

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 9, 2022

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

-and-

IN THE MATTER OF an appeal filed by Yvon and Lea Lapointe with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/09-LAR to Yvon and Lea Lapointe, and appeals filed by Donald Lapierre and 645639 Alberta Ltd. with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue *Water Act* Enforcement Order No. WA-EO-2019/08-LAR to Donald Lapierre and 645639 Alberta Ltd.

Cite as: Costs Decision: *Lapointe et al. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (9 February 2022), Appeal Nos. 19-043 and 19-046-047-CD (A.E.A.B.), 2022 ABEAB 8.

BEFORE:

Ms. Meg Barker, Acting Board Chair;
Dr. Nick Tywoniuk, Board Member; and
Mr. Kurtis Averill, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Yvon and Ms. Lea Lapointe, represented by Ms. Nicole Melnyk; and Mr. Donald Lapierre and 645639 Alberta Ltd., represented by Mr. Ken Haluschak, Bryan & Company LLP.

Director: Mr. Simon Tatlow, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Erika Gerlock and Mr. Paul Maas, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

The Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (AEP) issued enforcement orders to Mr. Yvon and Ms. Lea Lapointe (Lapointes) and Mr. Donald Lapierre and 645639 Alberta Ltd. (Lapierres) under the *Water Act*, R.S.A. 2000, c. W-3. The enforcement orders required the Lapointes and Lapierres to restore natural surface drainage patterns on their lands.

A hearing was held on March 21 and 22, 2021. The Board recommended the Minister vary the enforcement orders. The Minister accepted the Board's recommendations and issued Ministerial Order 64/2021 on June 7, 2021, incorporating the recommendations.

At the hearing, the Lapointes and Lapierres reserved their right to submit costs applications.

The Board received costs applications from the Lapointes totalling \$15,592.02 for consultants' fees. The Lapierres filed a costs application for legal fees and disbursements (\$73,378.25 and \$873.40) and consultant's fees (\$67,674.05) totalling \$141,925.70.

The Board reviewed the submissions from the parties and assessed the costs application against the criteria used by the Board to determining if costs should be awarded. After reviewing the submissions and taking into consideration the evidence and arguments presented at the hearing, the Board determined the Lapointes and Lapierres were of equal assistance to the Board. Any award of costs as against each appellant would be negated by the other.

Therefore, the Board denied the costs applications filed by the Lapointes and Lapierres.

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I. BACKGROUND

[1] On October 2, 2019, the Director Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the “Director”) issued Enforcement Order No. WA-EO-2019/19-09-LAR (the “Lapointe Order”) to Mr. Yvon Lapointe and Ms. Lea Lapointe. On October 18, 2019, the Director, issued Enforcement Order No. WA-EO-2019/19-08-LAR (the “Lapierre Order”) to Mr. Donald Lapierre and 645639 Alberta Ltd. The Enforcement Orders were issued under the *Water Act*, R.S.A. 2000, c. W-3. The Enforcement Orders required the Lapointes and Lapierras (collectively, the “Appellants”) to restore natural surface drainage patterns on their properties.

[2] On October 9, 2019, the Board received a Notice of Appeal from the Lapointes appealing the Director’s decision to issue the Lapointe Order.

[3] On October 17, 2019, the Board wrote to the Lapointes and the Director acknowledging receipt of the Notice of Appeal and notifying the Director of the appeal.

[4] On October 25, 2019, the Board received Notices of Appeal from the Lapierras appealing the Director’s decision to issue the Lapierre Order. The Notice of Appeal indicated the Lapierre Order was inextricably connected to the Lapointe Order.

[5] On November 3, 2019, the Board wrote to the Lapierras and the Director acknowledging receipt of the Notices of Appeal and notifying the Director of the appeal.

[6] On November 3, 2019, the Lapierras asked the Board to hear the Lapointes and Lapierras appeals together since they were inextricably connected.

[7] On November 20, 2019, the Board advised the Appellants and the Director (collectively, the “Parties”) the appeals would be joined.

[8] The hearing was held by video conference on March 21 and 22, 2021. The issues heard by the Board were:

1. Were the Orders properly issued? and
2. Are the terms and conditions in the Orders appropriate?

[9] On June 7, 2021, the Board provided its Report and Recommendations and the Ministerial Order to the Parties.¹ The Minister of Environment and Parks varied the Enforcement Orders based on the Board's recommendations.

[10] At the hearing, the Appellants reserved their right to ask for costs.

[11] On June 7, 2021, the Board scheduled the submission process for the Parties seeking costs.

[12] On June 28, 2021, the Board received costs applications from the Lapointes and the Lapierras.

[13] On June 30, 2021, the Lapointes wrote to the Board stating the Board should not accept invoices submitted after June 28, 2021, unless an extension was granted by the Board.

[14] On July 7, 2021, the Board received additional comments from the Lapierras and included invoices for their consultant.

[15] On July 9, 2021, the Board received the Director's response submission. The Lapointes provided a response submission on July 12, 2021.

II. SUBMISSIONS

A. Lapierras

[16] The Lapierras requested costs from the Board. The Lapierras' request for costs was based on 216.2 hours of legal services at a rate of \$325.00 per hour (\$70,265.00), plus GST (\$3,513.24), for a total of \$73,378.25. In addition, they sought \$873.40, including GST, for disbursements. The Lapierras also requested costs totalling \$67,500.40, including GST and disbursements, for their consultant, Mr. Steve Engman.

[17] The Lapierras stated their legal counsel and independent consultant made substantial contributions to the hearing by providing evidence directly related to the appeal and by providing evidence that made a noteworthy contribution to the goals of the *Water Act*. They

¹ See: *Lapointe et al. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (26 April 2021), Appeal Nos. 19-043 and 19-046-047-R (A.E.A.B.), 2021 ABEAB 8.

said the effectiveness of their participation in both appeals was due to their legal counsel and consultant.

[18] The Lapierras said their legal counsel responded to all pre-hearing motions and issues, was integral in preparing the Lapierras' reports, prepared submissions and the presentation for the hearing, conducted examination and cross-examination, and presented opening and closing comments.

[19] The Lapierras stated their legal counsel effectively presented their interests at the hearing. The Lapierras believed the expenses for their lawyer and consultant should be reimbursed to recognize the assistance their evidence and submissions provided to the Board in determining the recommendations to the Minister. The Lapierras said they were only claiming reimbursement for expenses related to the preparation and presentation of their submissions and evidence to the Board.

[20] The Lapierras believed their legal counsel and consultant contributed to the goals of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") and the *Water Act*, and they made timely, relevant, and succinct submissions without needlessly cross-examining witnesses. The Lapierras stated the expenses for their legal counsel and consultant were reasonable and were necessary to prepare and present their case to the Board.

[21] The Lapierras noted costs claimed should be primarily related to the preparation and presentation of their submission to the Board. The Lapierras said they claimed legal costs at \$325.00 per hour. The Lapierras explained they paid legal fees at a blended rate of \$500.00 per hour. The Lapierras were aware of the Government of Alberta tariff of fees for outside counsel often relied upon by the Board in costs awards, but the Lapierras believed this was one circumstance where the tariff was not appropriate.

[22] The Lapierras asked the Board to consider the following:

1. the original Lapierre Order did not cover Lot 1 and now it does after it was pointed out by the Lapierras;
2. the effectiveness of the Lapierre Order depended upon an adequate outlet which has now been directed and confirmed by the Board;
3. there was a public interest element since a wetland was destroyed by the Lapointes, and the Lapierras had to become involved;

4. there were three mediation meetings prior to the hearing;
5. the Board benefitted from the involvement of legal counsel and his analysis on legal issues; the Lapointes did not provide the same assistance;
6. their counsel and expert had to scrutinize the Director's record and information provided to the Board by the Parties;
7. the rate charged for their lawyer and consultant were fair and reasonable given their experience. Their legal counsel, Mr. Haluschak, was called to the Alberta bar in 1982, and his average hourly rate was \$580.00, but he charged the Lapierres at an average hourly rate of \$466.00;
8. the time spent by their counsel and consultant was fair and reasonable considering the number of issues heard, the amount of disagreement between the Appellants on many pieces of relevant evidence and issues, and how they had to go through the material to help the Board understand the big picture and the details;
9. Dr. Shome, consultant for the Lapointes, was not paid to offer opinions on some issues critical to the Board's recommendations, but the Lapierres' counsel and consultant, Mr. Engman, had to deal with Dr. Shome's evidence and opinion to give the Board perspective and context;
10. they spent a great deal of time making sure the Board was not making recommendations based on water management theories and unsupported allegations of fact by the Lapointes about both Enforcement Orders; and
11. this was two appeals, not one, since the appeals were intertwined, and the Enforcement Order against the Lapierres would be meaningless and ineffective without upholding the Enforcement Order against the Lapointes.

[23] The Lapierres stated they were charged for 216.2 hours of time after the Notice of Appeal was filed on October 25, 2019, up until March 21, 2021. Their legal counsel charged for 24.3 hours for the hearing days. The Lapierres clarified they were seeking legal costs at \$325.00 per hour even though they paid fees based on a blended rate with junior lawyers of \$500.00 per hour. The Lapierres were charged \$108,100.00 plus GST for a total of \$113,505.00 for legal fees, but they were claiming \$70,265.00 based on \$325.00 per hour. The Lapierres commented the Government of Alberta tariff of lawyers' fees was outdated, and if adjusted for inflation, \$250.00 per hour in 2004 would be approximately \$356.00 per hour in 2021.

[24] The Lapierres explained they were claiming for reimbursement of some or all of the disbursements incurred, including:

1. Copy and print services - \$532.09;
2. Service charge for online registry searches - \$23.31;

3. Long distance telephone - \$49.20;
4. Land titles office searches and charges for copies of documents - \$77.70;
5. Computer research - \$157.50; and
6. Copy and print services in colour for powerpoint presentation - \$33.60.

Disbursements claimed totalled \$873.40, including GST.

[25] The Lapierras asked the Board to assess their costs on the basis of four hours of preparation for each hour of time at the hearing.

[26] The Lapierras claimed costs totalling \$67,500.40 for their consultant, Mr. Engman for engineering technology services. The costs claimed included disbursements, GST, and fees charged by others conducting work on the file on behalf of Mr. Engman.

[27] The Lapierras did not believe it was appropriate to comment on the Lapointes' costs application.

B. Lapointes

[28] The Lapointes requested costs totalling \$15,592.02 for retaining their consultants, Dr. Thorman and Dr. Shome.

[29] The Lapointes stated they acted in good faith throughout the appeal proceedings, presentations were made in a timely and efficient manner, and they did not delay or prolong the hearing.

[30] The Lapointes believed they made a substantial contribution to the hearing given their knowledge of the situation and by bringing in two consultants who focused on and provided expert knowledge on the issues. The Lapointes said their submissions and evidence assisted the Board in preparing the recommendations for the Minister.

[31] The Lapointes provided the following list as to how they contributed to the Board's recommendations:

1. they pointed out AEP's investigation notes stated Lot 1 and Lot B, owned by the Lapierras, did not have a proper water management plan;

2. their consultants showed through aerial photographs that prior to development, water crossed the tree line through seepage at various locations throughout the tree line, and the tree line played a role in the seepage;
3. they showed water used to flow east-west in the old swale along the tree line and that is why the Lapointes' lands never had surface flow across it until the Lapierres developed their properties;
4. Dr. Thorman noted that during above normal snow conditions, some spring melt travelled east along the tree line;
5. they showed that, as the Lapierres' properties were developed, seepage across the tree line turned into above ground water flow to the north, changing the way the water moved across the land;
6. they made valid arguments regarding the north/south ditch on Lot B demonstrating it was not natural;
7. Dr. Thorman explained there was no defined surface drainage pathway from wetland 1 to the large wetland complex and the water moved north through "wet soil" seepage;
8. Dr. Thorman expressed concern about sending too much water to the wetland, potentially changing the wetland classification and affecting vegetation in the wetland;
9. Dr Shome noted Mr. Engman's, consultant for the Lapierres, calculations for pre and post volumes and storage pond volumes varied significantly;
10. Dr. Shome calculated there was an incremental volume of water entering the Lapointes' lands from the south, and this volume greatly exceeded pre-development volumes;
11. Dr. Shome included his exact calculation to explain the maximum pre-development flow rate calculations for a 1:100-year 24-hour storm event to be 2L/s/Ha, and AEP's 4L/s/Ha calculation was acceptable;
12. Dr. Shome determined the stormwater pond needed to include storage volume capacity for the 1:100-year 24-hour rain event; and
13. Dr. Shome explained how storage volume and maximum flow rate were interconnected in the design of a storm water management plan, and the plan cannot consider just one element.

[32] The Lapointes stated their costs request was reasonable as it reflects the time spent by their consultants to prepare the technical documents for the hearing, to reply to other technical submissions, to prepare for the hearing, and time spent at the hearing.

[33] The Lapointes said they were unable to find other sources of funding, and these funds were important in meeting financial obligations, including the development of the remedial plan and the implementation of the remedial plan pursuant to the Ministerial Order.

[34] The Lapointes claimed costs as follows:

1. Dr. Thorman – wetland assessment - \$1,958.88;
2. Dr. Shome – completion of regulatory report - \$2,042.64;
3. Dr. Shome – reviewing technical design - \$313.03; and
4. Dr. Shome and Dr. Thorman – preparation for and attendance at hearing - \$11,277.47.

C. Director

[35] The Director noted the Ministerial Order upheld both Enforcement Orders, only adding clarification and adjustment to timelines.

[36] The Director did not claim any costs.

[37] The Director noted the Appellants did not claim costs from the Director. He stated the Lapointes did not specify from whom they were seeking costs, and the Lapierras were seeking costs from the Board itself.

[38] The Director submitted he should not be responsible for costs as he acted in good faith and substantially contributed to the hearing. The Director stated there were no special circumstances that would justify a costs award against him, and he was substantially successful in the appeals. Therefore, he should not be responsible for paying any of the costs claimed.

[39] The Director took no position on whether the Board should be responsible for paying the Lapierras' costs. He took no position on any costs claims between the Lapierras and Lapointes nor the appropriateness of the costs claimed by the Appellants.

[40] The Director noted the Board and the Court have held that costs should not be awarded against the Director as long as the Director was acting in good faith and carrying out his or her statutory authority, and costs would only be awarded against the Director in special

circumstances. The Director stated this reflects the unique role of the Director as statutory decision maker of first instance.

[41] The Director said the Court upheld the Board's practice that the Director should not bear the costs of appeals absent bad faith.² The Director noted that in past decisions, even when the Director's decision was substantially varied or reversed, the Board did not consider that to be the special circumstances necessary to warrant awarding costs against the Director.

[42] The Director stated the legislation views the role of the Director differently from other parties to an appeal.

[43] The Director stated there were no special circumstances in these appeals, such as bad faith, that would justify awarding costs against the Director. The Director noted the Appellants did not allege special circumstances or bad faith apply in these appeals.

[44] The Director stated his decisions to issue the Enforcement Orders were not reversed and were only varied with minor clarifications, including accepting the Director's technical evidence which the Board relied on in its Report and Recommendations. The Minister also accepted the Board's recommendations to extend the timelines for the Appellants to complete the restoration work required under the Ministerial Order.

[45] The Director said the Board did not indicate in its Report and Recommendations the Director was not acting in good faith in issuing the Enforcement Orders.

[46] The Director stated he carried out his statutory duties in good faith throughout the decision making process leading to the issuance of the Enforcement Orders and throughout the appeals.

[47] The Director noted the Lapointes' cost submission requested costs as the funds were important to meeting financial obligations such as completing the remedial plan and implementation of that plan. The Director stated the deadline for submitting the remedial plan was August 1, 2021, and the work was to be completed by December 31, 2021. The Director submitted it would be inappropriate to delay the remedial process pending the outcome of the costs application, and completion of the remedial plan and remedial work under the Ministerial

Order is not, and should not be, contingent upon the costs decision. The Director stated the Lapointes' suggestion that they were unable to find other sources of funding to complete the remedial work should have no bearing on the Board's decision.

[48] The Director noted the Lapierras did not suggest they were unable or unwilling to meet their remedial obligations under the Ministerial Order.

[49] The Director stated neither of the Appellants named the Director in their costs applications. The Director stated there were no special circumstances and no bad faith on the part of the Director to warrant departing from the Board's longstanding practice of not awarding costs against the Director.

[50] The Director submitted that no award of costs should be made against the Director.

[51] The Director took no position as to the costs claim between the Appellants, if any, nor against any other entity, nor on the specific amounts claimed by the Appellants.

III. LEGAL BASIS FOR COSTS

A. Legislation

[52] 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."³

² See: *Cabre Exploration Ltd. v. Environmental Appeal Board*, 2001 ABQB.

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

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.)⁴

[53] The sections of the *Environmental Appeal Board Regulation*, A.R. 114/93 (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 *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

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

[54] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of the *Water Act*, as stated in section 2.⁵

[55] As stated in previous decisions, the Board has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply to a particular claim for costs.⁶ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.⁷ In *Cabre*, Mr. Justice Fraser noted that section “...20(2) of the Regulation sets out several factors that the Board ‘may’ consider in deciding whether to award costs...” and concluded “...the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal.”⁸

[56] As stated in previous appeals, the Board evaluates each costs application against the criteria in EPEA 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:

⁵ Section 2 of the *Water Act* provides:

- “2 The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing
- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
 - (b) the need for Alberta’s economic growth and prosperity;
 - (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
 - (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
 - (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
 - (f) the important role of comprehensive and responsive action in administering this Act.”

⁶ *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.).

⁷ *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.).

⁸ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

- (a) substantially contributed to the hearing;
- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."⁹

[57] 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.¹⁰

B. Tribunals vs. Courts

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

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

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

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

¹⁰ *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.).

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.”¹¹

[60] EPEA and the Regulation give the Board authority to award costs if it determines the situation warrants it, and the Board is not bound by the loser-pays principle. As stated in *Mizera*:

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

¹¹ *Bell Canada v. C.R.T.C.*, [1984] 1 F.C. 79 (Fed. C.A.). See also: R.W. Macaulay, *Practice and Procedure Before Administrative Tribunals*, (Scarborough: Carswell, 2001) at page 8-1, where he attempts to

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

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

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

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

spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed.”¹²

[61] The Board has generally accepted the starting point is that costs incurred in an appeal are the responsibility of the individual parties.¹³ There is an obligation for members of the public to accept some responsibility of bringing environmental issues to the forefront. Part of this obligation is for the party to pay their own way in an appeal.

IV. ANALYSIS

[62] When determining if costs should be awarded, the Board recognizes the role legislators placed on Albertans to ensure environmental issues are brought to the forefront. Given this obligation, the Board accepts the starting position when assessing any cost application is that parties who appear before the Board do so without receiving costs.

[63] The Board also recognizes the importance of receiving relevant, succinct evidence at the hearing that will assist the Board in formulating its recommendations for the Minister. The Board will consider awarding costs if the evidence and submissions provided were directly and primarily related to the matters contained in the Notices of Appeal and were related to the preparation and presentation of the party’s submissions at the hearing. Costs are not punitive in nature.

[64] It is also important to remember that costs are not awarded on the basis of whether a party “won or lost.” The Board looks at how the evidence and submissions assisted the Board in determining its recommendations for the Minister.

[65] In these appeals, the Director issued separate enforcement orders to the Appellants. Although the Board normally would hear the appeals separately, the Board heard these appeals together given how inextricably linked the matters were that needed to be heard.

¹² *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraph 9 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Mizeras, Glombick, Fenske, et al.*) (29 November 1999), Appeal Nos. 98-231, 232 and 233-C (A.E.A.B.) (“*Mizera*”). See: *Costs Decision re: Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraph 9 (A.E.A.B.).

¹³ *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.).

The Board appreciates the efforts made by the Appellants to ensure the Board clearly understood the past and current conditions at the sites.

[66] The Board appreciates the Parties were required to respond to the other Parties' evidence and submissions which increased the complexity of the preparation for the hearing. However, if the appeals had been heard separately, there is a likelihood the Appellants would have applied to participate in each other's hearings as intervenors to ensure the Board received the complete picture. By having one hearing, there was less duplication for all the Parties.

[67] The Board normally does not award costs in an appeal, as it believes each party is responsible for their own costs to bring environmental issues forward.

[68] The Lapierras submitted a costs application requesting the Board pay costs. Although it is feasible under section 20(3)(b) of the Regulation for the Board to pay costs, this would only occur in the most unusual circumstances. The party requesting costs against the Board would have to demonstrate why the Board should be responsible for the costs of any party over another. The Lapierras did not provide any arguments to suggest the Board should be responsible for paying costs. The Board is not a party to the appeal, and given the criteria used to determine if costs should be awarded, it would be a rare situation where the Board would pay costs to a party.

[69] These appeals were joined, given the same issues and fact patterns, and how they were interconnected on many levels. If each appeal was heard separately, the only parties in each appeal would be one appellant and the Director. Neither of the Appellants suggested there was a basis to award costs against the Director. He acted in good faith and within his jurisdiction in issuing the Enforcement Orders to the Appellants. The Director encouraged the Appellants to work cooperatively and presented alternatives to achieve compliance with the Enforcement Orders. Unfortunately, the Appellants could not resolve the matter even with the Director's assistance and the Board's mediator.

[70] Given there was no indication the Director should be responsible for costs, and there were no arguments presented to indicate a reason for the Board to pay costs, the Board is left to determine if the Appellants should be awarded costs against each other.

[71] Although awarding costs is not based on who wins or loses, the Board notes in these appeals, the Enforcement Orders were essentially upheld, so neither Appellant won or lost in their appeals.

[72] The Enforcement Orders were issued when the Appellants disturbed the environment in such a way that required work to be done to restore the natural drainage patterns on their properties. The Enforcement Orders were not punitive but were remedial.

[73] The Lapierras' legal counsel and the representative for the Lapointes effectively presented their cases for their clients. They focused on the issues and ensured the Board clearly understood the facts, both historically and the present. Given each representative was of equal assistance to the Board, no costs will be awarded for the Lapierras' legal counsel. The Board notes the Lapointes did not claim costs for their representative.

[74] The consultants for the Appellants provided useful evidence at the hearing. The evidence assisted the Board in making its recommendations, and it was the type of evidence the Board would expect a party to an appeal to present. The Board has determined in previous decisions that, if counsel or consultants are equally effective in presenting their positions, the Board considers it a draw and does not award costs, because any costs awarded would be offset equally by the opposing costs award.¹⁴ Therefore, the Board will not award costs for the participation of the Appellants' consultants.

[75] Whether costs are awarded or not does not change the Appellants' responsibilities to complete the work required under their respective Enforcement Orders as varied by the Ministerial Order. Each of the Appellants conducted activities on their properties contrary to the *Water Act*, and they are now responsible for ensuring the impacts of those activities are reversed in order to restore natural surface drainage patterns on their properties.

[76] As stated, the Board's starting point is for the individual parties in an appeal to bear their own costs. The Board sees no reason to move from this starting point. If it chose to

¹⁴ See: Costs Decision: *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (02 July 2010), Appeal No. 08-037-CD (A.E.A.B.).

award costs, it considers the assistance provided by the Appellants equal, resulting in equal costs to both Appellants, thereby negating the need to award costs.

V. DECISION

[77] For the foregoing reasons and pursuant to section 96 of EPEA, the Board denies the costs applications filed by the Appellants, Mr. Yvon and Ms. Lea Lapointe, and Mr. Donald Lapierre and 645639 Alberta Ltd.

Dated on February 9, 2022, at Edmonton, Alberta.

“original signed by”
Ms. Meg Barker
Acting Board Chair

“original signed by”
Dr. Nick Tywoniuk
Board Member

“original signed by”
Mr. Kurtis Averill
Board Member