPEA and 2(d) of the *Water Act* places on all Albertans "…for ensuring the protection, enhancement and wise use of the environment through individual action…" is particularly instructive in making its costs decision.

[50] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in the *Water Act*, EPEA, and the Regulation should apply in the

particular claim for costs.[15] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[16] 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 "…that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."[17]

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

> "To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:
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> (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.
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> 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."[18]

[52] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.[19]

B. Courts vs. Administrative Tribunals

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[15] *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.)).

[16] *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.)) (*"Paron"*).

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

[18] Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

[19] *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.)).

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

[54] The distinction between the costs awarded in judicial and quasi-judicial settings was stated 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 successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[20]

[55] The effect of this public interest requirement was also discussed by Mr. Justice Fraser in *Cabre*:

> "…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

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[20] *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."

> 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 tarrifs [*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.'"[21]

[56] There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.[22] Therefore, the Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[23]

C. Consideration and Application of Criteria

1. Approval Holder

[57] The Director expressed concerns that the Approval Holder filed their submission after the designated deadline. The Approval Holder submitted their costs request on January 28, 2005, and the deadline set by the Board to receive comments from the Approval Holder was January 14, 2005. The Approval Holder submitted their response letter out of time, and it is unclear whether they were actually claiming costs or simply outlining the costs they have incurred as a result of the project. None of the Parties will be prejudiced by the Board accepting this submission, as it does not effectively change the Board's decision. Therefore, the Board will allow the information provided by the Approval Holder to be included in its considerations.

[58] Their concerns regarding crop loss and the costs associated with completing the project on their lands does not meet the test set by the Board. These types of costs are not

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

[22] Section 2 of EPEA states:

> "(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: … (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions…."

[23] *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.)).

associated with the preparation and presentation of evidence at the Hearing. The costs of constructing and implementing the project allowed under an approval is the responsibility of the approval holder and is part of the costs associated with doing business. Other parties should not be responsible for those types of costs.

[59] The agronomist hired by the Approval Holder appears to have been hired to provide the necessary information for the application to the Director; the report was not prepared for the Hearing. Although the report may have assisted the Approval Holder in their arguments, there was no one available at the Hearing to be cross-examined and questioned on the information provided in the report. The Approval Holder did not provide any information to indicate how the report assisted in their preparation for the Hearing and without some connection to the Hearing, the Board cannot consider it appropriate to award costs associated with the completion of the agronomist's report. Costs, including those associated with preparing a report for the mediation, cannot be awarded unless it was part of the formal agreement between the participants. The Board generally is of the view that participants in a mediation are responsible for their own costs.

[60] No costs are awarded to the Approval Holder.

2. Appellant

[61] The Appellant claimed costs totaling $5,213.67 for legal fees and for consultant's fees that pre-date the filing of the Notice of Appeal. The Board acknowledges the consultant's work was completed with respect to the drainage ditches on the Approval Holder's lands, but it was not done specifically for the preparation and presentation of evidence for this appeal. It is unclear of the connection between the report and this appeal, and it appears the report was prepared in relation to a prior, broader dispute between the Appellant and the Approval Holder.

[62] The report that was provided by the Appellant was authored by Matrix Solutions. Before the Board can give weight to a report such as the one provided by the Appellant, someone should be available to speak to the contents of the report and be available for questioning by those adverse in interest and the Board. As the author of the report was not available at the Hearing, the Board can put limited weight to the accuracy of the information presented in the

report, and therefore, the report was of limited value to the Board in making its recommendations to the Minister.

[63] In determining an award of costs, the Board evaluates the evidence presented to assess whether it provided clarity to the Board in understanding the issues and the facts. Although the Board often requires scientific data, it also values the input from those who live in the area and know the area thoroughly. The Appellant in this case had lived in the area for a number of years and was aware of the drainage issues, so his evidence provided a basis on which the Board could understand the issues.

[64] The Appellant represented himself at the Hearing, which he has the right to do, but he submitted legal fees for a lawyer who was retained for a different issue. The costs claimed by a party must be in relation to the preparation and presentation of the issues in the current appeal. The Appellant's legal costs date back to 2000, three years before the Notice of Appeal was filed. The Appellant did not provide a clear indication as to how the work provided by legal counsel was connected to the preparation and presentation of evidence at the Hearing. It appears counsel was hired in relation to another matter prior to the Notice of Appeal being filed and was not hired to assist in the preparation and presentation at the Hearing. The Board appreciates that legal counsel assisted the Appellant in reviewing his submissions, but he did not charge for this service. Past accounts cannot be considered as part of preparation for the current appeal. The Board notes the effort made by counsel for the Appellant in helping to limit costs incurred by the Appellant.

[65] In assessing whether costs should be awarded, the Board will look at whether the arguments presented promoted the public interest. With respect, the Board believes the Appellant in this case had only a personal interest in the issue. Although a public interest, the protection of the road beds, was brought to the Board's attention, it was the evidence of Alberta Transportation and the County of Vulcan that demonstrated the potential effect of the project and that convinced the Board to recommend that additional conditions should be added to the Approval to protect the public interest.

[66] The evidence provided by the Appellant did not materially assist the Board in determining the issues, and the Appellant's evidence appeared to be contradictory to the other

evidence presented.[24] The evidence was not clear at times, and it did not materially assist the Board in understanding or determining the issues.

[67] As the costs claimed pre-date the filing of the Notice of Appeal, no costs will be awarded to the Appellant.

3. Siksika Nation

[68] The Siksika Nation claimed costs totaling $56,434.16. Before the Board discusses these costs, it is important to separate those costs associated with the preparation and presentation at the Hearing of the substantive issues from those costs associated with the submissions and arguments provided regarding the jurisdictional matters. In this case, costs claimed by the Siksika Nation that were associated with the jurisdictional matter totaled $44,815.93, whereas the costs associated with the substantive issues amounted to $11,618.23.

[69] As stated above, costs are awarded to acknowledge the assistance a party has provided to the Board in its decision of the issues.[25] The Board appreciated the involvement of the Siksika Nation at the Hearing, as they provided traditional knowledge regarding the area and the water flows.

[70] However, the costs incurred by the Siksika Nation were primarily related to the jurisdictional issue raised by them. The jurisdictional issue raised by the Siksika Nation was important to it, and it had the right to raise the matter. However, the Board also notes the Siksika Nation did not raise the matter until the day of the Hearing. The Board is not stating they should have avoided raising the matter, but the timing as to when it was raised and the fact the

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[24] See: *Monner* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *New Dale Hutterian Brethren* (13 October 2005), Appeal No. 03-010-R (A.E.A.B.) at paragraph 66.

[25] The issues before the Board were:

> "1. the changing direction of water flow so that the applicants (*sic.*) water drains onto Mr. Monner's property;
>
> 2. no recourse if conditions of the Approval are not met;
>
> 3. the increased water flow will raise the water level on Mr. Monner's property thereby compromising his ability to raise crops. When this happened in 1997 Mr. Monner lost the use of this land for six years;
>
> 4. perennial weeds/grasses that have built up since last unauthorized flooding; and
>
> 5. Mr. Monner would like the Approval revoked and all licenced drainage canals returned to original topographical state."

jurisdictional issue was withdrawn after a resolution was reached with the Director, are considerations for the Board. The costs associated with raising the jurisdictional question could have been mitigated. The Siksika Nation raised the matter at the Hearing rather than giving notice to the Parties and the Board. If notice had been given, the Board could have dealt with the matter as part of its process, rather than requiring an additional submission process.

[71] The Siksika Nation referred to the number of submissions that were required in relation to the jurisdictional matter. The submission process was lengthened as a result of the Siksika Nation raising additional arguments in the response submission. This required an additional round of submissions from the Parties in order to address the new arguments. As the process must be fair to all Parties involved, what was originally set as a three-stage process, became a five-stage process. The purpose of the response submission is not to raise new arguments. The response submission is there for the applicant to be able to provide arguments in response to matters raised in the respondent's submission that were not foreseeable by the applicant. It is not intended to allow a party to present new evidence that does not respond to the evidence of the other parties. By raising new issues, the rules of natural justice and administrative law requires the Board provide those adverse in interest the opportunity to respond. This, in turn, required an additional response submission from the Siksika Nation. The Board recognizes the Siksika Nation acquired the services of a different lawyer, but this does not justify the raising of new arguments at such a late stage of the submission process.

[72] The number of submissions was also increased by the Appellant and the Siksika Nation requesting a Stay. The Siksika Nation raised the jurisdictional matter at the Hearing. As a result, the Board required all of the Parties to provide written submissions regarding the issue. The Siksika Nation and the Appellant requested a Stay of the Approval until the jurisdictional matter had been settled, the Board had issued its Report and Recommendations, and the Minister had released his decision. In order to maintain fairness for all Parties involved, an additional submission process was required to determine if the Stay should be granted. The Board notes the Stay request was denied.

[73] The Board will not consider the costs associated with the jurisdictional and fiduciary matters, as these were not issues determined by the Board. The Board appreciates the efforts undertaken by the Siksika Nation and Alberta Environment to come to a resolution of the

concerns. As the matter was resolved outside of the Board's process, the arguments filed on the issue did not assist the Board in making its Report and Recommendations. The agreement that was reached between the Director and the Siksika Nation was never put before the Board and therefore, could not be part of the Board's decision making. As the Board is only in a position to make recommendations to the Minister to confirm, reverse, or vary the Approval issued, and as the Approval was varied only as it related to the environmental impacts on the adjacent roadbeds, the submissions provided regarding the jurisdictional matter did not affect the recommendations made to the Minister. Taking all of these matters into account, in this case the Board will not consider costs except those related to the environmental issues presented at the Hearing.

[74] As to the costs associated with the substantive issues, the Board does not consider it appropriate to award costs in this case. The evidence provided by the Siksika Nation was not considerably different from that provided by the other Parties. The evidence provided by the Siksika Nation put the issue regarding Indian Lake into perspective, but it was not determinative of the issues before the Board.

[75] Essentially the arguments provided by the Siksika Nation had little to do with the environmental issues that were identified by the Board. Although most appeals do have a private interest element to them, when awarding costs, the Board looks at whether the arguments supported the public interest, as environmental issues do concern the public generally. In this case, the issues raised and the arguments presented were important to the Siksika but of limited significance to the general public.

[76] When parties claim for costs, it is important to have the claims supported by the appropriate documentation. The Siksika Nation provided only a written note and no invoice for the $1500.00 claimed for Mr. Norman Running Rabbit's attendance at the Hearing. The invoice from Siksika Environmental Ltd. provided no details of what services were provided or information on how this environmental company is associated with the Siksika Nation. Without some indication of what these services entailed and how they assisted in the preparation and presentation of the Siksika Nation's evidence, the Board cannot award costs.

[77] The evidence provided by the Siksika Nation was useful background information and there was considerable traditional knowledge presented that is as valuable as much of the

scientific and technical data that is provided to the Board, but it was not the type of evidence that costs would be awarded for as, in this case, it did not contribute to the Board's decision making.

[78] The Siksika Nation had legal counsel present at the Hearing, but it was Mr. Owl Child that did most of the advocacy at the Hearing. Therefore, it cannot be said the legal counsel assisted the Board at the Hearing. What the Board looks for is whether the participation was above and beyond the basic level that all participants should have in an appeal. Without a demonstration of additional contributions to the Hearing process, the Board will generally not award costs.

[79] No costs will be awarded to the Siksika Nation.

IV. CONCLUSION

[80] For the foregoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the request for final costs by the Appellant, the Approval Holder, and the Siksika Nation are denied.

Dated on January 5, 2006, at Edmonton, Alberta.

"*original signed by*"

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Mr. Al Schulz
Panel Chair

"*original signed by*"

_____
Dr. Alan J. Kennedy
Board Member

"*original signed by*"

_____
Dr. Harrie Vredenburg
Board Member