ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 22, 2008

IN THE MATTER OF sections 91 and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed by the Siksika Nation Elders Committee and the Siksika Nation with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 1190-01-13 issued to the Town of Strathmore by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Costs Decision: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment,* re: *Town of Strathmore* (22 April 2008), Appeal Nos. 05-053-054-CD (A.E.A.B.).

BEFORE: Dr. Steve E. Hrudey, Chair,
Mr. Ron V. Peiluck, Vice-Chair, and
Mr. Al Schulz, Board Member.

SUBMISSIONS BY:

Appellants: Siksika Nation, represented by Mr. Rangi Jeerakathil, MacPherson Leslie & Tyerman LLP.

Director: Ms. May Mah-Paulson, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Approval Holder: Town of Strathmore, represented by Mr. Sabri Shawa, May Jensen Shawa Soloman.

EXECUTIVE SUMMARY

Alberta Environment issued Amending Approval No. 1190-01-13 to the Town of Strathmore amending the existing approval for the Town's wastewater treatment system. The Amending Approval authorized the construction of a wastewater pipeline and associated outfall, making it possible for the Town to discharge its treated wastewater into a secondary channel of the Bow River.

The Siksika Nation Elders Committee and the Siksika Nation appealed the Amending Approval, because they were concerned about the impact the treated wastewater would have on the Bow River ecosystem, and, in-turn, on their use of that ecosystem and the river as a potable water supply.

A hearing was held on February 12 to 14, 2007, and the Board provided its Report and Recommendations to the Minister on April 18, 2007. The Ministerial Order was issued May 18, 2007, varying the terms and conditions of the Amending Approval.

The Siksika Nation and the Town of Strathmore submitted costs applications. The Board found the evidence provided by the Siksika Nation's consultants furthered the purposes of the *Environmental Protection and Enhancement Act* and assisted the Board in its preparation of its recommendations. The Board allowed costs totaling $16,948.69 for the Siksika Nation's consultants. The Board recognized the value of the Siksika Nation Elders participating in the hearing and in meetings held with the Siksika Nation during the appeal process. However, the Siksika Nation Elders did not submit a costs application despite two extensions to the deadline and, therefore, no costs could be considered for the Siksika Nation Elders.

Even though the Amending Approval was varied, the Board did not find the circumstances warranted an award of costs against the Director. Therefore, the Board ordered the Town of Strathmore to pay costs totaling $16,948.69 to the Siksika Nation.

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I. BACKGROUND

[1] On November 24, 2005, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 1190-01-13 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ("EPEA") to the Town of Strathmore. The Amending Approval amended the Approval that authorized the construction, operation, and reclamation of a wastewater system for the Town of Strathmore, including its wastewater treatment plant (the "Plant"). Specifically, the Amending Approval allows for the construction of a pipeline and associated outfall, making it possible for the Town to discharge its treated wastewater from the Plant into a secondary channel of the Bow River, approximately 600 metres upstream from the confluence with the main channel at the western boundary of the Siksika lands.

[2] On December 20 and 22, 2005, the Board received Notices of Appeal from the Siksika Nation Elders Committee ("Siksika Elders") filed by Ms. Donna Breaker (05-053) and from Chief Adrian Stimson on behalf of the Siksika Chief and Council and the Siksika Nation (collectively the "Siksika Nation") (05-054), (collectively, the "Appellants") appealing the Amending Approval.

[3] On December 22 and 23, 2005, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively, the "Parties") acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to these appeals, and that the Parties provide available dates for a mediation meeting, preliminary meeting or hearing. The Director provided the Record to the Board on January 30, 2006, and copies were provided to the other Parties. Additional documents were provided by the Director on March 24, 2006, April 28, 2006, and January 22, 2007, and copies were again provided to the other Parties. The Siksika Nation also provided the Board with additional documents on March 2, 2006, and copies of these documents were provided to the other Parties.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] On January 16, 2006, the Siksika Elders filed a Stay request, and on February 1, 2006, the Siksika Nation also requested a Stay.[1] On March 16, 2006, the Board notified the Parties that the Stay was denied, and reasons were provided on May 26, 2006. The Board determined that the arguments presented by the Appellants did not provide a sufficient basis to consider granting a Stay at that point in time.

[6] On January 16, 2006, the Director advised that Alberta Environment was in the process of meeting with the Appellants and the Approval Holder. On January 30, 2006, the Director and the Approval Holder provided a status report explaining the Director had a meeting with the Siksika Elders, and that other meetings with the Siksika Nation, the Approval Holder, and the Director were planned.

[7] On April 5, 2006, the Siksika Nation sought confirmation that the Board would not be taking jurisdiction with respect to constitutional arguments relating to the duty to consult as referred to in the transitional provisions in section 15 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3.[2] On May 18, 2006, the Board indicated that it had not yet made a determination on this issue and would not do so without giving the Parties an opportunity to provide submissions for the Board to consider in making that determination.

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[1] The Board asked the Appellants to provide submissions responding to the following Stay questions:

"1. What are the serious concerns of the [Appellants] that should be heard by the Board?

2. Would the [Appellants] suffer irreparable harm if the Stay is refused?

3. Would the [Appellants] suffer greater harm if the Stay was refused pending a decision of the Board, than the Town of Strathmore would suffer from the granting of a Stay?

4. Would the overall public interest warrant a Stay?"

The Board received the submission from the Appellants on February 23, 2006.

[2] Section 15 states:

"Where proceedings to determine a question of constitutional law have commenced but have not been concluded before the coming into force of this Part, the decision maker hearing the question may continue the proceedings as if this Part had not come into force."

[8] On May 19, 2006, the Siksika Nation filed a judicial review of the Director's decision to issue the Amending Approval and the decision of the Board denying the Stay applications of the Siksika Nation and the Siksika Elders. On May 24, 2006, the Board notified the Parties that it intended to hold the appeals in abeyance pending the outcome of the judicial review application.[3] The Parties agreed to proceed with an information/technical meeting and a mediation meeting despite the judicial review. The information/technical meeting and mediation meeting were scheduled for August 15 and 16, 2006. The information/technical meeting was held on August 15, 2006 and adjourned at the request of the Parties. The mediation meeting did not proceed.

[9] On August 18, 2006, the Board wrote to the Parties, summarizing the course of action agreed to at the information/technical meeting of August 15, 2006. The Siksika Nation representatives were to consult with their technical experts, the Chief and Council, and the Siksika Elders were to seek instructions regarding the mediation process. The representatives of the Siksika Nation were to consider whether dye test modeling should be done, whether there should be a risk analysis done regarding the security of the water wells, and whether additional technical information was required from the Approval Holder. The Approval Holder agreed to provide the additional technical information, if available, as soon as possible, and the Parties agreed to tour each others' water treatment plants (Siksika Nation drinking water and Strathmore wastewater treatment plants). On August 25, 2006, the Approval Holder provided a document in response to a request at the information/technical meeting. On September 18, 2006, the Siksika Nation stated they were prepared to proceed to a mediation meeting, and on October 13, 2006, the Siksika Elders also indicated that they were prepared to proceed to a mediation meeting.

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[3] At the judicial review, only the consultation issues around the Director's decision were addressed. On September 6, 2006, Justice McIntyre dismissed the judicial review application. *Siksika First Nation* v. *Director, Southern Region (Alberta Environment)* (6 September 2006), Calgary 0601-06100 (Alta. Q.B.). On November 6, 2006, the Siksika Nation filed an appeal of Justice McIntyre's decision to the Court of Appeal. Arguments before the Court of Appeal were heard on October 12, 2007, and the decision was released on December 12, 2007, overturning the Court of Queen's Bench decision. See: *Siksika First Nation* v. *Alberta (Director Southern Region Environment)*, [2007] ABCA 402. The two Court decisions do not affect the Board's process.

[10] On October 30, 2006, the Board notified the Parties that it would hold the appeals in abeyance until the dye testing requested by the Appellants, and agreed to by the Approval Holder, was conducted. On December 15, 2006, the Approval Holder notified the Board that it was unable to complete the dye study in December as planned, and instead, the test would be undertaken as early as possible in the spring of 2007. The Approval Holder also informed the Board that the storage capacity of its lagoons would be reached at the end of February 2007. In response, the Board notified the Parties that it would be scheduling a Hearing as soon as possible.

[11] On December 15, 2006, the Board set up a submission process to address the Appellants' question about the Board's intention regarding the transitional provision in section 15 of the *Administrative Procedures and Jurisdiction Act*. Submissions were received between December 21, 2006, and January 3, 2007. On January 22, 2007, the Board notified the Parties that it had determined that it would leave it to the Courts to determine the constitutional issues.[4]

[12] On December 22, 2006, the Board notified the Parties that, based on the dates provided by the Parties, the Board would hold a Hearing on February 12, 13, and 14, 2007, in Strathmore, Alberta.[5]

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[4] At the hearing, the Siksika Elders made a number of arguments regarding the jurisdiction over First Nations, First Nations' lands, rights to water pursuant to Treaty 7, and the applicability of Provincial legislation. Respectfully, pursuant to the *Administrative Procedures and Jurisdiction Act*, the Board does not have the jurisdiction to deal with these issues. The Board was established under the *EPEA* to hear appeals of certain decisions made under that legislation. The Board's expertise is in environmental issues; such as in this case, the potential for treated wastewater to impact the Bow River ecosystem and the impact on the users of the ecosystem. While the Board recognizes that the Siksika Nation and its members have additional rights over that of an average citizen, it is not the Board's role to establish those rights. As the Board has stated in previous cases where First Nation's issues have been raised, the Board is of the view that the determination or establishment of any such rights is best left to the Courts.

[5] In response to the advertisement regarding the Hearing, the Board received intervenor requests from Wheatland County, Mr. Kelly Breaker, the Western Irrigation District (the "WID"), Communities in Bloom Strathmore Chapter, Rich-Lee Custom Homes, Royop Development Corporation (Pine Centre Development Ltd.), Aztec Real Estate, Strathmore Homes Ltd., Happy Gang Society, Wild Rose Economic Development Corporation, United Communities L.P., Ms. Patricia Cross (Madawaska Consulting), and Dr. Steve Stanley (EPCOR Water Services Inc.). On January 30, 2007, the Board notified the Parties and the persons who filed intervenor requests that Wheatland County and the WID would be able to provide evidence at the Hearing and would be subject to cross-examination by the Appellants; Mr. Kelly Breaker could provide a written submission; the intervenor applications of Communities in Bloom Strathmore Chapter, Rich-Lee Custom Homes, Royop Development Corporation (Pine Centre Development Ltd.), Aztec Real Estate, Strathmore Homes Ltd., Happy Gang Society,

[13] On February 2, 2007, the Siksika Nation requested a Stay of the Amending Approval. The Board asked the Approval Holder and Director to provide their responses to the Stay request, and the responses were received on February 6, 2007. The Siksika Nation's rebuttal submission was received February 8, 2007, and the Board heard additional arguments at the Hearing.

[14] The Hearing was held on February 12, 13, and 14, 2007, in Strathmore, Alberta.

[15] On February 14, 2007, the Board confirmed that the Parties were to provide written closing and final comments, and the schedule for the submissions was provided.

[16] On February 16, 2007, the Board notified the Parties that a partial Stay of the Amending Approval was granted, subject to certain conditions, and it would remain in effect until the Ministerial Order resulting from the appeals was issued.[6]

[17] The Appellants provided their closing comments on February 21, 2007. The Approval Holder's and Director's closing comments were provided to the Board on February 28, 2007. The Siksika Nation provided its final comments on March 7, 2007.

[18] On March 7, 2007, the Siksika Elders requested an extension for filing final comments and provided an updated version of their response. The Board granted a two week extension. On March 13, 2007, the Siksika Elders contacted the Board stating that they would not be able to meet the deadline because they would not be able to consult with the Siksika Elders membership within the timeframe. On March 19, 2007, the Board respectfully notified the Siksika Elders that it was unable to provide further extensions to submit final comments, and the Board explained the purpose of final comments is to respond to the Approval Holder's and Director's closing comments, not to introduce new arguments or evidence.

Wild Rose Economic Development Corporation, and United Communities L.P. were denied; the intervenor applications of Ms. Patricia Cross and Dr. Steve Stanley were withdrawn as they would be appearing as part of the Approval Holder's panel of witnesses.

[6] See: Stay Decision: *Siksika Nation Elders Committee and the Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 May 2007), Appeal Nos. 05-053 and 054-ID2 (A.E.A.B.).

[19] The Approval Holder, the Siksika Nation, and the Siksika Elders reserved their rights to apply for costs prior to the end of the Hearing.

[20] The Board provided its Report and Recommendations to the Minister on April 18, 2007, and the Minister released his decision on May 18, 2007.[7]

[21] The Board set a schedule to receive costs applications from the Parties. Applications were received by the Siksika Nation on June 21, 2007, and the Approval Holder on August 14, 2007. Response submissions were received from the Siksika Nation, Approval Holder, and Director on September 14, 2007. Although the Siksika Elders reserved their right to apply for costs, they did not file an application despite two extensions to the deadline to do so, and they did not provide a response submission.

II. Costs Applications

A. Siksika Nation

[22] The Siksika Nation submitted that the costs claimed were necessary to prepare and present its case to the Board and were directly related to the matters contained in the Notice of Appeal. The Siksika Nation stated that its participation, resulting in its technical and legal costs, made a substantial contribution to the appeals and assisted the Board in making its recommendations.

[23] The Siksika Nation explained a major cost claimed resulted from the necessity of using experts at the various stages of the appeal process, including reviewing the Amending Approval, the UMA report and design, the Golder reports, and other technical information to determine any potential impact on the Appellants. The Siksika Nation stated Dr. Roy Crowther prepared two reports in response to the Golder reports, and these reports were beneficial to the Siksika Nation and the Board. The Siksika Nation explained Mr. James Marr also prepared two reports and was useful as a water treatment consultant to the Siksika Nation. The Siksika Nation submitted that "…both experts provided useful testimony in the hearing on water quality and risk

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[7] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) [Erratum Pending] and Ministerial Order 11/2007 issued May 18, 2007.

impacts to the Siksika Nation … [and] the expert testimony assisted the Board in making its final decision, and the technical costs should be awarded as claimed."[8]

[24] The Siksika Nation explained the legal costs were necessary for the preparation of the submissions and representation throughout the appeal process, because it would have been impossible for the Siksika Nation to proceed without extensive legal assistance for matters as complex as in these appeals. The Siksika Nation stated it chose its counsel because they were experienced in environmental and First Nations related matters. The Siksika Nation submitted that the legal costs claimed were appropriate for a matter of this complexity and magnitude, and its counsel assisted the Board.

[25] The Siksika Nation stated meeting costs were incurred with respect to preparing for the Hearing and organizing the implementation of the Stay decision.

[26] Costs claimed by the Siksika Nation were:

1.	Technical Services:	$106,510.33
2.	Legal Fees:	$123,461.40
3.	Meeting Expenses:	$7,915.75
4.	Miscellaneous:	$84.73
	Total:	$237,972.21

B. The Town of Strathmore

[27] The Approval Holder submitted that the costs claimed were reasonable and necessary for the Approval Holder to make a valuable contribution to the appeals in such a technical and complex case. The Approval Holder stated its "…participation in the appeal[s] was in the public interest as the matters under appeal impacted the provision of water services to all Town residents, the Town's current and future residential and commercial development, and the Town's allocation of public funds."[9]

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8 Siksika Nation's costs application, dated June 21, 2007.

9 Approval Holder's costs application, dated August 14, 2007.

[28] The Approval Holder explained the costs claimed reflect actual external expenditures incurred, and certain unrelated legal costs, such as legal costs incurred as a result of complying with the Amending Approval, were not claimed. The Approval Holder further explained that internal costs were not included, nor were the costs of some technical data reports that were prepared as part of the Town's compliance with the Approval and subsequent amendments. The Approval Holder deducted GST off all of the costs because it receives a 100 percent rebate on GST costs.

[29] The Approval Holder argued it has a real need for a costs award because of the "…substantial expense of finding a suitable, long-term solution for the Town of Strathmore's wastewater, complying with the *EPEA* Approvals 1190-01-01 to 13 and the Stay decision, and the significant cost of meaningful participation in this appeal."[10]

[30] The Approval Holder stated its technical experts provided evidence and reports that were succinct, accurate, and were of assistance to the Board. The Approval Holder further stated that its evidence and arguments related directly to the matters in the Notices of Appeal, and it conducted itself in good faith and participated in a forthright and efficient manner. The Approval Holder submitted that its participation and its "…extensive efforts to comply with the terms of the Amending Approval…"[11] demonstrate its commitment to the goals of EPEA.

[31] The Approval Holder stated it has, at all times, complied with the validly obtained approvals and the terms of the Stay and has "…expended extraordinary financial resources in doing so."[12] The Approval Holder argued that, "Notwithstanding any deficiencies found by the Board regarding the Amending Approval and expert reports, the Town must be able to rely on Approvals issued by Alberta Environment and on expert assessments prepared for it by qualified professionals."[13]

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10 Approval Holder's costs application, dated August 14, 2007.

11 Approval Holder's costs application, dated August 14, 2007.

12 Approval Holder's costs application, dated August 14, 2007.

13 Approval Holder's costs application, dated August 14, 2007.

[32] The Approval Holder submitted that it is entitled to an award of costs as it followed proper procedure in obtaining the required approvals, complied with the conditions in the approvals, and participated openly and fully in the appeal.

[33] The Approval Holder asked for the following costs:

1.	Technical Services:	$43,113.09
2.	Legal Services:	$67,292.09
	Total:	$110,405.18

C. Director

[34] The Director explained she was neither seeking costs nor did she believe the Director should be liable for costs.

D. Response Submissions

1. Siksika Nation

[35] The Siksika Nation argued the public interest does not support an award of costs to the Approval Holder. It stated the Approval Holder "…acted in an imprudent manner throughout this process."[14] The Siksika Nation argued the Approval Holder failed to conduct tests to support its application to Alberta Environment, such as failing to collect baseline data on the side channel of the Bow River upstream of the outfall location, failing to conduct a risk assessment of the Siksika Nation's potable water treatment plant and an appropriate dye study, and failing to select an appropriate outfall location.

[36] The Siksika Nation stated the studies are now being conducted due to the Siksika Nation's appeal to the Board. The Siksika Nation submitted that had the tests been conducted earlier, considerable expense may have been avoided, a different outfall location chosen, or a different discharge scenario implemented.

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[14] Siksika Nation's response submission, dated September 14, 2007.

[37] The Siksika Nation explained it provided an expert report, prepared by Aquatic Resource Management Ltd., after the Amending Approval was issued setting out numerous concerns with the application including the need to conduct the tests. The Siksika Nation stated the Approval Holder and the Director ignored the advice.

[38] The Siksika Nation referred to the Board's Report and Recommendations, stating the Board found numerous instances where the experts for the Town had not acted appropriately. It argued that if it had not intervened, the Approval Holder's application would have proceeded and discharge into the Bow River would have been allowed to the Amending Approval limits. The Siksika Nation submitted that, given the actions of the Approval Holder and the Director, the Siksika Nation should not have costs awarded against it.

[39] The Siksika Nation argued it served the public interest and its members by opposing the Amending Approval and obtaining a favourable result from the Board. It stated the Board found the Amending Approval was in breach of Alberta Environment's own policy, and without the appeal, the breach would have persisted. The Siksika Nation argued that, even though the Board does not use the loser pays approach, the public interest was clearly served by the appeal of the Siksika Nation and therefore, the Siksika Nation should not bear the costs of the appeal on its own. It stated its participation clearly furthered the purposes of the EPEA, and the evidence of its experts was largely adopted by the Board.

[40] The Siksika Nation stated it has fewer resources than the Approval Holder or Alberta Environment. The Siksika Nation explained the costs it incurred were considerable and resulted from the considerable work completed by legal counsel and experts, including filing two Stay applications and the complex hearing. The Siksika Nation argued all of the costs are recoverable, including costs associated with the Stay applications. It explained the first Stay application was filed before the pipeline was built, and had the Approval Holder responded appropriately to the Siksika Nation's concerns, considerable expense would have been avoided by all Parties. The Siksika Nation stated the second Stay application resulted from the Approval Holder requesting an emergency discharge, and the Stay application was brought to protect the Siksika Nation's water treatment plant and its members. The Siksika Nation stated the second Stay application was partially successful, as the Board required the Approval Holder comply

with stringent conditions while discharging. The Siksika Nation stated it incurred costs in ensuring compliance with the conditions. The Siksika Nation submitted that "…the actions of Strathmore in failing to properly plan for its wastewater discharge forced the Board to order only a partial stay to avoid an uncontrolled release from the lagoons."[15]

[41] The Siksika Nation explained its costs were greater than the Approval Holder's because of the number of steps required for the Appellant, and it had to respond to the Approval Holder and the Director whereas they only had to respond to the Appellants' submissions. The Siksika Nation stated it does not have the same administrative resources as the Approval Holder or the Director and, therefore, it had to rely on experts to a greater degree.

[42] The Siksika Nation argued that special circumstances exist to award all of the costs it incurred, and the costs award should be against both the Approval Holder and the Director as both bear equal responsibility for the errors made with respect to the Amending Approval.

2. Approval Holder

[43] The Approval Holder argued that much of the Siksika Nation's costs application was neither reasonable nor necessary, and an award of costs to the Siksika Nation would be inappropriate in consideration of all of the circumstances of this appeal. The Approval Holder questioned whether the costs relating to the Siksika Elders claimed by the Siksika Nation were brought by the appropriate party.

[44] The Approval Holder submitted that the Board's decisions indicate that an "…award of costs is to reimburse parties for some of the costs necessarily incurred in order to participate in a quasi-judicial process, not to compensate individuals or groups for involvement in the appeal."[16]

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15 Siksika Nation's response submission, dated September 14, 2007.

16 Approval Holder's response submission, dated September 14, 2007.

[45] The Approval Holder argued the Siksika Nation's costs application does not indicate a need for financial assistance to adequately participate in the appeal.

[46] The Approval Holder noted that some of the Siksika Nation's technical, legal, and meeting expense costs appear to be costs incurred on behalf of the Siksika Elders, including meetings with the Siksika Elders by the consultants and meeting and refreshment costs. The Approval Holder argued the Siksika Elders held themselves out to be an independent party to the appeal, and therefore, the Siksika Nation is not entitled to bring an application for costs incurred by the Siksika Elders. It stated such costs should have been claimed by the Siksika Elders.

[47] Although the Approval Holder conceded that technical expertise was necessary for these appeals, it disputed the reasonableness and necessity of the technical expenses claimed for a total of $106,510.33. The Approval Holder stated the costs claimed by the Siksika Nation were double the Town's technical expenses claimed, and it submitted that the costs claimed by the Siksika Nation do not directly relate to the issues in the appeals or were not expended in the preparation and presentation of the evidence before the Board.

[48] The Approval Holder pointed out that approximately $60,000.00 of the technical expenses claimed were paid to Siksika Environmental Ltd., but the invoices give little detail what services were provided, how the company is associated with the Siksika Nation, or how they assisted in the preparation and presentation of the Siksika Nation's submissions and evidence at the Hearing. The Approval Holder argued there is the possibility the charges were internal to the Siksika Nation.

[49] The Approval Holder recognized that legal counsel was appropriate given the complexity of the appeals, but it argued the amount claimed by the Siksika Nation for legal services, being $120,000.00, was excessive and nearly double the amount submitted by the Town. The Approval Holder stated the invoices include charges for services not directly or primarily related to the matters in the appeals or for services not related to the preparation and presentation of the Siksika Nation's evidence and submissions. In particular, the Approval Holder noted the Siksika Nation claimed $3,461.40 for the preparation of an Appeal Book, which the Approval Holder explained was an expense related to an appeal of the judicial review

decision from the Court of Queen's Bench to the Court of Appeal and is therefore unrelated to the appeals before the Board and ineligible to be claimed.

[50] The Approval Holder stated the $7,915.75 claimed for meeting and refreshment expenses consisted of honorariums paid to the Siksika Elders to attend meetings, conference calls, and briefing sessions, and for the refreshments provided to the Siksika Elders at the meetings and the Hearing. The Approval Holder argued these are not appropriate costs that can be claimed by the Siksika Nation, and these costs should be borne by those participating in the appeals. The Approval Holder argued these costs do not relate directly to the matters on appeal nor for the preparation of the Siksika Nation's submission for the Hearing. The Approval Holder noted the Siksika Nation did not provide any documentation supporting the costs claimed for February 16, 17, and 21, 2006, and the final three invoices are for costs arising after the Hearing and therefore could not relate to the preparation of submissions for the Hearing. The Approval Holder argued that if these costs were claimed by the Siksika Elders, it would amount to individual compensation for participating in the appeals, not out-of-pocket expenses. The Approval Holder stated the Siksika Nation admitted the meeting costs were unrelated to the preparation of its submissions but were costs associated with implementing the Stay decision. The Approval Holder argued these were not appropriate expenses to be claimed.

[51] According to the Approval Holder, the Siksika Nation is not entitled to a costs award of $237,972.21 as claimed in the costs application.

[52] The Approval Holder reiterated that it is a public entity with a finite budget of public funds. It stated the "…participation in this appeal, compliance with the stay decision, and the planning and construction of a new wastewater treatment plant has already consumed significant public resources from the Town."[17]

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[17] Approval Holder's response submission, dated September 14, 2007, at page 4.

[53] The Approval Holder stated it was undertaking the activity approved by the Director for the benefit of the citizens of the Town and as a necessity in a modern urban centre. The Approval Holder submitted that should the Board award costs to the Siksika Nation, the Town should not be held responsible for such costs.

3. Director

[54] The Director noted that the Siksika Nation and the Approval Holder did not seek costs to be paid by the Director.[18] The Director argued she should not be responsible for paying any of the costs claimed by either the Siksika Nation or the Approval Holder.

[55] The Director stated the Board and the Courts have developed specific principles for costs claim as they relate to the Director given the unique role the Director has in these matters as the statutory decision maker whose decision is being appealed. The Director explained the legislation gives her the authority to consider the applications submitted by the proponent and to make decisions on whether or not to issue the authorizations applied for and to determine the terms and conditions to be included. She stated she is therefore an automatic party to every appeal of the Director's decisions. According to the Director, the Board and the Courts have recognized the statutory role of the Director and has considered this a factor in not ordering the Director pay costs as long as the Director is acting in good faith.

[56] The Director stated there is no allegation or finding of bad faith in the actions or interpretations taken by the Director. She argued there are no special circumstances that exist that should result in costs being assessed against the Director.

[57] The Director stated that even though the Board recommended substantial revisions to the Amending Approval, the Board also stated that "…this Approval Amendment, in terms of stringency that it imposes on the treated wastewater of Strathmore, would be the envy of many other provincial environmental regulators in Canada."[19] She argued that in past decisions by the Board where the Director's decision was substantially varied or reversed, the Board did

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[18] The Board notes that the Siksika Nation did not seek costs from the Director in its costs application but did in its response submission.

[19] Director's response submission, dated September 14, 2007, at paragraph 39.

not consider it to be special circumstances to warrant awarding costs against the Director. The Director submitted that the Board should not find any special circumstances to award costs in this case.

[58] The Director pointed out the Siksika Nation included costs for Appeal Books, which were related to the judicial review and not the Hearing.

III. Legal Basis

A. Statutory Basis for Costs

[59] 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."[20]

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.)[21]

[60] The sections of the *Environmental Appeal Board Regulation*,[22] (the "Regulation") concerning final costs provide:

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

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

[22] *Environmental Appeal Board Regulation*, A.R. 114/93.

"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."

[61] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purpose of EPEA. 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."

[62] 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."

[63] 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.

[64] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in EPEA and the Regulation should apply in the particular claim for costs.[23] The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.[24] 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."[25]

[65] 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:
>
> (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

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[23] *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.)).

[24] *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*").

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

> counsel or other advisors to prepare for and make presentations at the Board's hearing."[26]

[66] 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.[27]

B. Courts vs. Administrative Tribunals

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

[68] The distinction between the costs awarded in judicial and quasi-judicial settings was stated in *Bell Canada* v. *C.R.T.C.*:

> "The principle issue in this appeal is whether the meaning to be ascribed to the word [costs] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals."[28]

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

[27] *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.).

[28] *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

[69] 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 tarrifs [*sic*], and in any event are directed to *lis inter partes*. We are here concerned with the costs of public hearings on a matter of public interest. There is no underlying similarity between the two procedures, or their purposes, to enable the principles underlying costs in litigation between parties to be necessarily applied to public hearings on public concerns. In the latter case the whole of the circumstances are to be taken into account, not merely the position of the litigant who has incurred expense in the vindication of a right.'"[29]

[70] 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

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> losers. Agencies, in finding what best serves the public interest, may rule against every party representing before it."

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

> spokespersons to advance the public interest for both environmental protection and economic growth in reference to the decision appealed."[30]

[71] The Board has generally accepted the starting point that costs incurred in an appeal are the responsibility of the individual parties.[31] There is an obligation for each member of the public to accept some responsibility of bringing environmental issues to the forefront.[32]

IV. Discussion

A. Siksika Nation

[72] As the Board has stated in previous decisions, the starting point of any costs decision is that the Parties are responsible for the costs they incurred. Section 2 of the *Water Act* and EPEA state citizens of Alberta have a responsibility in protecting the environment, and participating in the approval and appeal processes is one way of fulfilling their obligations.

[73] The Board reviewed the costs submissions from the Parties and the evidence presented during the Hearing to determine the extent the written submissions and oral evidence materially assisted the Board in preparing its recommendations to the Minister. In these appeals the Appellants were the Siksika Nation and the Siksika Nation Elders Committee and the Approval Holder was a municipality, the Town of Strathmore. The Appellants raised an important issue in their appeals, essentially the minimization of impacts on the aquatic environment of the Bow River. Without the appeals, the concerns of the Appellants would not have been addressed and the concerns noted by the Board regarding the Amending Approval would not have been corrected and may have been perpetuated in other approvals.

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30 *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.).

31 *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.).

32 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…."

[74] The Siksika Nation requested costs totaling $237,972.21, with $106,510.33 for technical costs, $123,461.40 for legal costs, $7,915.75 for meeting expenses, and $84.73 for miscellaneous (courier) expenses. The technical costs were expensed to Siksika Environmental Ltd. (“Siksika Environmental”) ($70,690.87), Banner Environmental Engineering (“Banner”) for the professional services of Mr. James Marr ($16,869.61), and Aquatic Resources Management Ltd. (“Aquatic Resources”) ($16,644.35) and Dillion Consulting Limited (“Dillion”) ($2,305.50) for the professional services of Dr. Roy Crowther.

[75] The Board accepts that the Siksika Nation required the assistance of external consultants to review the reports provided by the Approval Holder’s experts. The issues raised in the appeals were complex and very technical.

[76] Siksika Environmental did not appear at the Hearing and there is no indication in the costs application to explain its role in the preparation and presentation of the arguments before the Board. In reviewing the documents provided with the costs claim, it appears Siksika Environmental was involved in the hiring of consultants and discussions with the consultants. However, there is nothing in the documents that clarify what Siksika Environmental actually did that related to the preparation and presentation of the evidence for the Hearing. Because it is unclear how Siksika Environmental itself was involved in the process, the Board cannot grant costs with respect to Siksika Environmental.

[77] It appears that some of the costs claimed by Siksika Environmental were costs paid for work completed by Banner for Alpine Environmental. However, it is unclear how these costs were included in the Siksika Environmental statements. The Board will not award costs for expenses when it is unclear what was paid, to whom, and for what services were provided. Therefore, the Board cannot consider those expenses related to Banner Engineering for which there is no clear documentation of what work was related to the payment.

[78] Dr. Roy Crowther was the consultant hired by the Siksika Nation to conduct a review of the reports provided by the Approval Holder and to conduct further testing and site assessments. The costs for Dr. Crowther included those listed under Aquatic Resources, Dillion, and Siksika Environmental. It was through his review of the data the concerns of the Siksika Nation were raised and presented to the Board. He provided balanced evidence which is

required of an expert witness before this Board. The data collected and research conducted by Dr. Crowther were directly related to the issues before the Board, as was his evidence presented at the Hearing.

[79] The Board notes that, upon receipt of Dr. Crowther's critical review of the initial report prepared by Golder Associates for the Approval Holder, the Town's consultants used the data presented by Dr. Crowther to rerun the analysis without questioning the values. For example, in the second report, Golder used water quality data from Carseland Weir instead of from Stier's Ranch in response to Dr. Crowther's critique.[33] The consultant for the Town did not question the data presented by Dr. Crowther even when the testimony was not consistent with the data.[34] This leads the Board to believe the Approval Holder's consultants saw some merit in the values presented by Dr. Crowther. Dr. Crowther also raised the possibility of the warm treated wastewater discharge into the secondary channel creating an environment for *Giardia* cysts. Although the Board recognized this was a hypothetical scenario, it also thought it was sufficiently plausible to warrant some evaluation.[35]

[80] Under section 3.1.15 of the Amending Approval, the Approval Holder was to assist the Siksika Nation in arranging for an independent review of the Golder assessment.[36] Although it is unclear what "assist" would include, the Board is of the opinion that it should include covering some, if not all, of the costs related to retaining an independent consultant. The

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[33] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) at paragraphs 209 and 245 [Erratum Pending] and Ministerial Order 11/2007.

[34] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) at paragraphs 211 and 220 [Erratum Pending] and Ministerial Order 11/2007.

[35] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) at paragraph 311 [Erratum Pending] and Ministerial Order 11/2007.

[36] See: Amending Approval: "**INDEPENDENT REVIEW OF THE GOLDER BOW RIVER WATER QUALITY ASSESSMENT**

3.1.15 The approval holder shall assist the Siksika Nation in arranging for review, by a recognized expert other than Golder Associates, of the Golder Associates Bow River Water Quality Assessment provided in the June 29, 2005 Golder Associates Memorandum from J.P. Bechtold to Mark Ruault, UMA Engineering Ltd. Re: Town of Strathmore – Bow River Water Quality Assessment."

Board notes the Approval Holder did not seem to present any major concerns covering at least some of these costs for the Siksika Nation.

[81] Dr. Crowther effectively presented his concerns with the original Golder report and he provided viable alternatives for evaluating the data and resulting analyses. He was an effective witness for the Siksika Nation and he caused the consultant for the Approval Holder to consider alternatives for evaluating the effect of the project on the Siksika Nation, the Bow River, and the environment. Where the Board concludes that an award of costs are appropriate, the usual starting point for the Board when assessing such costs is generally 50 percent of legitimate costs claimed, and the Board will then adjust the amount depending on the value of the evidence presented. Dr. Crowther's evidence was very valuable to the Board when making its recommendations. Therefore, the Board will allow 75 percent of the labour costs claimed for the services of Dr. Crowther. Therefore, the Board will allow the costs incurred by Aquatic Resources in the amount of $11,238.75. The Board will not allow costs claimed by Mr. Andrew Chan of Dillion, because his work was completed in conjunction with Banner and parties should not be liable for paying twice for the same work.

[82] Included in the expenses for Dr. Crowther were costs for mileage ($1,022.50) and disbursements ($636.88). Within the mileage claim are costs associated with attending meetings with the Siksika Nation or its counsel. The Board would consider providing costs if the mileage was incurred while collecting data. However, it is not willing to consider costs for attending strategy meetings or if there is uncertainty as to the purpose of the travel. The Board will accept the mileage claimed for Dr. Crowther's travel to the information session and the Hearing, totaling 363.5 kilometres. It appears the rest of the mileage claimed was for strategy meetings and other meetings and will not be considered in the costs claim. The Board notes the mileage rate claimed was $0.50 per kilometer. When calculating costs, the Board uses the Government of Alberta rates, which in the case of mileage is $0.44 per kilometer. Therefore, the Board will allow mileage costs totaling $159.94.

[83] Disbursements were calculated by using a flat rate of 4.25 percent of the time charges. There is no indication that these actual expenses were incurred when a flat calculation is used, or if they occurred, they are internal costs associated with operating a business and not

related to the direct preparation and presentation of the submission. The Board is granting costs for the evidence provided by Dr. Crowther and, therefore, it will not award costs for such disbursements.

[84] The total costs that will be awarded for the assistance of Dr. Crowther in the Hearing will be $11,238.75.

[85] Mr. Marr of Banner was retained by the Siksika Nation to review engineering reports provided by the Approval Holder in its application for the Amending Approval, and he provided evidence at the Hearing. The total number of hours claimed by Banner was 111 hours, at a rate of $125.00 per hour. Therefore, the costs associated with completing the assigned work was $13,875.00. Also included in the statements provided was a 10 percent administration fee and "reimbursable expenses," which included mileage, courier charges, copying charges, postage, aerial photographs, and maps.

[86] The Board recognizes the limited contribution Mr. Marr made to the Hearing by raising the issue of disinfection by-products in Siksika drinking water as they may be affected by water quality impacts in the Bow River.[37] He provided limited information on the ability of the Siksika Nation water treatment plant to treat surface water and the role of UV disinfection of Strathmore treated wastewater.[38]

[87] His hourly rate of $125.00 per hour was reasonable. Mr. Marr's evidence was of some value to the Board in preparing its recommendations for the Minister. Therefore, the Board will allow 40 percent of the costs claimed for the work completed by Banner, for a total amount of $5,550.00. The Board will not award the 10 percent administrative costs claimed, totaling $1,446.80, because these charges are not directly related to the preparation and presentation of the evidence and arguments presented at the Hearing but are internal costs associated with operating the business.

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[37] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.). [Erratum Pending.] at paragraph 312.

[38] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.). [Erratum Pending.] at paragraphs 310 and 360.

[88] Banner included GST totaling $954.89 on the invoices. However, the Siksika Nation is tax exempt and not required to pay GST. Therefore, the Board will not award GST costs to the Siksika Nation.

[89] Banner claimed mileage costs totaling $853.10. There is no indication of the mileage rate charged or the specific purpose of the travel claimed. Because there is uncertainty as to why these costs were charged, and without further details, the Board cannot award costs associated with mileage claimed.

[90] The Banner invoices included reimbursable costs totaling $1,368.09. The Board will not award costs for courier services, postage, and photocopying, because these types of costs are part of operational costs and are not part of the preparation or presentation to the Board.

[91] The total costs awarded for the assistance of Banner is $5,550.00.

[92] The Board notes most of the costs requested by the Siksika Nation are for legal fees, and they requested the fees be paid on a solicitor-client basis. The Board has set out its approach to costs in regard to solicitor fees in recent decisions and this approach is appropriate in this case as well.[39]

[93] In *Mizera*, the Board stated:

> "In court proceedings, it is only in exceptional circumstances that the courts award costs on a solicitor and client basis. Rather, the norm is for the courts to base costs, in so far as they relate to the costs of advocacy, upon a scale related to the size and nature of the dispute and the amount of trial and preparatory time customarily involved in matters of that type. In Alberta, this approach is embodied in the Schedule to the Rules of Court. Such amounts are, at all times, subject to the overriding discretion of the court. They are not intended to compensate for the full costs of advocacy, even in the court system where a 'loser pays' approach is the norm.
>
> In exercising its costs jurisdiction, this Board believes it is not appropriate (except perhaps in exceptional cases) to base its awards on a solicitor and client costs approach. It is up to each party to decide for themselves the level and the nature

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[39] See: Costs Decision: *Imperial Oil and Devon Estates* (8 September 2003) Appeal No. 01-062-CD (A.E.A.B.); *Mizera* (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.); and *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.).

> of representation they wish to engage. Similarly, it is up to each party to decide to what extent they wish their advocates to be involved in their pre-hearing preparation. The Board does not intend, through the exercise of its costs jurisdiction, to become involved in such decisions, yet this would be inevitable if, in deciding costs, the starting point was the actual account charged by the lawyer or advisor in question. Rather, the Board intends to follow the court's approach of basing any costs awards on a reasonable allowance for hearing and preparation time, suitably modified to reflect the administrative and regulatory environment and the other criteria that apply before the Board."[40]

[94] Having regard to all of the arguments advanced by the Parties, the Board does not believe that the special circumstances contemplated in *Mizera*[41] exist in this case to warrant granting solicitor-client costs.

[95] The Board, if it does award legal costs, will generally base the award on a reasonable allowance for hearing and preparation time and will adjust this amount to reflect the other criteria the Board determines to be relevant in the specific case.

[96] Legal counsel for the Siksika Nation was helpful in that he kept the submissions and evidence focused on the issues before the Board. However, the Board considers the assistance given by legal counsel for the Approval Holder equally as helpful during the appeal process. However, counsel for the Siksika Nation presented little argument regarding the policies of Alberta Environment that should have been followed or reasons why the policies were not followed. As stated in the Board's Report and Recommendations, it was the interpretation of the Alberta Environment policy regarding wastewater discharge into receiving waters included in the "Water Quality Based Effluent Limits Procedures Manual (December 1995)" that was the basis of the Board's recommendations.[42] Unfortunately, little evidence or arguments were provided by the Parties regarding the interpretation of this policy at the Hearing. Although the technical evidence provided by Dr. Crowther and Mr. Marr were of assistance to the Board, the

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[40] *Mizera* (2000), 32 C.E.L.R. (N.S.) 33 at paragraphs 17 to 18 (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.). See: Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C at paragraphs 10 and 11 (A.E.A.B.).

[41] *Mizera* (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.).

[42] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) at paragraphs 177 to 179.

arguments provided by legal counsel did not materially assist the Board beyond the minimum expectation. Therefore, the Board will not grant legal costs for the Siksika Nation or the Approval Holder.

[97] The Board appreciates the efforts by counsel and the Parties to provide documents and receipts of their expenses. This documentation is important to the Board when determining costs. The Board notes some of the costs included as legal costs items that the Board generally does not award costs for. For example, provincial taxes would not be awarded, and the Board usually does not award costs for online research. The Board appreciates the efforts made by the Sikiska Nation's counsel to differentiate between costs incurred as a result of the Hearing and those resulting from the Court application. However, some of the time claimed covers more than just preparation for the Hearing. This resulted in the time claimed being slightly skewed for the purposes of the costs application. Because the Board has determined in this case that legal costs will not be awarded, it does not have to estimate what time should be apportioned to the actual Hearing.

[98] The Siksika Nation also claimed costs for meetings held regarding the Amending Approval and for the attendance of the Siksika Elders at the meetings and the Hearing. The Board is aware that it is traditional for the Elders to communicate their evidence orally rather than through written format, and the evidence they provided was valuable to the Board. The Board does not generally award costs for persons attending the Hearing or meetings for preparation of the submissions. The Siksika Elders were a Party to these appeals and were given the opportunity to submit their own costs application, but no application was provided even though the Board granted an extension to accommodate their submission. Therefore, the Board will not award costs claimed for the honorariums paid to the Siksika Elders by the Siksika Nation.

[99] The Siksika Nation claimed $84.73 for miscellaneous expenses. Most of the costs are to the Siksika Nation's counsel in Saskatoon, Saskatchewan or its consultants. Even though these costs may have been necessary, these costs cannot be awarded because they are not part of the preparation and presentation costs related to these appeals. It was the Siksika Nation's decision to retain counsel outside of the area so it is not appropriate for the other Parties to cover

the incidental costs related to that choice. Only $22.42 is for courier services to the Board's offices. These types of costs are part of the costs associated with filing an appeal and included in the responsibility of all Albertans to bring environmental issues to the forefront. Therefore, the Board will not award any costs for the miscellaneous expenses claimed.

[100] In summary, the Board considers it appropriate that some of the costs claimed by the Siksika Nation should be granted. Therefore, as discussed above, the Board grants costs in the total amount of $16,948.69 to the Siksika Nation for the experts retained for the Hearing.

B. Siksika Elders

[101] The Board valued the evidence brought by the Siksika Elders in terms of their traditional knowledge regarding the Bow River and the use of the Bow River by the Siksika peoples. The Siksika Elders did not submit a costs application even though the Board granted them two extensions to do so. Therefore, the Board cannot award costs to the Siksika Elders.

C. Approval Holder

[102] The Approval Holder asked for costs totaling $110,405.18. These costs were broken down as $43,113.09 for technical costs and $67,292.09 for legal expenses.

[103] The Board is of the view that part of the Approval Holder's costs resulted from its own actions. The Approval Holder argued it "…has a real need for an award of costs…" because of the expense of finding a suitable, long term solution for its wastewater, complying with the Amending Approval, associated with complying with the Stay conditions, and participating fully in these appeals. The costs associated with finding a suitable solution for its wastewater and for complying with the Amending Approval are costs the Town would have to bear regardless of whether there was an appeal. These costs are associated with growth of the community.

[104] The costs associated with the Stay are, in part, a result of the Approval Holder's lack of foresight. As stated in the Stay decision, the Approval Holder placed the Board in a difficult position.[43] The Approval Holder was aware it was running short of storage space well

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[43] See: Stay Decision: *Siksika Nation Elders Committee and the Siksika Nation* v. *Director, Southern Region,*

before the Hearing, but chose not to seek alternative disposal methods until the storage ponds were at their maximum capacity. The Board was put in the untenable position of either allowing the discharge and possibly affecting the Siksika Nation's water source,[44] or allowing the storage ponds to overflow and possibly cause more extensive environmental concerns. The Board had to balance the potential environmental impacts and the safety of the residents of the Siksika Nation, and therefore, the Approval Holder was required to assure a safe water supply to the Siksika Nation when the Town's treated wastewater was being discharged. Therefore, the costs associated with providing water to the Siksika Nation as part of the Stay application and other costs incurred as a result of the Stay are partly the result of the Town's reluctance to find alternative methods of disposing the treated wastewater. When there is an appeal before the Board, the proponent of the project should know there is the possibility of a Stay being requested by the appellants and being granted by the Board. The proponent is required to abide by the conditions of the Stay, should it be granted, at its own expense.

[105] The Approval Holder stated its experts provided reports that were "…succinct, accurate, and were of assistance to the Board." The Board cannot agree. The Board noted many inconsistencies in the reports prepared for the Approval Holder as part of the Amending Approval application and as pointed out in the Board's Report and Recommendations.[45] It is also clear in the Board's recommendations that the Board was not impressed with the work completed by the consultants retained by the Approval Holder. Questions should have arisen

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Regional Services, Alberta Environment, re: *Town of Strathmore* (18 May 2007), Appeal Nos. 05-053 and 054-ID2 (A.E.A.B.), at paragraphs 124 to 125:

> "The Approval Holder has placed the Board in a very difficult position. It has forced the Board to weigh the adverse impacts that may occur as a result of the Approval Holder's inactions and lack of a risk assessment against the possible effect on the Appellants' drinking water supply should the Board decide to allow the Approval Holder to proceed under the Amending Approval.
>
> The Approval Holder was well aware in December 2006 that its lagoons would not be able to hold all of the treated wastewater until spring when it could use its irrigation system. The Approval Holder took no steps to alleviate the build up in the lagoons. It was at that time, if not earlier, that it should have sought out and implemented alternative disposal methods. There was no guarantee at that time that all of the work would have been completed as required as a prerequisite under the Amending Approval."

[44] At the time of the Stay request, no mixing studies or risk assessment had been completed by the Approval Holder as requested by the Siksika Nation.

[45] See: *Siksika Nation Elders Committee and Siksika Nation* v. *Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of Strathmore* (18 April 2007), Appeal Nos. 05-053-054-R (A.E.A.B.) at paragraphs 217 to 221, 228 to 231 to 234, 235 to 237, 241 to 243, 253, 255, 263, 294, and 339.

when the report submitted as part of the application was marked as a draft and was not signed by the consultant overseeing the report.

[106] The evidence provided by the consultants for the Approval Holder evidently supported the position of the Approval Holder while evidently overlooking the policy guidance provided by Alberta Environment. In a hearing, the Board expects evidence given by consultants or experts to be based on the data and facts presented, not biased to support the party who hired them. This was particularly evident in the cross-examination of the Approval Holder's consultant from Madawaska Consulting when she stated that if she was pressed for a personal assessment, she would place equal value on the ecosystem of the Western Irrigation District canal as she would place on the Bow River because the Western Irrigation District was her client.[46] This type of argument did not provide the Board with confidence that the evidence being presented adequately considered the public interest in the environment as it should from an environmental expert.

[107] The Board notes the efforts made by counsel for the Approval Holder to clearly represent the time he spent on the file preparing for the Hearing. The time spent discussing other issues, including the Court challenge, was edited out of the documentation. This simplifies the Board review of the relevant documentation.

[108] Because the Board did not find the consultants for the Town effective or helpful, and its legal counsel was as effective as counsel for the Siksika Nation, the Board will not award costs to the Approval Holder.

[109] As stated above, the Board considers the legal counsel for the Approval Holder was equally effective as counsel for the Siksika Nation. The Board recognizes the contributions counsel for both the Siksika Nation and the Approval Holder made to the Hearing and to ensuring the evidence was focused on the issues in a very complex and demanding Hearing for all Parties. The Board notes the challenges faced by both counsel throughout the process. As the

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[46] See: Hearing Transcript at pages 451 to 452.

performance of the counsel was equal, the costs claimed balance each other out, and no costs will be awarded to either Party for the legal costs claimed.

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,[47] that costs should not be awarded against the Director providing her actions, while carrying out her statutory duties, were done in good faith.

[111] In this case, the Director's decision was not overturned by the Board but was substantially varied. Even if the decision had been reversed, special circumstances are required for costs to be awarded against the Director. The Courts, 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.
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> 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.'

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

> 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."[48]

[112] In this case, the Board has concerns with the Director's decision to issue the Amending Approval. However, she exercised her judgment in performing her statutory duties, and her actions were not exercised in bad faith. She relied on the report prepared for the Approval Holder by a well established environmental consulting company. The Board does not find the "special circumstances" contemplated by the Court, or this Board, to award costs against the Director.

[113] In previous costs decisions where costs have been awarded against the 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 [EPEA] into its project. This includes accommodating, in a reasonable way, the types of interests advanced by the parties…."[49] 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."[50]

[114] The Board appreciates that, in this case, the proponent of the project is a municipality with limited resources and it would not see the financial benefits of the project for a number of years. However, the Board also notes that some of the problems facing the Approval Holder were a result of its own actions or inaction.

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

[49] 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.)

[50] 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.

[115] The Board recognizes that the Approval Holder retained the services of a well known environmental consulting company, Golder Associates, with the required expertise to conduct the necessary data collection to apply for the Amending Approval. It is unfortunate for the Town that the data collection and analyses were not completed to the standard expected for such an application. However, the Town was ultimately responsible for ensuring the information gathered was accurate and complete. Because the Approval Holder seemed to be in a rush to have the Amending Approval issued, the consultant provided the answers to support the Approval Holder's application, and it appears the Approval Holder did not complete a thorough review of the information. The Approval Holder had been warned of the potential for problems with nutrient loading to the Bow River by its consultants for the initial feasibility study.[51] As a result, the Board considers it appropriate that the Town be responsible for paying some costs to the Siksika Nation.

[116] In any case, it was the Board's understanding that the Approval Holder was to pay some of the costs incurred by the Siksika Nation in acquiring a consultant to review the application data. Condition 3.1.15 of the Amending Approval requires the Approval Holder to "assist" the Siksika Nation in arranging for a review of the assessment prepared by the Town's consultant.[52] Nowhere in the Approval Holder's submission was there an indication that it had paid for any part of the costs incurred by the Siksika Nation in hiring Dr. Crowther or Mr. Marr.

[117] Therefore, in the circumstances of these appeals, costs will be ordered against the Approval Holder.

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[51] See: Exhibit 11: EPCOR 2002 Options Report and 2005 Updated Application filed with Alberta Environment.

[52] Condition 3.1.15 of the Amending Approval states:

> "The approval holder shall assist the Siksika Nation in arranging for review, by a recognized expert other than Golder Associates, of the Golder Associates Bow River Water Quality Assessment provided in the June 29, 2005 Golder Associates Memorandum from J.P. Bechtold to Mark Ruault, UMA Engineering Ltd. Re: Town of Strathmore – Bow River Water Quality Assessment."

V. DECISION

[118] For the forgoing reasons and pursuant to section 96 of the *Environmental Protection and Enhancement Act*, the Board awards costs to the Siksika Nation in the amount of $16,948.69 for the assistance of the Siksika Nation's expert witnesses, to be payable by the Approval Holder, the Town of Strathmore. The Approval Holder shall pay this award of costs to the Siksika Nation within 60 days of issuance of this decision and payment shall be made in trust to the Siksika Nation's counsel, Mr. Rangi Jeerakathil of MacPherson Leslie & Tyerman LLP. The Town of Strathmore is requested to provide confirmation to the Board that payment has been made within the 60 day period.

Dated on April 22, 2008, at Edmonton, Alberta.

"*original signed by*"

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Dr. Steve E. Hrudey, FRSC, PEng
Chair

"*original signed by*"

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Mr. Ron V. Peiluck
Vice-Chair

"*original signed by*"

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Mr. Al Schulz
Board Member