

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 16, 2005

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 appeals filed by Ben Gadd with respect to Approval No. 00188589-00-00 issued under the *Water Act* and Approval Nos. 11767-01-02 and 46972-00-01 issued under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (16 December 2005), Appeal Nos. 03-150, 151 and 152-CD (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair,
Mr. Ron V. Peiluck, Vice Chair, and
Mr. Al Schulz, Board Member.

SUBMISSIONS BY:

Appellant: Mr. Ben Gadd, represented by Ms. Jennifer Klimek.

Director: Mr. Larry Williams, Director, Central Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Darin Stepaniuk, Alberta Justice.

Approval Holder: Cardinal River Coals Ltd., represented by Mr. Martin Ignasiak, Fraser Milner Casgrain LLP.

Intervenors: Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, and Mr. Roger Wilkins (the Cadomin Residents).

Witnesses (Approval Holder): Mr. Ben Gadd; Mr. Cleve Wershler; Ms. Dianne Pachal; and Mr. Chris Severson-Baker.

EXECUTIVE SUMMARY

Alberta Environment issued Approval No. 00188589-00-00 under the *Water Act* and Amending Approval Nos. 11767-01-02 and 46972-00-01 under the *Environmental Protection and Enhancement Act* to Cardinal River Coals Ltd. for the construction, operation, and reclamation of a private haul road near Cadomin, Alberta. The Approval and Amending Approvals modify the original design of the Cheviot Coal Mine Project. The primary difference from the original design is the introduction of a private haul road and the elimination of the need to rebuild the existing abandoned railway line. The Board received Notices of Appeal from Mr. Ben Gadd appealing the Approval and the Amending Approvals.

The Board determined that Mr. Gadd was directly affected by the private haul road and, therefore, was granted standing. A hearing was held, and at the end of the hearing, Mr. Gadd and Cardinal River Coals reserved their right to ask for costs.

The Board provided its recommendations to the Minister of Environment, and the Minister accepted the recommendations.

The Board received costs applications from Mr. Gadd, Cardinal River Coals, and the Cadomin Residents who intervened in the hearing. The Board denied costs to the Cadomin Residents, as they did not reserve their right to ask for costs prior to the end of the hearing. Costs were not awarded to Cardinal River Coals Ltd. as the costs they were seeking were punitive in nature. The Board awarded costs to Mr. Gadd for legal fees (\$10,165.00) and for witnesses that appeared on his behalf (\$3,838.96). These costs are to be paid by Cardinal River Coals Ltd.

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I. BACKGROUND

[1] On December 9, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00188589-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Cardinal River Coals Ltd. (the “Approval Holder”) for the construction, operation, and reclamation of a private haul road (the “Haul Road”) with respect to the Cheviot Coal Mine Project near Cadomin, Alberta.

[2] On December 19, 2003, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Ben Gadd (the “Appellant”) appealing the Approval.

[3] On December 29, 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 December 5, 2003, the Director issued Approval Nos. 11767-01-02 and 46972-00-01 (the “Amending Approvals”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, E-12 (“EPEA” or the “Act”) to the Approval Holder for the construction, operation, and reclamation of the Haul Road. The Amending Approvals allow for the development of the Haul Road between the Luscar Coal Mine Project and the Cheviot Coal Mine Project.

[5] On January 5, 2004, the Board received Notices of Appeal from the Appellant appealing the Amending Approvals.

[6] On January 5, 2004, the Board acknowledged receipt of the Notices of Appeal and notified the Approval Holder and the Director of the appeals.

[7] On January 5, 2004, the Board received a letter from the Director suggesting the appeals of the Approval and the Amending Approvals be combined.¹ On January 6, 2004, the Board received a letter from the Approval Holder also asking that the appeals be dealt with

¹ As the Approval and Amending Approvals were issued with respect to the same Haul Road, the Board will refer to the Approval and Amending Approvals collectively as the “Approvals.”

together by the Board. It also requested that a Preliminary Meeting should be held.² The Board granted these requests.

[8] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the “NRCB”) and the Alberta Energy and Utilities Board (the “AEUB”) asking whether this matter had been the subject of a hearing or review under their respective legislation. On January 13, 2004, the NRCB responded in the negative. On January 20, 2004, the Board received a letter from the AEUB advising that:

“...Cardinal River Coals Ltd. (CRC) applied to the Alberta Energy and Utilities Board (Board/[A]EUB) in August 2002, under the *Coal Conservation Act* for approval to develop a private haul road from the Cheviot Mine Site to the Coal Processing Plant located at the Luscar Mine Site. CRC applied to amend Permit 2000-37 to extend the Cheviot mine permit area so as to include the private haul road. Permit No. C2000-37 was issued to CRC with respect to the Cheviot mine following two joint [A]EUB/Canadian Environmental Assessment Agency (CEAA) hearings in 1997 and 2000. The CRC also applied for an amendment of Permit No. C2000-2 with respect to those portions of the private haul road that would be located within the Luscar Mine site. Permit No. C2000-2 was issued to CRC for the operating of the Luscar Mine.

A number of objections were received to CRC’s application to develop a haul road, including an objection from Mr. Ben Gadd. Following a review of submissions, the Board [(AEUB)] dismissed all the objections on the basis that the objectors did not have standing, pursuant to s. 26 of the *Energy Resources Conservation Act*. As a result, no hearing was held and the Board [(AEUB)] issued Permit No. C2003-4 on April 9, 2003. Permit No. C2003-4 rescinded Permit No. C2000-37 in order for the inclusion of a private haul road to the existing coal processing plant located at the Luscar Mine site.”

The AEUB provided a copy of Permit No. C2003-4 and AEUB Decisions 97-088 and 2002-59, which were the two decisions of the Joint Review Panel with regard to the Cheviot Coal Mine Project.³

² The issues addressed at the Preliminary Meeting were:

- “(a) whether Mr. Gadd is ‘directly affected’ by the Approvals under appeal;
- (b) whether Mr. Gadd had the opportunity to participate in a hearing or review administered by the Energy Resources Conservation Board [(AEUB)] at which all of the pertinent matters were adequately dealt with;
- (c) whether the Government of Alberta participated in a public review under the *Canadian Environmental Assessment Act* at which all of the pertinent matters were adequately dealt with; and
- (d) which matters raised by Mr. Gadd in the Notices of Appeal ought to be addressed during

[9] On January 22, 2004, the Board informed the Parties that it had decided to schedule a Preliminary Meeting to deal with the preliminary motions raised in the Approval Holder's letter of January 6, 2004. The Preliminary Meeting was held on April 26, 2004.

[10] The Board notified the Parties on May 26, 2004, that it had decided to grant the Appellant standing in these appeals and that the Board had jurisdiction to hear these appeals. The Board stated:

“The [Approvals relate] specifically to the haul road, and the changes allowed for under the [Approvals] alter the design of the haul road. To the extent these changes in the design of the haul road were not considered in the Alberta Energy and Utilities Board hearings, the Board retains jurisdiction to hear the matter.

The Board is in the process of setting the issues for the hearing. The issues will be narrowly defined and will focus on the difference in the environmental impacts that were originally before the AEUB and what now exists as the result of the [Approvals]. The hearing of these appeals will deal with the Haul Road only and not the project as a whole.” (Emphasis deleted.)

On June 14, 2004, the Parties provided additional submissions on the issues that should be considered at the Hearing of these appeals.

[11] On July 26, 2004, the Board provided a letter stating the issues that would be considered at the Hearing would be as follows:

- “1. What effect will the new design of the haul road have on the movement and migration of wildlife in the area?
2. What effect will the new design of the haul road have on public access to the wilderness areas and tourist sites on either side of the haul road?
3. What effect will the new design of the haul road have on the local watershed?
4. What effect will the new design of the haul road have on the noise and dust coming from the haul road?
5. What is the legal status of the approval given that ‘pre-development activities under the previous approval were to be commenced by December 31, 2001 unless amended.’”

The Board scheduled a Hearing for September 27 and 28, 2004, in Hinton, Alberta.

the EAB's [(the Board's)] hearing of the appeal, if an appeal proceeds.”

³ See: AEUB Decision 97-08, Cardinal River Coals Ltd./TransAlta Utilities Corporation, Cheviot Coal Project (June 1997) and AEUB Decision 2000-59, Cheviot Coal Project (12 September 2000).

[12] In response to the Board's Notice of Hearing, the Board received intervenor requests from Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins, Mr. Roger Wilkins, Mr. Tom Stang, Trout Unlimited Canada, Yellowhead County, Alberta Fish and Game Association, United Mine Workers of America, the Town of Hinton, West Yellowhead Community Futures Development Corporation, and the Alberta Council for Sustainable Communities and the Environment. The Board requested the Parties provide their comments regarding the intervenor requests, and the Parties' responses were received on September 7, 2004. On September 9, 2004, the Board notified the Parties and the intervenors that Ms. Barbara Higgins, Ms. Helen Ready, Ms. Janice Melnychuk, Mr. Edd Vass, Ms. Joyce Wilkins and Mr. Roger Wilkins (collectively the "Cadmin Residents") had been granted full party status; the Alberta Council for Sustainable Communities and the Environment, West Yellowhead Community Futures Development Corporation, the Town of Hinton, United Mine Workers of America, Alberta Fish and Game Association, Trout Unlimited, and Yellowhead County had been given limited intervenor status; and the intervenor request of Mr. Tom Stang had been denied.

[13] On September 1, 2004, the Approval Holder requested the Board stay its proceedings until an application previously filed in the Federal Court of Canada, Trial Division, had been adjudicated. The Federal Court application was for an order compelling the Federal Minister of Fisheries and Oceans to prepare an environmental assessment of the Haul Road pursuant to the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"). The Approval Holder stated that depending on the outcome of the Federal Court application, the Board may lose jurisdiction to hear the appeals. The Board received the Parties' responses to the Approval Holder's request on September 3, 2004. On September 9, 2004, the Board notified the Parties that the Approval Holder's request for a stay of the Board's proceedings had been denied.

[14] On September 14, 2004, Mr. Tom Stang requested a reconsideration of the Board's decision to deny his intervenor application. On September 15, 2004, the Board notified Mr. Stang and the Parties that his reconsideration was denied.⁴

⁴ The Board notes that Mr. Stang appeared before the Board as a witness for the Appellant.

[15] The Board received submissions for the Hearing from the Parties and the Intervenor between September 13 and September 21, 2004.⁵

[16] On September 17, 2004, the Approval Holder commenced an action in the Court of Queen's Bench of Alberta for a judicial review of the Board's decisions regarding the directly affected status of the Appellant, the stay, and the intervenors. The Approval Holder requested an adjournment of the Board's proceedings until the issues raised in the application had been determined. On September 21, 2004, the Board granted the adjournment stating:

"In making its decision to adjourn the hearing at this time, the Board took into account the difficulty that the parties would have preparing for both the Court application and the hearing at the same time. The Board also did not want to have the parties spend their time preparing for the hearing, with the potential that the Court could order the Board to adjourn the hearing on Friday [September 24, 2004].

The Board will re-visit this matter on November 1, 2004, at which time all parties are requested to provide the Board with a status report regarding the judicial review and the status of the federal court judicial review. In this regard, the Board requests the parties expedite the judicial review process." (Emphasis deleted.)

[17] On October 13, 2004, the Board provided the Parties with a copy of its decision on the Preliminary Meeting,⁶ and on October 14, 2004, the Board provided its intervenor decision to the Parties.⁷ On October 15, 2004, the Board provided the Parties with its reasons for denying the Approval Holder's stay request pending the application filed in the Federal Court of Canada.⁸

[18] On November 3, 2004, the Approval Holder's judicial review application was heard by the Court of Queen's Bench. On November 4, 2004, the Court denied the Approval

⁵ The Board received a revised submission from the Town of Hinton on December 15, 2004, as Mayor Glenn Taylor replaced Alex Galbraith in the October 2004 elections.

⁶ See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID (A.E.A.B.).

⁷ See: Intervenor Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (12 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID2 (A.E.A.B.). The West Yellowhead Community Futures Development Corporation did not provide any submissions to the Board.

⁸ See: *Pembina Institute for Appropriate Development et al. v. Minister of Fisheries and Oceans and Cardinal River Coals Ltd.*, Notice of Application No. T-1488-04 (12 August 2004) (F.C.T.D.).

Holder's judicial review, finding the Board's determination that the Appellant was directly affected was correct, and in any event, the application by the Approval Holder was premature.⁹

[19] On December 10, 2004, the Board confirmed the Hearing was rescheduled to January 24 and 25, 2005, in Hinton, Alberta.

[20] In their August 20, 2004 intervenor request, the Cadomin Residents also requested interim costs. The Board received comments from the other Parties regarding the request. On September 9, 2004, the Board notified the Parties and the Cadomin Residents that the request for interim costs was denied. On December 23, 2004, the Board provided the Parties and Intervenors with a copy of its decision with respect to the interim costs application of the Cadomin Residents.¹⁰

[21] The Hearing was held on January 24 and 25, 2005.

[22] The Board submitted its Report and Recommendations to the Minister of Environment on February 24, 2005, and the Minister accepted the Board's recommendations on April 8, 2005.¹¹

[23] Before the close of the Hearing, the Board received notice from the Appellant and the Approval Holder that they may wish to make an application for costs. The Cadomin Residents stated they did not intend to apply for costs.

[24] The Board provided the Parties with a schedule to provide submissions regarding costs. The Board received the Parties' submissions between April 25 and May 11, 2005.

⁹ See: *Cardinal River Coals Ltd. v. Environmental Appeals Board (Alberta)* (4 November 2004), Edmonton 0403 18462 (Alta. Q.B.). In the judicial review, the Approval Holder abandoned its objections regarding the Board's decisions to deny the stay and to grant some of the intervenors status. The Approval Holder only advanced its arguments on the Appellant's standing.

¹⁰ See: Interim Costs Decision: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (21 December 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID3 (A.E.A.B.).

¹¹ See: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (24 February 2005), Appeal Nos. 03-150, 03-151 and 03-152-R (A.E.A.B.).

II. SUBMISSIONS

A. Appellant

[25] The Appellant asked the Board to order the Approval Holder or the Director to pay the costs of the Appellant's participation in the Hearing. The Appellant asked for costs of \$5,782.59 for Mr. Cleve Wershler; \$6,283.37 for Mr. Chris Severson-Baker; \$8,326.57 for Ms. Dianne Pachal; and \$50,971.73 for Ms. Jennifer J. Klimek, for a total of \$71,364.26.

[26] The Appellant explained the Director had originally denied that the Appellant was directly affected, but after a meeting with the Director and his counsel, the Director ultimately determined the Appellant was directly affected.

[27] The Appellant stated he assisted the Board in reviewing the matter and understanding the issues. According to the Appellant, he acted reasonably and did what he could to move the matter ahead, and his costs are reasonable. The Appellant explained he cooperated with the Cadomin Residents to make sure his intervention was not redundant or conflicted with the Cadomin Residents.

[28] The Appellant argued he limited his involvement to the issues of the Haul Road and only brought in evidence that would assist the Board in dealing with matters within its jurisdiction. He submitted his contribution was valuable as the Board asked many questions and his submissions were reflected in the conclusions made in the Board's Report and Recommendations.

[29] The Appellant stated his experts, all of whom attended the Joint Review Panel hearings and were recognized as experts, dealt with issues as directed by the Board, were well-briefed, and provided articulate, relevant, and succinct evidence. He explained he did not have the resources to have his experts conduct their own independent research, so they were limited to providing a critical analysis of the work done. The Appellant stated the witnesses assisted in preparing for an effective cross-examination.

[30] The Appellant stated Mr. Cleve Wershler, who dealt with the wildlife impacts of the Haul Road, is a recognized wildlife biologist.

[31] The Appellant stated Mr. Chris Severson-Baker has an extensive background in environmental policy and planning and environmental assessment. According to the Appellant, Mr. Severson-Baker is employed by the Pembina Institute, which is frequently retained by industry and intervenors to provide the type of services provided at the Hearing. The Appellant stated Mr. Severson-Baker reviewed the project with respect to water issues and particulate matter.

[32] The Appellant explained Ms. Dianne Pachal has worked in the environmental field for many years and is an expert on wildland and protected areas. He stated her involvement was essential in assisting his legal counsel in reviewing the application and determining which issues should be pursued.

[33] The Appellant's legal counsel, Ms. Jennifer Klimek, explained she was admitted to the bar in 1985 and she has a Masters in Environmental Law. She stated she has worked in the environmental area since 1990 and has appeared before the Board on previous occasions. Ms. Klimek has a billable rate of \$250.00 per hour, and she spent 210.8 hours working on this matter.

[34] The Appellant stated there were many preliminary matters that needed to be addressed, including standing and jurisdictional issues, in all of which the Appellant was successful. The Appellant stated these were time consuming and required a great deal of research, reviewing of the application, preparation of submissions, and presenting before the Board. The Appellant argued that because of the jurisdictional issue and the factual complexities, he required legal expertise in order to present the arguments in an organized, focused manner. He stated this was achieved by providing "...succinct, relevant evidence, both written and orally, by staying within our timelines, and making the most of our cross-examination."¹²

[35] The Appellant argued his participation assisted the Board in understanding the appeals and there are now better Approvals, as conditions were imposed and further directions were given to the Director regarding procedural matters, review of applications, and approval conditions. The Appellant stated the Board recognized there were wildlife concerns, provided direction on how adaptive management should be used, and provided direction to the Director as

¹² Appellant's submission, dated April 25, 2005.

to what he should do with information gaps. The Appellant stated the Board made specific recommendations with respect to the Approval, including requiring the Approval Holder to participate in the Foothills Model Forest Program, for the Approval Holder to provide public access, and provided direction on the Whitehorse Creek Provincial Recreation Area and public involvement

[36] The Appellant argued the Approval Holder's actions in this matter increased his costs. The Appellant stated the Approval Holder raised jurisdictional arguments such as standing and whether previous hearings dealt with the matters. He also stated the Approval Holder brought a judicial review application and a Stay application to stay the Board's proceedings based on four grounds after the Appellant had completed his submissions and was more or less ready to go to a hearing originally set for September 2004. The Appellant stated the delay resulted in him redoing some of the work with respect to the preparation for the Hearing. The Appellant also stated the Approval Holder dropped three of the grounds for its judicial review only a few days prior to the judicial review hearing, and had the grounds been dropped prior to asking for the adjournment, the adjournment of the appeal hearing may not have been granted. The Appellant explained he is not asking for costs associated with the judicial review, but the delay and the additional costs incurred in the hearing process should be factored into the decision of whether costs should be granted.

[37] The Appellant stated he cannot afford to conduct such an appeal on his own. He submitted that through his appeal, the public has been better served, and therefore, he should not bear full costs. The Appellant stated he was prepared to donate his time and travel costs, but he should be compensated for the expenses incurred on his behalf. The Appellant argued his income has been affected by the project that further affects his ability to pay for these appeals.

[38] The Appellant opposed the nominal costs application made by the Approval Holder, as there was no basis to award costs as a result of the Appellant's conduct at the Hearing. He argued the application is punitive in nature, it infers he abused the process, and that he should be punished. The Appellant stated he assisted the Board in coming to its conclusion in this matter, as the variations made to the Approval were "...not insignificant."¹³ He stated variations

¹³ Appellant's submission, dated April 25, 2005.

were ordered on three of the four substantive issues, and the Report and Recommendations provided further direction as to how such approvals should be handled in the future.

[39] The Appellant stated the one area where the Board did not accept his evidence was with respect to selenium, but the Board also found the Approval Holder's views on selenium were not determinative of the issue and left the uncertainties to the Director.

[40] The Appellant explained he had limited resources, and as an environmental impact assessment was not completed on the project, he did not have the benefit of that process to address mitigation strategies. He stated he did not have the expertise to suggest what could be done to mitigate the damages, but his experts did raise some mitigation measures.

[41] The Appellant submitted that his appeal was well organized and extremely helpful to the Board, and as such, he should be awarded costs.

B. Approval Holder

[42] The Approval Holder requested costs in the amount of \$1.00 from the Appellant. The Approval Holder argued that even though the Board recommended some variations to the Approvals to address wildlife concerns, "...it did not make any recommendations in respect of the plethora of unfounded concerns raised by the Appellant..."¹⁴ including issues in respect of the local watershed, noise, dust, and public access. According to the Approval Holder, the Appellant raised a number of issues that the Board determined were already appropriately addressed in the Approvals, and therefore, the Appellant must bear the responsibility for a hearing that was much longer and more complicated than required.

[43] The Approval Holder argued the Appellant raised a number of issues that were not properly before the Board, as the Appellant refused to accept that the AEUB made a decision that the Haul Road was in the public interest. The Approval Holder also argued the Appellant raised a number of issues that were not supported by facts, such as concerns related to selenium.

[44] The Approval Holder stated it had to incur considerable expense because the Appellant raised a number of issues without basis in fact, and it had to retain experts to respond

¹⁴ Approval Holder's submission, dated April 25, 2005.

to the Appellant's written submissions. The Approval Holder stated that, had the Appellant limited his submissions to matters that were truly at issue, such as wildlife concerns, the Approval Holder would not have had to incur the expenses associated with its expert witnesses.

[45] The Approval Holder argued the Board acknowledged that the Appellant failed to be constructive or helpful and that he could not suggest meaningful alternatives for the Board to consider. The Approval Holder further argued the Appellant was not prepared for the Hearing.

[46] The Approval Holder argued the Appellant "...is a die-hard opponent of [the Cheviot Coal Mine Project] and used the Board's processes as a platform to pontificate as opposed to a forum in which to make constructive and meaningful suggestions based on evidence. As a result, CRC has incurred considerable expenses unnecessarily, as has the Alberta taxpayer."¹⁵

[47] The Approval Holder objected to the expenses for Mr. Severson-Baker and Ms. Pachal. The Approval Holder argued Mr. Severson-Baker did not give any evidence that resulted in changes or variations to the Approvals. The Approval Holder stated Mr. Severson-Baker is a policy analyst and not an expert on the technical issues, and the evidence he gave could have been as effectively given by the Appellant. The Approval Holder argued Mr. Severson-Baker is not a skilled expert and he was not acting as a neutral third party expert. The Approval Holder stated Mr. Severson-Baker did not provide impartial, independent expert advice to assist the Board, and therefore, his costs are more appropriately characterized as compensation rather than costs. In addition, the Approval Holder argued the hourly rate charged by Mr. Severson-Baker, \$75.00, is "...unreasonably high given his background and lack of technical expertise."¹⁶

[48] The Approval Holder stated that, based on the expenses submitted by Ms. Klimek, her true clients were the Canadian Parks and Wilderness Society ("CPAWS"), the Pembina Institute for Appropriate Development, and the Sierra Club of Canada. The Approval Holder pointed out that the disbursements incurred by the Appellant's legal counsel were reimbursed by the Sierra Club of Canada and the Pembina Institute, and there was no indication

¹⁵ Approval Holder's submission, dated April 25, 2005.

¹⁶ Approval Holder's submission, dated May 11, 2005.

the Appellant ever paid for any of the disbursements. The Approval Holder argued the true appellants in this case were CPAWS and the Sierra Club. It also argued the Pembina Institute should be treated as an appellant and not as a neutral third party claiming legitimate costs.

[49] The Approval Holder stated Ms. Pachal is also a "...long time die-hard opponent of the Cheviot [Coal Mine] Project...",¹⁷ as she has applied to the Federal Court to quash the regulatory approval issued to the Approval Holder. The Approval Holder argued Ms. Pachal is not an independent and impartial expert witness, and therefore, her costs are more appropriately characterized as a type of compensation rather than costs.

[50] The Approval Holder further argued that Ms. Pachal is not an expert and she is not a professional biologist. The Approval Holder stated Ms. Pachal's testimony did not substantially contribute to the Hearing or make a significant and noteworthy contribution to the goals of EPEA.

[51] The Approval Holder explained that Ms. Pachal's involvement in the Federal Court litigation would have largely prepared her for the Hearing, and it questioned the 291.5 hours claimed by Ms. Pachal. The Approval Holder stated it was improper for Ms. Pachal to try to recoup the time spent on the Federal Court litigation by claiming compensation from the Approval Holder as a result of the Board's process. The Approval Holder noted there was no description to elaborate on what Ms. Pachal was doing for 291.5 hours, and therefore the documentation was deficient and cannot be relied upon. The Approval Holder stated the documents submitted by Ms. Klimek suggest that CPAWS or the Sierra Club are actually responsible for the amounts owing.

[52] The Approval Holder acknowledged the fees charged by Mr. Wershler were reasonable given that his testimony was relevant to the pertinent issue at the Hearing, specifically the effect of the Haul Road on wildlife.

[53] In respect to costs claimed by legal counsel for the Appellant, the Approval Holder stated it should not be responsible for any costs pre-dating the filing of the Notices of Appeal. The Approval Holder submitted that only a minimal portion of Ms. Klimek's costs for preparation and hearing time should be awarded, as the Appellant prolonged the Hearing by

¹⁷ Approval Holder's submission, dated May 11, 2005.

raising numerous issues that the Board determined were appropriately addressed in the Approvals.

[54] The Approval Holder submitted the Cadomin Residents are not entitled to an award of costs. The Approval Holder argued the residents had two full days to consider whether they would apply for costs. The Approval Holder stated it relied on the representations of the Cadomin Residents when they waived their right to costs, and it would be prejudicial to the Approval Holder and contrary to the specific direction of the Board to allow a costs claim three months after the conclusion of the Hearing. The Approval Holder stated the Cadomin Residents had availed themselves of legal counsel and ought to have known the Board's procedures for dealing with costs.

[55] The Approval Holder argued it should not be financially responsible for the Cadomin Residents' legal costs solely because their legal counsel did not issue an account until seven months after last doing work for the Cadomin Residents. The Approval Holder stated that, if the Cadomin Residents are surprised by the account issued by their counsel, it is a matter they should raise with their counsel.

[56] The Approval Holder opposed an award of costs to both the Appellant and the Cadomin Residents as against the Approval Holder. However, the Approval Holder submitted that, if the Board determines certain costs should be payable, the costs should be minimal and be based on a portion of the costs claimed by Mr. Wershler and a portion of the costs claimed by Ms. Klimek.

C. Director

[57] The Director stated that he did not seek costs nor does he agree that costs should be awarded against him. The Director submitted that he should not be responsible for paying any of the costs claims of the Appellant or the Cadomin Residents. The Director made no submission regarding the costs claim submitted by the Approval Holder nor with respect to the Cadomin Residents claim for costs when they failed to reserve their right at the conclusion of the Hearing.

[58] The Director stated the Board and the Courts have developed principles for costs claimed as against the Director because of the unique role the Director holds in these matters as statutory decision-maker whose decision is being appealed. The Director stated that the legislation makes the Director an automatic party to every appeal, and this statutory role has been recognized by the Board and the Courts as a vital factor in not ordering the Director to pay costs, as long as he has acted in good faith.

[59] The Director stated the Appellant did not indicate who should be responsible for paying his costs. He stated there have been no allegations that the Director or his staff were not acting in good faith in carrying out their statutory duties. The Director stated the Board recommended the Approvals be upheld with minor variations, and the Board did not suggest the Director had acted in bad faith. Therefore, the Director submitted there are no special circumstances that should result in costs being assessed against the Director.

D. Cadomin Residents

[60] The Cadomin Residents requested costs for legal costs incurred in obtaining standing. The amount requested was \$5,935.74.

[61] The Cadomin Residents explained they did not ask for costs at the end of the Hearing because they had:

- “1. No prior experience at Environmental Appeal[s] Board.
2. Advice that the Board would not consider costs.
3. Lack of opportunity for full discussion at end of hearing with [the other members of the] Cadomin [R]esidents
4. No official bill from law firm for costs incurred in getting standing in the appeal.”¹⁸

[62] The Cadomin Residents stated they assisted the Board in its deliberations, and the Board addressed issues raised by the Cadomin Residents, including the use of road salt, public scrutiny of mitigative measures of the work plans, and restricting access to the haul road if mining ceases.

¹⁸ Cadomin Residents’ submission, received April 25, 2005.

[63] The Cadomin Residents explained that, even though they provided all the research, labour, and technological skill to present their submission at the Hearing, they needed legal assistance in applying for standing. They believed legal expertise was appropriate and necessary in order to be successful in attaining standing, as the legal considerations were complicated and challenging. The Cadomin Residents stated no person in their group had the knowledge or skill to adequately address the considerations in achieving standing.

[64] The Cadomin Residents explained they were not seeking costs for travel, food, and accommodations while attending the Hearing in Hinton. The Cadomin Residents stated that, except for one member, they are retired citizens with limited means available to them for pursuing these appeals. They stated they collectively brought the issues to the Board's attention.

[65] The Cadomin Residents asked the Board to consider reimbursement of the legal costs associated with attaining standing.

III. ANALYSIS AND DISCUSSION

A. Statutory Basis for Costs

[66] 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*:

"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."¹⁹

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

¹⁹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

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.)²⁰

[67] The sections of the *Environmental Appeal Board Regulation*,²¹ (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.

...

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.”

²⁰ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

²¹ *Environmental Appeal Board Regulation*, Alta. Reg. 114/93.

[68] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of the 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.”

[69] 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.”

[70] 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.

[71] However, the Board has stated in other decisions that it has the discretion to decide which of the criteria listed in the Act and the Regulation should apply in the particular claim for costs.²² The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.²³ 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.”²⁴

[72] As stated in previous appeals, the Board evaluates each costs application against the criteria in the acts and 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:

- (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

²² *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.).

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.) (“*Paron*”).

²⁴ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

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."²⁵

[73] 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.²⁶

B. Courts vs. Administrative Tribunals

[74] 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.

[75] The distinction between the costs awarded in judicial and quasi-judicial settings was discussed 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."²⁷

²⁵ Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

²⁶ *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.).

²⁷ *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

[76] 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 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.’²⁸

[77] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.²⁹ There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.³⁰

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.”

²⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 32 (Alta. Q.B.).

²⁹ *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.).

³⁰ 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....”

C. Consideration and Application of Criteria

1. Cadomin Residents

[78] As is the Board's usual practice, at the end of the Hearing, the Board asked the Parties if they wanted to reserve their right to costs.³¹ The Appellant and the Approval Holder both reserved their right. The Cadomin Residents, however, clearly stated they did not intend to file for costs, and they were willing to do their part as citizens to appear before the Board.

[79] In order for the Board to consider a costs application after a party states they are not seeking costs would require compelling reasons. It would not be fair to the other parties to suddenly declare that they now want costs as it introduces uncertainty into the process. Parties must realize that, if they do reserve their right to costs, there is no penalty in not submitting a costs application when asked to do so by the Board after the Minister has released his decision.

³¹ The Parties were told on two separate occasions at the Hearing that, should they want to reserve their rights to costs, they must inform the Board. See: Transcript, January 24 and 25, 2005, page 13 at lines 35 to 36 and page 14 at lines at 1 to 3:

"If you intend to ask for final costs, you must indicate so prior to the close of the hearing and the Board will establish a submission process to address cost applications after the Minister has made his decision on this matter."

See also: Transcript January 24 and 25, 2005, page 424 at line 36 and page 425 at lines 1 to 31:

"CHAIRMAN: Thank you. This now closes the input on the substantial matters of this hearing. Before I proceed to close the hearing and discuss the matter of costs, are there any submissions on any other matters? Hearing none, I will now proceed to prepare to close the hearing. I have heard from two parties with respect to reserving for costs. The appellant has mentioned reserving for costs and CRC has mentioned reserving for costs. Does the Director have any position on this?"

MR. McDONALD: The Director's position with respect to costs is the Director does not seek costs nor does the Director agree that he is responsible or should pay for any costs.

CHAIRMAN: The Board will establish a submission process to address the cost applications after the Minister has made his decision in this matter.

MR. VAN NES: Mr. Chairman, perhaps we could get the Cadomin's position on costs.

CHAIRMAN: Oh, I am sorry, pardon me.

MS. MELNYCHUK: I am sorry, Mr. Chairman, costs for our group, is that what we are being asked?

CHAIRMAN: Yes. Do you have any wish to apply for costs for your participation in the hearing?

MS. MELNYCHUK: We have determined that we will not apply for costs, Mr. Chairman. I was trying to make that point when I mentioned that we were willing to do our part as citizens and come forward to try to protect our interest in the environment.

CHAIRMAN: Thank you, very much. Okay...."

[80] The Board appreciates the Cadomin Residents were inexperienced with the Board's processes, but their response demonstrates they did consider the matter of costs. The Board recognizes that they did not receive their lawyer's invoice until after the Hearing. However, they must have anticipated an invoice at some time that would have to be paid. At the time of the Hearing, when they were asked if they wished to reserve their right to ask for costs, they were not required to provide an estimate of the costs they would be seeking.

[81] Even if the Cadomin Residents had reserved their right to ask for costs, it would still be questionable as to whether costs would have been justified. The costs submitted were in relation to the fees for legal services. Their counsel did not assist them at the Hearing; however they did have legal counsel assist them in the preparation of their submissions in relation to the issue of standing. Although this is a valid part of the appeal process and could be considered for costs, the Board still believes parties are responsible for some, if not all of the costs associated with filing an appeal.

[82] The Board therefore denies the costs application of the Cadomin Residents.

2. Approval Holder

[83] The Approval Holder suggested a \$1 costs award from the Appellant. The Board has stated in previous decisions that a costs award is not to be used as a penalty.³² An award of costs is intended to acknowledge the assistance parties provide to the Board in the hearing process. Even though \$1 is negligible, it would still send the message that the Board is penalizing the Appellant. The Board does not believe that this is an appropriate use of costs under our legislation.

[84] However, the Board must express concern about the Appellant's lack of preparedness at the Hearing. The Appellant filed the appeal, and it was the Appellant who needed to be versed on the issues on appeal. The Board appreciates that the Appellant did not have the expertise to answer all of the questions on all of the subjects, and he did provide

³² See: Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003), Appeal No. 01-062-CD (A.E.A.B.) at paragraph 75.

witnesses to discuss the various issues under appeal, but the Appellant has an obligation to familiarize himself with the file.

[85] Although the Appellant may not have been as familiar with the documents and all of the issues as much as the Board would prefer and a number of his responses to questions in this regard were not helpful, the Appellant did provide valuable arguments in relation to wildlife issues. His appeals were not frivolous, vexatious or without merit, because the appeals resulted in better Approvals for the Haul Road.

[86] Therefore, the Approval Holder's request for costs, even though minimal, is denied.

3. Appellant

[87] Although the Approval Holder stated the Appellant raised a number of issues that did not result in recommendations to the Minister, including issues related to noise, dust, and public access, these were all identified issues by the Board as a result of the Notice of Appeal that was filed. The issue of public access also resulted in the Board recommending to the Minister that the Approvals be varied. It is acceptable for the Appellant to raise issues related to an approval even though the Board may not make recommendations on those issues. As long as an issue is of concern to an appellant, and the appellant provided evidence to support his position, the possibility existed the Board could have made additional recommendations. This is certainly not a basis on which to deny costs.

[88] As with the Appellant, Ms. Pachal and Mr. Severson-Baker did not distinguish themselves from other participants in the appeals. Because their helpfulness to the Board was limited, the Board will award only minimal costs. As Mr. Wershler's testimony was the most useful, the Board will award costs for his participation. Legal counsel for the Appellant, Ms. Klimek, was effective in her cross-examination. Therefore, some of her costs will be awarded.

[89] The Board will discuss each of these participants and how they contributed differently to the Hearing.

i. Mr. Cleve Wershler

[90] The wildlife witness for the Appellant, Mr. Cleve Wershler, provided evidence that was valuable to the Board. In the Board's Report and Recommendations, most of the recommendations and variations to the Approvals related to wildlife issues. Mr. Wershler focused his evidence on the issues that had been identified and provided reasoned alternatives. Therefore, the Board is willing to pay some of the costs related to his participation. The Board believes an appropriate award of costs is 50 percent of all reasonable costs. The Board considers half of Mr. Wershler's costs ($\$5600.00/2 = \2800.00) plus out of pocket expenses (\$182.59) as a reasonable award of costs for his contribution to the Hearing. The Board looks at whether the costs were directly related to the preparation and presentation of the evidence at the Hearing. Mr. Wershler familiarized himself with the issues and the specifics of the site. His testimony was well organized and credible. Of even greater importance is whether the evidence assisted the Board in its decision. There is no doubt it was his testimony more than any of the Appellant's panel of witnesses that provided the Board the greatest assistance. Even the Approval Holder recognized the value of Mr. Wershler's evidence.

[91] Mr. Werschler provided evidence on the potential effects of the Haul Road on wildlife. He provided impartial evidence and raised valid points. It was based on his evidence that the Board recommended that additional conditions needed to be added to the Approvals to protect wildlife in the area. He provided receipts of his expenses and a breakdown of the time spent and his associated fees. As a general rule, the Board considers three to five days of preparation for each day of a hearing when assessing legal fees. This same guideline is appropriate for many of the experts that appear before the Board. In this case, Mr. Werschler claimed six days of preparation for one day at the Hearing. Although this is within the general guide, it is at the maximum level. One day claimed was for literature survey, which the Board does not doubt assisted in putting the issues in perspective and assisted in the preparation and presentation of his evidence at the Hearing. One of the expenses claimed by Mr. Werschler is \$6.90 for meals. The Board does not, as a general rule, pay for meals for participants. Therefore, \$6.90 will be reduced from the expenses claimed. The other expenses claimed included transportation to and from the Hearing and accommodation. These are valid out of pocket expenses. Therefore, the Board will allow costs for expenses in the amount of \$175.69. The Board believes parties should bear some, if not all of the costs associated with appearing

before the Board. With this in mind, the Board generally reduces costs claimed to 50 percent, and will adjust this amount based on the assistance the witness and party provides to the Board in its decision-making. Mr. Werschler did provide valuable evidence and provided rationale for his reasons. This type of evidence was most useful to the Board and resulted in the Board making specific recommendations, which the Minister accepted.

[92] Mr. Werschler provided evidence in a truthful, forthright manner. It was his evidence that was most convincing to the Board and demonstrated to the Board the need to vary the Approval and Licences. Although the costs claimed by Mr. Werschler were not very detailed, the Board considers the time claimed reasonable, as Mr. Werschler was reasonably well informed on the Approvals and the Licences and it would have taken time for him to get up to speed on the issues.

[93] In recognition of his contribution to the Hearing, the Board will award costs for Mr. Werschler's participation and evidence in the amount of \$2982.59 ($\$5600.00/2 = \$2800.00 + \182.58 (for expenses) - $\$6.90$ (for meals)).

ii. Mr. Chris Severson-Baker and Ms. Dianne Pachal

[94] The Appellant claimed \$6,283.37 for professional fees and other expenses related to the appearance of Mr. Chris Severson-Baker. Of these costs, \$5,537.25 was for professional fees, \$280.92 for legal fees, and \$465.20 for travel expenses, including rental vehicles (\$278.24), taxi (\$15.90), a park pass (\$28.00), gas (\$85.07), and meals (\$89.88).³³

[95] The Appellant claimed costs totaling \$8,326.57 for the services of Ms. Dianne Pachal at the Hearing. Of these costs, \$7,797.63 was for professional fees (291.5 hours x \$25.00 per hour plus \$510.13 GST), and \$528.94 was for disbursements (accommodation and meals (\$46.38), copying and printing (\$179.90), postage and courier (\$19.72), telephone (\$89.25), and travel (\$193.69)).

[96] With respect, Mr. Severson-Baker and Ms. Pachal acted as advocates rather than experts. The Board is willing to hear evidence from experts advocating a particular position, but they should not expect to be paid for appearing before the Board. When the Board is evaluating

³³ The actual total of the travel expenses was \$497.30. However, the Board notes \$31.90 for GST on these expenses was not claimed, and therefore, GST will not be considered in the awarding of costs.

an expert's evidence, they look at whether the evidence was presented in a fair and impartial way. In this case, Mr. Severson-Baker and Ms. Pachal alerted the Board to a number of issues, but their evidence was from the position of an advocate. Therefore, the Board will not award costs for the professional services of Mr. Severson-Baker and Ms. Pachal. The Board does recognize the assistance Mr. Severson-Baker and Ms. Pachal provided to Ms. Klimek in preparing for the Hearing. Therefore, the Board will award costs related to the disbursement costs of Mr. Severson-Baker and Ms. Pachal. As stated previously, the Board generally does not award costs for meals. Therefore, the meals claimed, totaling \$89.88 for Mr. Severson-Baker and \$46.38 for Ms. Pachal, will be deducted from the costs claimed for these witnesses. Costs associated with accommodation, copying and printing, postage, telephone, and travel costs, including vehicle rentals, will be awarded.

[97] The expense claimed by Mr. Severson-Baker has had the tax deducted. The total claim for Mr. Severson-Baker for the accepted disbursements is \$407.21. From this total, the Board deducts the GST that was paid, in the amount of \$26.50, leaving total accepted disbursement costs of \$380.71.

[98] Therefore, the total costs award for Mr. Severson-Baker is \$380.71, and \$482.56 for Ms. Pachal.

iii. Ms. Jennifer Klimek

[99] Ms. Klimek, counsel for the Appellant, submitted accounts totaling \$50,971.73, including \$46,710.00 plus \$3269.70 GST for legal services, and \$948.39 plus \$43.64 GST for disbursements.

[100] Ms. Klimek is experienced counsel who has appeared before this Board on numerous occasions, and she represented her client well in this case. It was her experience in cross-examination that was most useful to the Board. However, the Board had significant concerns about the Appellant's lack of preparation and failure to consider any possible alternatives. It is important for appellants to realize that alternatives should also be presented. In many appeals, the Appellant essentially does not want the project to go ahead. However, the Board must take into consideration the purposes of the applicable legislation, in these appeals section 2 of EPEA and the *Water Act*. Both of these acts, in particular section 2(b) of EPEA and

section 2(b) of the *Water Act*, require a balance of environmental protection and economic growth. As a result, appellants should take into account that the Board may not reverse an approval, but may make substantial changes in order to ensure the environment is protected.

[101] In reviewing the costs claimed by Ms. Klimek, costs were included that pre-date the filing of the Notice of Appeal. As only those costs associated with the preparation and presentation of the submissions can be considered, the Board will not consider the costs incurred prior to the filing of the Notice of Appeal. Therefore, all costs pre-dating December 03, 2003, cannot be considered in assessing a costs award.

[102] An issue of concern for the Board was whether Ms. Klimek was actually representing the Appellant or whether her client was in fact the CPAWS. Ms. Klimek statement's was sent to CPAWS, not the Appellant. The Appellant should have clearly identified the interrelationship between himself and CPAWS and provide information as to whether CPAWS was in fact providing any funding for the appeals. CPAWS could have requested to be involved in the appeals, and the contribution made by the Appellant and CPAWS could have been easily determined.

[103] The Appellant did not present any alternatives for the Board to consider. The Board appreciates that legal counsel for the Appellant attempted to raise options during cross-examination, but was limited in her ability to do so, presumably as a result of the instructions given to her by her client. Constructive suggestions or alternatives clearly demonstrate the degree of any party's helpfulness to the Board.

[104] The Board notes the Sierra Club and the Pembina Institute have paid the disbursement costs of Ms. Klimek. The Board acknowledges the efforts made by the Appellant to secure additional funding to help with the preparation and presentation of his evidence. The Board encourages parties to make such efforts. However, it is not right that these expenses be considered in the assessment of costs, as the Appellant should not have the Approval Holder reimburse the Appellant for items that the Appellant never paid for personally. Therefore, the Board will not award costs for the disbursements claimed by Ms. Klimek.

[105] The Board generally considers counsel will spend between three and six hours for preparation for every hour at a hearing. The Hearing lasted approximately 19 hours over the two

days. As Ms. Klimek was also involved in the Joint Review Panel hearings, she was very familiar with the site and the issues, even though it was not specifically the Haul Road. Therefore, she did not require a great deal of time to become familiar with the background behind the Appellant's issues and concerns. Based on this, the Board considers it appropriate to use the lower end of the spectrum, namely three hours, to determine a reasonable amount of time to spend preparing for the Hearing. Based on this factor, three hours for each of the 19 hours spent at the Hearing, plus the 19 actual hours at the Hearing, totals 76 hours. Ms. Klimek has been at the bar for 20 years and has considerable experience appearing before boards, including this Board, arguing environmental issues. The rate of \$250.00 is the current maximum hourly rate the Government of Alberta would likely pay for outside counsel based on its tariff of fees.³⁴ The Board will accept the rate of \$250.00 per hour for 76 hours, for a total of \$19,000.00 for legal fees.

[106] The Board considers it appropriate for parties to be responsible for some, if not all, of the costs associated with bringing environmental matters to the Board, and in this case considers the starting point for determining costs is one half of reasonable costs. Therefore, in this case, one half of the adjusted legal fees is \$9,500.00. Ms. Klimek provided considerable assistance in her cross-examination of the Director and the Approval Holder. She also guided the evidence presented by the Appellant and his witnesses, and she effectively brought forth the wildlife issues through the evidence of Mr. Wershler.

[107] As stated, the Board did have concerns with the preparation of the Appellant himself. He did not appear to have taken the time to familiarize himself with the file. The Board does not expect appellants to know the entire file in minute detail, but they should be able to respond to general questions. The other aspect that concerns the Board is the lack of alternatives that were provided. If the intent of the hearing is to assist the Board in making a decision, an appellant should be prepared to present other mitigative measures that could alleviate some of their concerns if the approval or licence is confirmed but varied. Although the Appellant in these

³⁴ According to the Alberta Legal Telephone Directory 2004-2005, Ms. Klimek was admitted to the Law Society of Alberta in 1985 and as a result, has 20 years of legal experience in Alberta. Based on the tariff of fees used by the Government of Alberta for outside counsel with her level of experience, the rate would be \$250.00/hour. The Board considers the Government of Alberta rate is an appropriate tariff against which to judge the appropriateness of legal fees, but notes that there are circumstances in which it may not be appropriate.

appeals did provide a panel to answer the other Parties' and the Board's questions, it is still important that the Appellant be familiar with the file. When an appellant comes to a hearing unprepared, it demonstrates a lack of interest in the appeal, and if the appellant is not interested in the outcome, it raises the question of why the appeal was filed or whose appeal it actually is. It also raises questions whether the Appellant is attempting to assist the public interest. As a result, the Board does not consider it appropriate in this case to allow for costs exceeding the amount determined above.

[108] The Board notes a preliminary hearing was held with respect to the matters of standing, jurisdiction, and hearing issues. The Board did not consider the time spent in the preliminary hearing as it is only when the witness or counsel provides assistance to the Board beyond the minimum required to make his or her case will the Board award costs in relation to a preliminary meeting. In these appeals the Appellant and his counsel were able to provide sufficient arguments to show he would be directly affected by the project and there were significant enough differences in the Haul Road to give the Board jurisdiction to hear the appeals. However, the arguments and evidence presented were what was required in order to have the appeals proceed. This is what the Board would expect from any party to an appeal.

[109] Therefore, the Board awards costs in the amount of \$9,500.00 for legal fees, plus \$665.00 for GST, for a total costs award for legal costs of \$10,165.00.

D. Who Should Bear the Costs?

[110] Although the legislation does not prevent the Board from awarding costs against the Director, the Board has stated in previous cases, and the courts have concurred,³⁵ that costs should not be awarded against the Director providing his actions, while carrying out his statutory duties, were done in good faith.

[111] In this case, the Board did not recommend overturning the Director's decision but it did recommend the Approvals be varied. Even if the decision had been reversed, special circumstances would likely be required for costs to be awarded against the Director. The courts,

³⁵ See: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.).

in the decision of *Cabre*, considered the issue of the Board not awarding costs against the Director. In his reasons, Justice Fraser stated:

“I find that it is not patently unreasonable for the Board to place the Department in a special category; the Department’s officials are the original statutory decision-makers whose decisions are being appealed to the Board. As the Board notes, the Act protects Department officials from claims for damages for all acts done in good faith in carrying out their statutory duties. The Board is entitled to conclude, based on this statutory immunity and based on the other factors mentioned in the Board’s decision, that the Department should be treated differently from other parties to an appeal.

The Board states in its written submission for this application:

‘There is a clear rationale for treating the [Department official] whose decision is under appeal on a somewhat different footing *vis a vis* liability for costs than the other parties to an appeal before the Board. To hold a statutory decision maker liable for costs on an appeal for a reversible but non-egregious error would run the risk of distorting the decision-maker’s judgment away from his or her statutory duty, making the potential for liability for costs (and its impact on departmental budgets) an operative but often inappropriate factor in deciding the substance of the matter for decision.’

In conclusion, the Board may legitimately require special circumstances before imposing costs on the Department. Further, the Board has not fettered its discretion. The Board’s decision leaves open the possibility that costs might be ordered against the Department. The Board is not required to itemize special circumstances that would give rise to such an order before those circumstances arise.”³⁶

[112] In this case, the Director exercised his judgment in performing his statutory duties, and his actions could not be considered as inappropriate as defined by the legislative authority, and it certainly was not an exercise of bad faith.

[113] The Director in this case was fulfilling his statutory obligations, and the Approvals were issued in accordance with the legislation. The Board finds no special circumstances or misconduct on the part of the Director and, therefore, does not view this as an appropriate case in which to order costs against the Director.

³⁶ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (9 April 2001) Action No. 0001-11527 (Alta. Q.B.) at paragraphs 33 to 35.

[114] In previous costs decisions where costs were awarded against a project proponent, the Board has described the role of project proponents as being "...responsible for incorporating the principles of environmental protection set out in the Act into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties...."³⁷ As the Board has stated before, "...these costs are more properly fixed upon the body proposing the project, filing the application, using the natural resources and responsible for the projects financing, than upon the public at large as would be the case if they were to be assessed against the Department."³⁸

[115] The Board notes that although the Approval Holder argued it should not be responsible for any costs awarded to the Appellant, it also did not argue that it should not pay the costs should the Board determine minimal costs be awarded in recognition of the evidence provided by Mr. Wershler and the assistance of the Appellant's legal counsel in the appeal process.

[116] In the circumstances of these appeals, costs will be ordered against the Approval Holder.

IV. CONCLUSION

[117] For the forgoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Appellant, Mr. Ben Gadd, as follows:

1. Attendance of Mr. Cleve Wershler:	\$2,975.69
2. Attendance of Mr. Chris Severson-Baker:	\$380.71
3. Attendance of Ms. Dianne Pachal:	\$482.56
4. Counsel, Ms. Jennifer Klimek:	<u>\$10,165.00.</u>
Total:	\$14,003.96

³⁷ See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B). In *Cabre*, the Board stated that where the Department has carried out its mandate and has been found, on appeal, to be in error, then in the absence of *special circumstances*, it should not attract an award of costs. The Court of Queen's Bench upheld the Board's decision: *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2001), 33 Admin. L.R. (3d) 140 (Alta. Q.B.)

³⁸ Re: *Mizeras* (2000), 32 C.E.L.R. (N.S.) 33 (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.) at paragraph 33.

[118] Total costs of \$14,003.96 are payable by the Approval Holder, Cardinal River Coals Ltd. The Approval Holder shall pay this award of costs to the Appellant within 60 days of issuance of this decision and are payable on trust to the Appellant's legal counsel, Ms. Jennifer Klimek. The Approval Holder is requested to provide the Board with confirmation when the payment has been made.

[119] No costs are awarded to the Cadomin Residents or to Cardinal River Coals Ltd.

Dated on December 16, 2005, at Edmonton, Alberta.

"original signed by"

Dr. Steve E. Hruday
Chair

"original signed by"

Mr. Ron V. Peiluck
Vice-Chair

"original signed by"

Mr. Al Schulz
Board Member