TOTAL E&P Joslyn Ltd.

Application for an Oil Sands Mine and Bitumen Processing Facility—Joslyn North Mine Project
Fort McMurray Area

Cost Awards

February 2, 2012

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2012-002: TOTAL E&P Joslyn Ltd., Application for an Oil Sands Mine and Bitumen Processing Facility, Joslyn North Mine Project, Fort McMurray Area

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Energy Resources Conservation Board
Suite 1000, 250 5 – Street SW
Calgary, Alberta
T2P 0R4

Telephone: 403-297-8311
Fax: 403-297-7040
E-mail: infoservices@ercb.ca
Website: www.ercb.ca

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

TOTAL E&P JOSLYN LTD.
APPLICATION FOR AN OIL SANDS MINE AND
BITUMEN PROCESSING FACILITY **Energy Cost Order 2012-002**
JOSLYN NORTH MINE PROJECT **Application No. 1445535**
FORT MCMURRAY AREA **Cost Application No. 1666848**

INTRODUCTION

Background

[1] In February 2006, TOTAL E&P Joslyn Ltd. (TOTAL) applied to the Energy Resources Conservation Board (ERCB), pursuant to Sections 10 and 11 of the *Oil Sands Conservation Act* and Sections 3, 24, and 26 of the *Oil Sands Conservation Regulation*, and to Alberta Environment (AENV; now known as Alberta Environment and Water), pursuant to the *Environmental Protection and Enhancement Act* and the *Water Act*, for the construction, operation, and reclamation of the Joslyn North Mine Project (the project).

[2] The project is to be located about 70 kilometres (km) north of Fort McMurray. It consists of an oil sands surface mine and ore preparation and bitumen extraction facilities. It is designed to produce about 15 900 cubic metres per day of bitumen. The project also includes tailings management facilities and other supporting infrastructure. The ERCB deemed the application technically complete in January 2008. AENV determined that the environmental impact assessment (EIA) was complete in February 2008.

[3] On August 8, 2008, Canada's Minister of the Environment and the Chairman of the ERCB signed the Agreement to Establish a Joint Review Panel for the project, putting in place a three-member panel to review the proposed project.

[4] The panel considered the application at a public hearing that began in Fort McMurray, Alberta, on September 21, 2010, and concluded in Sherwood Park, Alberta, on October 8, 2010. On January 27, 2011, the panel issued *Decision 2011-005: TOTAL E&P Joslyn Ltd., Application for the Joslyn North Mine Project* approving the application subject to certain conditions.

Cost Claims

[5] On November 5, 2010, the Oil Sands Environmental Coalition (OSEC) filed a cost claim in the amount of $130 221.36. On November 8, 2010, Sierra Club Prairie submitted a cost claim in the amount of $13 701.61. On November 19, 2010, TOTAL submitted comments on the cost claims of OSEC and Sierra Club Prairie. On November 26, 2010, Sierra Club Prairie submitted a response to TOTAL's comments. On December 3, 2010, OSEC submitted a response to TOTAL's comments. The Board considers the cost process to have closed on January 31, 2011.

VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

[6] In determining local intervener costs, the Board is guided by its enabling legislation, in particular by Section 28 of the *Energy Resources Conservation Act* (*ERCA*), which reads as follows:

> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,
>
> (a) has an interest in, or
>
> (b) is in actual occupation of or is entitled to occupy
>
> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

[7] It is the Board's position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the application in question.

[8] When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in ERCB *Directive 031: Guidelines for Energy Proceeding Cost Claims*.

[9] Section 57(1) of the *Rules of Practice* states

> 57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that
>
> (a) the costs are reasonable and directly and necessarily related to the proceeding, and
>
> (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

COST CLAIM OF OSEC

[10] OSEC was represented by Ackroyd LLP. On November 5, 2010, OSEC filed a cost claim for fees in the amount of $113 200.20, expenses in the amount of $10 833.51, and GST in the amount of $6 187.65, for a total claim of $130 221.36. In its claim, OSEC acknowledged that it had received funding from the Canadian Environmental Assessment Agency (CEAA) in the amount of $41 000. It stated that this funding was applied to a portion of OSEC's costs to prepare for the hearing and that its claim to the ERCB was for costs that were not covered by CEAA's participant funding. OSEC stated that the number of hours claimed in this proceeding did not include the preparation time incurred by the following individuals: 13 hours by Myles Kitigawa; 75.25 hours by Nathan Lemphers; 110.5 hours by Simon Dyer; and 58.25 hours by Marc Huot. OSEC also stated that legal costs are not eligible for payment under CEAA's participant funding program.

Views of TOTAL

[11] TOTAL stated that it has a history of engaging with OSEC to address its concerns and that OSEC has broader environmental interests. TOTAL submitted that OSEC does not meet the statutory requirements classifying it as a local intervener and, therefore, should be denied costs.

[12] TOTAL took the position that, in accordance with Section 28 of the *ERCA*, OSEC had not established the requisite interest in or right to occupy land and, secondly, had not established that such land may be directly and adversely affected by the Board's decision on the application in question. TOTAL noted that OSEC has received costs for its participation in past proceedings and that a review of the cost orders cited by OSEC indicates that OSEC's entitlement to costs in those cases was either not challenged or that OSEC had put forward evidence at the hearing from residents in the area that could be tested through cross-examination. TOTAL stated that in this instance, such evidence was not included and that the Board is not bound by these prior decisions.

[13] TOTAL submitted that OSEC had not shown that it may be affected by the project in any greater or different way than any other member of the general public and where there is no potential for direct and adverse effect, costs should not be awarded.

[14] TOTAL pointed out that OSEC had incorrectly drawn a parallel between Section 26 of the *ERCA*, respecting the test for standing to participate in a proceeding, and Section 28 of the *ERCA*, respecting local intervener costs. TOTAL noted that this was recently clarified by the Board in *Energy Cost Order 2010-007*: *Grizzly Resources Ltd., Section 39 and 40 Review of Well Licences No. 0404964 and 0404965, Pembina Field,*

> Sections 26(2) and 28(1) set out different tests and determine different entitlements. Section 26(2) requires a determination based upon information available prior to a hearing on whether a person has legally recognized rights that may be directly and adversely affected by a Board decision. Section 28(1) entails a consideration by the Board of all evidence provided at the hearing and in the cost proceeding to determine if a party applying for costs has an interest in, occupies, or is entitled to occupy land that could be directly and adversely affected by the Board's decision.

[15] TOTAL submitted that the standard a party must meet under Section 26 is less stringent than the standard under Section 28, as illustrated by the fact that a party who is granted standing under Section 26 to participate in a proceeding may be denied costs because it was unable to show, through its participation, that it had the requisite interest in land under Section 28. TOTAL submitted that a determination of whether there is a direct and adverse effect must be made in the context of the applicable legislative provision, that being Section 28 of the *ERCA*.

[16] TOTAL stated that OSEC did not seat any residents on its witness panel to give evidence that could be tested in the proceeding, that little of OSEC's written evidence focused on socio-economic effects, and that none of OSEC's witnesses gave evidence regarding socio-economic effects. TOTAL contrasted this with the Regional Municipality of Wood Buffalo (RMWB) which represented community members and spoke directly to socio-economic issues. The RMWB did not oppose the project and did not claim costs as a local intervener.

[17] TOTAL noted that the Pembina Institute, a member of OSEC, claims to have a licence of occupation for lands near Fort McKay. Mr. Dyer cited canoeing and hiking as two of the activities that take place on these lands, but TOTAL noted that the Pembina Institute has never

actually occupied these lands. TOTAL put forward that cross-examination of Mr. Dyer confirmed that the purpose of the licence of occupation is, at least in part, to support an argument that the Pembina Institute has an interest in land for the purpose of recovering costs when participating in ERCB proceedings regarding oil sands projects. This exchange is found on pages 1637 and 1638 of the hearing transcript:

> Q. Is another purpose in having the license of occupation is that it allows the Pembina Institute to make the argument that it has an interest in land that may be affected by oil sands projects?
>
> A. That's a sort of legal question that I'm not familiar -- not, not really aware of the ramifications of, but I believe that is the, I believe that is the case, yes.

[18] TOTAL submitted that an interest in land acquired by an advocacy group solely for the purpose of qualifying for local intervener costs is not a type of interest that could have been contemplated by the legislature when it drafted Section 28. The local intervener cost regime would be subject to abuse if it were not in the Board's jurisdiction to consider whether a given interest in land was genuine or simply an attempt to take advantage of the regulatory regime.

[19] TOTAL also submitted that there was no evidence that the lands described in the licence of occupation will be directly and adversely affected by the ERCB's decision on the application; the lands OSEC claimed an interest in were located more than 8 km from the southern boundary of the project.

[20] TOTAL submitted that OSEC's claim that "TOTAL's large construction work force can be expected to incrementally increase crimes" was not supported by evidence, and that the cost claim should be denied.

[21] TOTAL also stated that in the event the Board finds that, technically, OSEC does have the requisite interest in land, the Board should exercise its discretion and deny OSEC's cost claim in its entirety.

[22] If the Board were to award costs to OSEC, TOTAL submitted that the award should be reduced to more accurately reflect the nature and scope of OSEC's participation in the proceeding. TOTAL observed that the $130 221.36 sought by OSEC is in addition to the $41 000.00 provided to OSEC by CEAA as participant funding.

[23] TOTAL noted that the costs claimed by OSEC are greater than those permitted under ERCB *Directive 031* and by previous decisions of the Board. Costs are within the discretion of the Board and should only be awarded in accordance with Section 57(1) of the *Rules of Practice*.

[24] TOTAL did not dispute the professional fees claimed by Ackroyd LLP, which TOTAL stated appear to reflect Ackroyd LLP's representation of OSEC.

[25] TOTAL suggested that the remainder of the costs claimed should be reduced or denied altogether.

[26] TOTAL observed that the following disbursements claimed by Ackroyd LLP exceed the limits set out in *Directive 031*:

- Accommodation: $1101.98 for five nights' accommodation for Will Randall. Pursuant to *Directive 031*, accommodation may not exceed $140.00 per night, plus tax. On this basis, $735.00, including GST, may be claimed; a reduction of $366.98.

- Meals: $665.19 for meals for Mr. Randall attending the hearing for six days and Karin Buss attending for five days. At $40 per day, as allowed under *Directive 031*, the total allowable amount is $440; a reduction of $225.19.

- Other: $341.38 for corporate searches, scanning, Westlaw research, tabs, binders, office supplies. These are not listed in *Directive 031* as recoverable disbursements and should be denied in full.

[27] TOTAL requested reductions of the costs claimed by the Pembina Institute as follows:

A) Mr. Dyer:

[28] TOTAL noted that Mr. Dyer was compensated for 110.5 hours of preparation time through CEAA funding. Given the scope of his participation, which was broad in nature, and the fact that it is part of his day-to-day job to speak generally about oil sands issues, it is unreasonable that Mr. Dyer should receive any further funding for preparation time. No further award is reasonable for hearing attendance.

B) Mr. Lemphers:

[29] TOTAL submitted that 75.25 hours is more than sufficient to account for Mr. Lemphers' preparation for the proceeding. TOTAL stated that his evidence was based primarily on an existing paper prepared for the benefit of the Pembina Institute and not primarily for the purposes of the hearing. Mr. Lemphers was retained by OSEC to address mine reclamation and reclamation costs. Under cross-examination, he was shown to have made a significant error in the calculation of the potential reclamation costs associated with the project, overstating estimated costs by several billion dollars. TOTAL submitted that the 28 hours claimed by Mr. Lemphers should be denied in full.

C) Mr. Huot:

[30] TOTAL submitted that although Mr. Huot sat on the OSEC witness panel, he did not give any substantive evidence, nor was his presence required at the hearing. TOTAL noted that Mr. Huot was paid for 58.25 hours of preparation through CEAA funding and submitted that the fees claimed for his hearing attendance should be denied in full.

D) Jennifer Grant:

[31] TOTAL observed that Ms. Grant did not sit on the OSEC witness panel and that nothing indicated that she contributed to the OSEC submission. On this basis, TOTAL submitted that her claimed professional fees should be denied in full.

E) Disbursements and Expenses:

[32] TOTAL argued that the following disbursements claimed by the Pembina Institute exceed the limits set out in *Directive 031*:

- Airfare: $1746.40 in airfare for Mr. Dyer and Mr. Lemphers. While the airfare itself is reasonable, TOTAL submits that the change fees are not. TOTAL observed that Mr. Lemphers changed his return flight more than once and submitted that the change fee of $105.00 should be denied.
- Accommodation: $468.00 for two nights' accommodation. The total amount allowable under *Directive 031* is $140 per night, plus GST. For two nights' accommodation, this is a total of $294.00; a total reduction of $174.00.
- Red Arrow: There are no receipts to support the costs of $227.52 for Red Arrow transportation. This amount should be denied in full as Ms. Grant's attendance at the hearing was shown to be unnecessary and Mr. Lemphers chose to travel by airplane.
- Mileage: Ms. Grant's mileage charges of $112.20 should be denied in full as her attendance at the hearing was shown to be unnecessary. Mr. Dyer claimed $306.00 in mileage on September 27, 2010; however, the records attached to the cost claim show that he travelled by airplane between Edmonton and Fort McMurray and nothing indicates why these mileage costs were incurred. A total reduction of $418.20 should be made from the mileage costs claimed.

F) Toxics Watch Society of Alberta—Mr. Kitigawa:

[33] Although Mr. Kitigawa sat on the OSEC witness panel, he did not give any substantive evidence, nor was he required at the hearing. TOTAL submitted that the fees claimed for Mr. Kitigawa's hearing attendance should be denied in full.

[34] TOTAL did not dispute the disbursements totalling $41.80 claimed by Mr. Kitigawa for car rental.

G) Dr. William Donahue:

[35] TOTAL submitted that in light of Dr. Donahue's misinformed and unhelpful evidence, his fees of $24 893.40 should be denied in full or reduced significantly.

[36] TOTAL submitted that Dr. Donahue's evidence was not helpful or relevant. Dr. Donahue admitted that while he did review the Regional Aquatics Monitoring Program (RAMP) 2009 Technical Report, his unfamiliarity with that document showed that his review was, at best, cursory. Although Dr. Donahue claimed to have given a substantial amount of evidence in relation to RAMP, it was shown to be unfounded, incomplete, and, in most cases, simply incorrect.

[37] TOTAL submitted that OSEC's assertion in the cost claim that Dr. Donahue provided the Joint Review Panel with "valuable information" is simply not true. The evidence provided by Dr. Donahue was of no use or value to the Joint Review Panel in making its decision; therefore, Dr. Donahue's claimed professional fees should be denied in full.

[38] TOTAL submitted that if the Board were to award Dr. Donahue's costs, he should only be compensated for his hearing attendance costs of $4082.50, plus GST, due to his use of outdated and incomplete information.

H) Dr. James Hansen:

[39] TOTAL submitted that the following disbursements claimed by Dr. Hansen do not meet the requirements of Directive *031*:

- Accommodation: $198.53 for one nights' accommodation; however, only $140.00, plus GST, is allowed under *Directive 031*. Accommodation costs should, therefore, be reduced by $51.53.

- Mileage: $305.24 for mileage is not supported by the cost claim and, in fact, conflicts with Dr. Hansen's own request for reimbursement, which indicates that the cost of mileage is $47.50. Mileage costs should therefore be reduced by $257.74.

[40] TOTAL recognized that it has an obligation to reimburse recognized local interveners for costs that are reasonably, directly, and necessarily incurred in furtherance of their intervention, but submitted that OSEC is not a local intervener under the *ERCA*. TOTAL observed, however, that if OSEC is found to be a local intervener then the costs that TOTAL addressed above are unreasonable given the contribution of those witnesses to the proceeding or the parameters of *Directive 031*.

[41] Should the Board find that OSEC qualified as a local intervener, TOTAL agreed to a payment of $92 449.01 to OSEC, including GST, stating that this was a reasonable cost award in the circumstances.

Views of OSEC

[42] OSEC submitted that TOTAL incorrectly interpreted the law and misstated the evidence, as detailed in this section.

[43] OSEC stated that in *Kelly v. Alberta (Energy Resources Conservation Board)*[1] the Court specifically dealt with the phrase "may directly and adversely affect the rights of a person" in Section 26(2) the *ERCA*, and held that an intervener need not be more affected or affected in a different way than the general public. OSEC stated that the only difference between Section 26(2) and 28(1) is that the latter section substitutes "rights of a person" with an "interest in land" in relation to a potential adverse effect. OSEC submitted that the *Kelly v. Alberta (Energy Resources Conservation Board)* decision is binding on the Board and is more relevant than the case law cited by TOTAL.

[44] OSEC noted that it filed a prehearing submission[2] stating that members of the Fort McKay Environmental Association occupied lands in Fort McKay. OSEC noted that the Board has found this to be true in several past oil sands proceedings. OSEC also noted that TOTAL did not dispute that OSEC members resided in Fort McMurray.

[45] OSEC submitted that in its initial "integrated application," TOTAL admitted that there would be impacts on local infrastructure as a result of its workforce camp, increased traffic volumes and increased oversize loads, impacts on housing availability, and potential impacts on health services.

[1] *Kelly v. Alberta (Energy Resources Conservation Board), 2009 ABCA 349.*
[2] Exhibit 008-007: *Submission of the Oil Sands Environmental Coalition, dated August 24th, 2010.*

[46] The RMWB intervened and gave evidence at the hearing because it was concerned about the adverse effects it identified and sought and obtained concessions from TOTAL. OSEC noted that, specifically, Mayor Blake testified that her residents were concerned about environmental effects but that such effects were outside the scope of the RMWB's chosen intervention issues.

[47] The licence of occupation was tendered into evidence and the authenticity of the document was not challenged. OSEC submitted that although TOTAL says there is no evidence of occupation, it overlooks that Section 28 of the *ERCA* includes the right to occupy land in the definition of "interest in land," making actual occupation not a legally relevant consideration.

[48] OSEC replied to TOTAL's suggestion that OSEC's licence of occupation was to help it secure local intervener status at ERCB oil sands hearings and, therefore, rendered this interest in land disingenuous. OSEC stated that Mr. Dyer's response to the question about the reason for having the licence of occupation reflected a candid desire to participate in public interest decisions regarding large industrial development plans and potential impacts on Fort McMurray, Alberta, and Canada. OSEC submitted that there was no evidence that cost recovery was the sole purpose, or even the primary purpose, for OSEC's licence of occupation or for its participation in the hearing.

[49] OSEC observed that TOTAL tendered evidence that lands in Fort McKay will be affected by the Joslyn North Mine when it detailed several potential accidents and malfunctions that could cause significant adverse effects in the local study area (including Fort McKay).

[50] OSEC also noted that TOTAL reported to the Joint Review Panel that wildlife populations have declined an average of 19 per cent in the regional study area since pre-oil sands development. The study area encompasses Fort McKay and the northern portion of the Fort McMurray urban area.

[51] OSEC stated that the Joslyn North Mine will directly destroy another 5000 hectares of wildlife habitat and that TOTAL's witnesses testified that the zone of impact on terrestrial resources would extend 11 km around the mine site, which includes Fort McKay.

[52] With respect to Ackroyd LLP's disbursements, OSEC submitted the following:

- OSEC stated that accommodation costs were the actual costs. Accommodation in Fort McKay is more expensive than the provincial average.
- The $665.19 claimed for counsel's meals included $343.26 for OSEC witnesses.
- *Directive 031* allows for miscellaneous disbursements through the requirement of an affidavit and receipts supporting the disbursements. These types of disbursements are often included in cost awards by the ERCB and were necessarily incurred for the representation.

Mr. Dyer

[53] OSEC stated that Mr. Dyer's evidence was not general in nature and that it dealt specifically with the extent to which TOTAL included relevant facts and underrepresented the impacts of the Joslyn North Mine. He identified errors in TOTAL's evidence and tested its validity. OSEC submitted that Mr. Dyer was more qualified and experienced in the area of forestry and the Terrestrial Effects Management Framework prepared by CEMA than any of

TOTAL's witnesses. His attendance at the hearing was necessary to help counsel with cross-examination. OSEC witnesses were in attendance prior to their testimony to comply with the Board's instructions that each intervener be prepared to seat their panel when called. OSEC panel members left Fort McMurray during the second week of hearing, as soon as they could get flights, and did not attend during the evidence of other parties when the hearing reconvened in Edmonton. This was reasonable.

Mr. Lemphers

[54] Mr. Lemphers was required to review, analyze, and understand the implications of TOTAL's mine and reclamation plan, and he prepared sections of the OSEC submission dealing with end pit lakes and reclamation. OSEC stated that Mr. Lemphers corrected the error in his calculation and noted that TOTAL made numerous errors in its submission. OSEC submitted that the point of cross-examination is to test the evidence, partly because miscalculations can be made.

Mr. Hout

[55] Mr. Hout was instrumental in organizing, compiling, and editing the OSEC submission, which was a large task given the number of contributors and scope of the submission. He prepared the response to the undertaking requested by TOTAL regarding the calculation of impacts from UTS Energy Corp.'s mines.

Ms. Grant

[56] Ms. Grant was in attendance one day to assist the OSEC panel with its presentation.

Disbursements

- Airfare: Airfare change fees were reasonable in light of the evolving hearing schedule and the difficulty in reserving a flight out of Fort McMurray. Pembina could have avoided change fees by booking full fare tickets, but tried to keep travel costs to a minimum. The change fees offset the cost of additional costs for accommodation if the flight was not rebooked.

- Mileage: Mr. Dyer resides in Rocky Mountain House and has to drive to an airport.

Toxics Watch

[57] OSEC stated that although Mr. Kitagawa did not give evidence in chief in the interest of efficiency, he was required to attend the hearing to be available for cross-examination.

Dr. Donahue

[58] OSEC submitted that if Dr. Donahue had read all of the reports created by RAMP, it would have taken several weeks, resulting in fees that would have been exorbitant and likely contested.

[59] Dr. Donahue testified to the scientific literature, which indicates that RAMP data does not meaningfully measure the impacts of oil sands development on terrestrial effects. Dr. Donahue was very familiar with the 2009 RAMP report vis-a-vis sediment polyaromatic hydrocarbons (PAHs) and changes in techniques for calculating critical loads for acid inputs, which were relevant to his report and critique of TOTAL's EIA. TOTAL's EIA relied heavily on the 2005 RAMP report in relation to PAHs in sediments. In addition, the 2010 EIA update failed to

mention the 2009 RAMP report, suggesting TOTAL's cursory approach to providing relevant current data to the panel and its forming an opinion of "no impact."

[60] Dr. Donahue had reviewed and integrated all of the amendments and various changes TOTAL made to its application and testified that this information did not affect his opinion. The flaws in the original 2006 EIA were carried forward through to the 2007 and 2010 changes and updates to the application.

[61] OSEC asked the Board to take into account the complexity of the information filed by TOTAL, with a series of changes and updates that referred to earlier versions, when considering the time taken by consultants or experts in reviewing the EIA and preparing their reports.

Dr. Hansen

[62] OSEC submitted that Dr. Hansen's disbursements are very modest for someone who travelled from his home near New York City to Edmonton for a hearing and should be allowed in full.

Views of the Board

OSEC's Status as a Local Intervener

[63] The Board's authority to award costs is derived from Section 28(2) of the *ERCA*, which authorizes the Board to make an award of costs to a local intervener. Section 28(1) defines a local intervener as someone who has an interest in, is in actual occupation of, or is entitled to occupy land that may be directly and adversely affected by a decision of the Board. This requires the Board to determine two things: 1) if the party seeking costs has an interest in, occupies, or has the right to occupy certain land and 2) if that land may be directly and adversely affected by a decision of the Board.

[64] In previous cost orders relating to oil sands mining projects, the Board determined that OSEC met the qualifications for a local intervener cost award. In *Energy Cost Order 2007-004: Imperial Oil Resources Ventures Limited, Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* , the Board stated:

> OSEC is a coalition of Alberta public interest groups that have a long-standing interest in the Athabasca oil sands area. OSEC states that it was formed to facilitate more efficient participation in the regulatory approvals process for oil sands applications. The FMEA, one of the OSEC member groups, is comprised of residents living in and around Fort McMurray. Ms. Ann Dort-MacLean, an OSEC witness, is a long-term Fort McMurray resident and the FMEA Chairperson. She is also the President of the Wood Buffalo Environmental Association. The Pembina Institute is a member of CEMA and a number of the OSEC witnesses participate in CEMA workgroups. Given the residency of a number of OSEC members and the potential for the lands owned or occupied by its members to be affected by the Project proposed by Imperial, the Board has determined that OSEC is eligible to apply for cost recovery as a local intervener under section 28 of the ERCA

[65] Although the Board is not bound to follow its previous decisions, it may have regard for those decisions when considering subsequent applications. In determining the status of an unincorporated association or coalition of hearing participants, the Board's practice has been to consider the group as having the characteristics and attributes of its individual members. In this case, as in previous oil sands mine hearings, a number of OSEC's member groups include

residents living in and around Fort McKay and Fort McMurray. It is noteworthy that these individuals not only reside in these communities but take active roles in organizations such as WBEA and FMEA that monitor the activities of and impacts from oil sands mining operations. Although she did not participate as an OSEC witness in this hearing, Ann Dort-MacLean is known to the Board from previous proceedings and is an example of one such individual from the Fort McMurray community.

[66] The Board recognizes that actual surface disturbances related to the project will largely be limited to public lands that are the subject of a surface disposition by the Alberta Government. In the Board's opinion, it would be taking a narrow view of oil sands mining if it were to require a hearing participant to demonstrate an interest in or right to occupy the very lands that would be disturbed by the project in order for him or her to be eligible for an award of local intervener costs. It is clear from the EIA reports provided as part of the project application that project impacts may not be confined to the lands taken up by the mine and its various facilities. The large-scale of these developments and the relatively small size of the communities that are near them requires the Board to adopt a more holistic view of what lands may be impacted by a project. A number of OSEC's active members reside in the Fort McMurray and Fort McKay communities. In the Board's opinion, OSEC has satisfied the test of having an interest in land that may be directly and adversely affected by the project. OSEC, therefore, qualifies as a local intervener under Section 28 of the *ERCA*.

Ackroyd LLP

[67] The Board notes that TOTAL did not take issue with the legal fees claimed by Ackroyd LLP. The Board believes that the fees claimed are reasonable and were directly and necessarily incurred in relation to the proceeding. The Board, therefore, awards legal fees claimed in the amount of $75 560.00, plus GST in the amount of $3778.00.

[68] Accommodation costs claimed by OSEC for Mr. Randall of Ackroyd LLP exceed the amount of $140 per night, plus the 4 per cent provincial hotel tax of $5.60, allowed under the Scale of Costs. OSEC stated that the charges claimed were actual costs and provided receipts as required by *Directive 031*. Although OSEC did not provide information supporting its statement that accommodation in Fort McMurray is more expensive than other places in Alberta, the Board has experience booking accommodation in Fort McMurray and accepts OSEC's explanation for why its accommodation claim exceeded the Scale of Costs. Having regard for this explanation and the efficiencies afforded by staying at the hotel where the hearing is taking place, the Board has decided that the claim for accommodation is reasonable and that an exception from the Scale of Costs is appropriate. The Board will, therefore, award OSEC the amount claimed by Ackroyd LLP for Mr. Randall's accommodation, plus GST in an amount that is calculated using the total that excludes the provincial hotel tax.

[69] OSEC claimed airfare for Mr. Randall and Dr. Hansen for travel during the hearing phase of the proceeding in the total amount of $2293.05, plus GST. When the Board reviewed this part of the cost claim it determined that the receipts Ackroyd LLP provided totalled only $2073.15, and that the only receipt for Mr. Randall's airfare related to a flight change charge. Board counsel advised Ackroyd LLP of the discrepancy. On January 24, 2012, Ackroyd LLP filed revised cost claim forms and provided additional receipts for Mr. Randall's airfare.

[70] OSEC's revised claim for Mr. Randall and Dr. Hansen's airfare is $2609.40. The Board has reviewed the claim and finds that the travel was directly and necessarily incurred in relation to the hearing portion of the proceeding and that the amounts claimed are reasonable (including the change fee) and within the Scale of Costs. The Board, therefore, awards OSEC a total of $2609.40 for airfare costs claimed by Ackroyd LLP, plus GST.

[71] Meal costs claimed by Ackroyd LLP exceed the amount of $40 per day per person that is allowed under the Scale of Costs. OSEC stated in its reply submission that meals in Fort McMurray are more expensive than the provincial average and that the claim includes the cost of meals for OSEC's witnesses. The Board notes that only Pembina Institute and Ackroyd LLP claimed meals as part of OSEC's cost claim. Pembina Institute claimed only $104.15 for meals. The Board also notes that the Scale of Costs states that receipts are not required for meal claims. The Board is satisfied with Ackroyd LLP's explanation that its meal claim includes meals for OSEC witnesses who did not make a separate claim for meal costs. The Board awards OSEC the total amount claimed by Ackroyd LLP for meals in the amount of $665.19, plus GST.

[72] Ackroyd LLP claimed taxi charges in the amount of $110.10, parking costs in the amount of $17.14, and car rental costs in the amount of $218.49. Receipts were provided for these charges and although the Scale of Costs does not require that receipts be submitted for taxi and parking charges, the Board appreciates that Ackroyd LLP provided those. The Board finds the expenses reasonable and directly and necessarily incurred in relation to the proceeding. The Board awards each of those costs as claimed, plus GST.

[73] Ackroyd LLP also made claims for the following amounts: $0.96 for postage, $8.32 for courier charges, $22.73 for long distance telephone charges, $30.00 for fax charges, $1735.50 for internal photocopy charges, and $119.80 for external photocopy charges for which a receipt was provided. The Board finds that these costs are reasonable, fall within the applicable Scale of Costs, and were directly and necessarily incurred in relation to the proceeding. The Board, therefore, awards each of these costs in the amount claimed, plus GST.

[74] The Scale of Costs states that legal fees charged by counsel are deemed to include and cover all overhead charges implicit in the normal operation of a law firm. Certain office disbursements set out in the Scale of Costs are recoverable; however, corporate searches, scanning, Westlaw research,[3] tabs, binders, and office supplies are not on the list of recoverable office disbursements. The Board has, therefore, decided not to award Ackroyd LLP's miscellaneous expenses numbers 1 to 4, inclusive.

OSEC Witness Fees—CEAA Funding

[75] The Board is aware that OSEC received $41 000 funding from CEAA's participant funding program and has regard for this funding when considering OSEC's cost claim. In its submissions, TOTAL argued that some of OSEC's witnesses were adequately compensated for their work in the proceeding through the CEAA funding and that the Board should not award costs for the additional fees of those OSEC witnesses. The Board (and indeed the Joint Review Panel that considered the project applications) plays no role in CEAA's funding program; it does not award the funding or direct how the funds must be spent and, historically, it has not been provided details of how CEAA funding has been spent by a participant. When considering a cost

[3] The Board does not consider Westlaw research as "computer charges."

claim made under Section 28 of the *ERCA* the Board will attempt to ensure that the same costs are not compensated twice (i.e., under CEAA funding and again under local intervener cost awards); however, the Board is normally not in a position to otherwise assess whether CEAA participant funding provides reasonable compensation to local interveners for all of the costs incurred by them to participate in the proceeding. The Board has, therefore, considered OSEC's cost claim in accordance with the Board's established criteria; namely, whether the fees and disbursements claimed are reasonable and were directly and necessarily incurred in relation to the proceeding.

Pembina Institute—Mr. Dyer

[76] OSEC claimed fees for Mr. Dyer for 56 hours of preparation time and hearing attendance at a rate of $86.67 per hour, for a total of $4853.52. The Board notes that the Scale of Costs maximum rate for professional fees for an individual with experience equivalent to Mr. Dyer's thirteen years is $270.00/hour, and in the Board's view the difference is relevant to the question of the reasonableness of the cost claim.

[77] The Board does not accept TOTAL's argument that Mr. Dyer should not be compensated beyond the CEAA funding that was apparently allocated to his professional fees. The Board is also not persuaded to deny OSEC's claim for Mr. Dyer's fees on the grounds that Mr. Dyer's daily occupation includes speaking about oil sands issues. Although some of his evidence was general in nature there were substantial portions that related directly to issues arising from the application. In addition, Mr. Dyer was available to answer questions from TOTAL, other hearing participants, the Joint Review Panel Secretariat, and the Joint Review Panel itself. Mr. Dyer's evidence and participation in the proceeding was of assistance to the Joint Review Panel. Having regard for the relatively modest amount of the fees claimed for Mr. Dyer, and for the size and complexity of the application and the issues for the hearing, the Board finds these fees reasonable and directly and necessarily incurred in relation to the proceeding. The Board, therefore, awards OSEC the fees it claimed for Mr. Dyer in the amount of $4853.52, plus GST.

Pembina Institute—Mr. Lemphers

[78] OSEC claimed fees for Mr. Lemphers for 57 hours of preparation time and hearing attendance at a rate of $86.67 per hour, for a total of $4940.19. The Board notes that the maximum rate for professional fees in the Scale of Costs for an individual with experience equivalent to Mr. Lemphers's two years is $120.00 per hour. In the Board's view, this difference is relevant to the question of the reasonableness of the cost claim.

[79] Mr. Lemphers's evidence addressed TOTAL's mine plan and its reclamation plan including end pit lakes. TOTAL submitted that Mr. Lemphers made numerous errors in his submission that were revealed during cross-examination. The Board notes that the errors were acknowledged by Mr. Lemphers and that Mr. Lemphers provided corrections during the hearing. The Board is not prepared to deny awarding witness fees for Mr. Lemphers on account of the errors, but it will reduce the cost award for the fee that was claimed by twenty per cent in recognition that the errors resulted in hearing time being taken up to identify the errors and then to provide the corrections.

[80] TOTAL also submitted that the Board should deny awarding Mr. Lemphers's fees because his presentation was based on a paper he had previously written for the Pembina Institute. While that may or may not be the case, Mr. Lemphers's evidence was of assistance to the Joint Review

Panel. The Board notes that Mr. Lemphers was available to answer questions from TOTAL, other hearing participants, the Joint Review Panel Secretariat, and the Joint Review Panel itself. Having regard for the relatively modest amount that was claimed by Mr. Lemphers, and for the size and complexity of the application and the issues for the hearing, the Board finds the fees reasonable (subject to the twenty per cent reduction noted above) and directly and necessarily incurred in relation to the proceeding. The Board, therefore, awards OSEC fees for Mr. Lemphers in the amount of $3952.15, plus GST.

Pembina Institute—Mr. Huot

[81] OSEC claimed fees for Mr. Huot for 20.75 hours of preparation time and hearing attendance at a rate of $86.67 per hour, for a total of $1798.40. TOTAL stated that Mr. Huot did not give any evidence as part of OSEC's witness panel. OSEC indicated that Mr. Huot completed the undertaking related to greenhouse gas emissions[4] and was seated on the witness panel to answer any questions in response.

[82] Having regard for the very modest fee claimed and the fact that Mr. Huot was available to answer questions in response to the undertaking, the Board finds the fee reasonable and directly and necessarily incurred in relation to the proceeding. The Board, therefore, awards OSEC the fees it claimed for Mr. Huot in the amount of $1798.40, plus GST.

Pembina Institute—Ms. Grant

[83] OSEC claimed fees for Ms. Grant for 15 hours of preparation time and hearing attendance at a rate of $86.67 per hour, for a total of $1300.05. Ms. Grant did not visibly participate in the proceeding. Although she may have assisted OSEC's intervention the Board is unable to conclude that her fees are reasonable and were directly and necessarily incurred by OSEC in relation to the proceeding. The Board has decided not to award any local intervener costs for Ms. Grant's involvement.

Dr. Donahue

[84] OSEC claimed fees for Dr. Donahue for 91.85 hours of preparation and 17.75 hours hearing attendance at a rate of $230.00 per hour, for a total of $23 708.00. The corresponding rate under the Scale of Costs is for a consultant, analyst, or expert with 8 to 12 years' experience. The Board is satisfied that the rate claimed for Dr. Donahue falls within the Scale of Costs.

[85] OSEC and Sierra Club Prairie agreed to jointly retain and tender the expert evidence of Dr. Donahue to assess water quality, sediment quality, benthic invertebrates, and hydrology of the project. These topics were of fundamental importance to the assessment conducted by the Joint Review Panel. In order to make an informed presentation on them, Dr. Donahue was required to review a substantial body of documentation that included CEMA reports, the application, and a number of updates. While the Joint Review Panel may not have accepted all of the positions advanced by OSEC through Dr. Donahue's evidence, the evidence helped the panel understand the issues and promoted beneficial discussion of the issues during the hearing. The Board finds that Dr. Donahue's participation was of assistance to the Joint Review Panel. Given the size and complexity of the application and the issues addressed by Dr. Donahue, the Board also finds that the fees claimed are reasonable and were directly and necessarily incurred in relation to the

[4] Exhibit 008-028 filed during the Joslyn North Mine Project proceeding.

proceeding. The Board, therefore, awards OSEC the full amount of fees claimed for Dr. Donahue, plus GST.

Pembina Institute—Disbursements

[86] TOTAL did not take issue with the airfare claimed by Pembina Institute but did submit that the airfare change fees were not reasonable, particularly because Mr. Lemphers changed a return flight more than once. The Board agrees with OSEC's submission that the hearing schedule evolved over time and that parties were expected to be in a position to give evidence or argument or cross-examine witnesses when their turn in the order arrived. In addition, if an individual is unable to reschedule a departing flight, accommodation and meal claims likely increase, which, in this case, amounts to greater than the cost of the flight change fees. The Board is satisfied that the flight change requests were reasonably incurred and will not deduct the change fees from the cost award. The Board awards airfare claimed by Pembina Institute in the amount of $1746.40, plus GST.

[87] Accommodation costs claimed for Mr. Lemphers exceed the amount of $140 per night, plus the 4 per cent provincial hotel tax of $5.60, allowed under the Scale of Costs. OSEC stated that the charges claimed were actual costs and provided receipts as required by *Directive 031*. As stated above in relation to Ackroyd LLP's claim for accommodation in Fort McMurray, the Board accepts the explanation for why Mr. Lemphers's accommodation claim exceeded the Scale of Costs, even though he did not stay at the hotel where the hearing was taking place. The Board has decided that the claim for accommodation is reasonable and that an exception from the Scale of Costs is appropriate. The Board will, therefore, award OSEC the amount claimed by Ackroyd LLP for Mr. Randall's accommodation, plus GST calculated on the amount that excludes the provincial hotel tax.

[88] Pembina Institute claimed meal costs in the amount of $104.15. This claim is within the Scale of Costs and is approved, together with GST.

[89] Pembina Institute claimed costs in the amount of $689.72 for vehicle travel mileage. The Board is satisfied with OSEC's explanation that Mr. Dyer travelled by vehicle between his residence in Rocky Mountain House and Edmonton. Mr. Dyer claimed two return trips to Edmonton for a total of 1200 km travelled. The Board finds that Mr. Dyer's vehicle travel was necessary for the purposes of the proceeding. The Board, therefore, approves OSEC's claim for vehicle travel by Mr. Dyer equal to 1200 km at the prescribed rate of $0.505,[5] for a total of $606.00, plus GST.

[90] Pembina Institute also provided receipts indicating that Ms. Grant travelled 220 km by vehicle and, therefore, claimed travel costs in the amount of $106.86, plus GST. As the Board did not find any visible indication that Ms. Grant participated in the hearing, the Board cannot conclude that her mileage claim is reasonable or that the costs were directly and necessarily incurred in relation to the proceeding. The Board, therefore, does not award any of the travel mileage claimed by Ms. Grant.

[91] Pembina Institute claimed taxi fare in the amount of $84.98. The Board finds this claim reasonable and approves the amount in full, plus GST.

[5] *Directive 031* sets out a mileage rate for automobile travel that is equal to the rate prescribed under the *Public Service Subsistence, Travel and Moving Expenses Regulation.*

[92] Pembina Institute claimed car rental expenses in the amount of $154.02 and provided a copy of the rental receipt in that amount. The Board approves this part of the claim and awards the full amount, plus GST.

[93] Pembina Institute claimed return bus fare on the Red Arrow (Calgary-Edmonton-Calgary) for both Mr. Lemphers and Ms. Grant, plus parking at Red Arrow for Ms. Grant. The Board notes that Mr. Lemphers claimed airfare from Edmonton to Calgary on the evening of the same day that his Red Arrow return trip was booked, which was October 5, 2010. The Board concludes that after having purchased a return fare on Red Arrow, Mr. Lemphers subsequently decided to fly from Edmonton to Calgary rather than take the Red Arrow. Awarding two travel fares for the same trip is unreasonable, and the Board has, therefore, decided to award Pembina Institute the cost of one Red Arrow fare in the amount of $67.00, plus GST. The Red Arrow fares and parking charge claimed for Ms. Grant are not approved, given the Board's finding that she had no visible participation in the hearing.

Toxics Watch Society of Alberta—Mr. Kitagawa

[94] OSEC claimed fees for Mr. Kitagawa for 12 hours of preparation time and hearing attendance at a rate of $86.67 per hour, for a total of $1040.04. The Board notes that the maximum rate for professional fees in the Scale of Costs for an individual with experience equivalent to Mr. Kitagawa's fifteen years is $270.00 per hour. In the Board's view, this difference is relevant to the question of the reasonableness of the cost claim.

[95] TOTAL stated that Mr. Kitagawa did not give any substantive evidence at the hearing. The Board notes that Mr. Kitagawa was available to answer questions and responded to questions from TOTAL's counsel on predicted air emissions and the benefits from cogeneration. Having regard for the very modest fee claimed and Mr. Kitagawa's participation in the hearing, the Board finds the fee reasonable and directly and necessarily incurred in relation to the proceeding. The Board therefore awards OSEC the fees it claimed for Mr. Kitagawa in the amount of $1040.04, plus GST in the amount of $52.00.

[96] Mr. Kitagawa claimed expenses for car rental in the amount of $39.81. TOTAL took no exception to that expense. The Board finds the car rental expense reasonable and directly and necessarily incurred in relation to the proceeding. The Board awards the claimed expenses in the amount of $39.81, plus GST.

Dr. Hansen—Disbursements

[97] OSEC claimed accommodation costs for Dr. Hansen in the amount of $198.53, plus GST. This claim exceeds the amount of $140 per night, plus the 4 per cent provincial hotel tax of $5.60, allowed under the Scale of Costs. Although OSEC stated that the charges claimed were actual costs and provided a receipt, the Board is not persuaded that reasonable accommodation in Edmonton at a rate permitted under the Scale of Costs was unavailable. The Board will, therefore, reduce the award for Dr. Hansen's accommodation claims to $145.60, plus GST in an amount calculated on the total that excludes the provincial hotel tax.

[98] OSEC also claimed mileage for Dr. Hansen in the amount of $305.24, parking in the amount of $75.00, and U.S. tolls in the amount of $10.35. No receipts or details of these claimed expenses were provided but OSEC submitted that the charges were very modest for someone who travelled from outside New York City to Edmonton. To award any particular cost, the

Board must conclude that it is reasonable and was directly and necessarily incurred in relation to the hearing. Without details or receipts, the Board is unable to draw such a conclusion in relation to these costs and, therefore, will not award any amount for Dr. Hansen's claim for mileage, parking, or tolls.

COST CLAIM OF SIERRA CLUB PRAIRIE

[99] On November 4, 2010, Sierra Club Prairie filed a cost claim for expert fees in the amount of $7500.00, expenses in the amount of $5226.61, and GST in the amount of $1975.00, for a total claim of $13 701.61.

Views of TOTAL

[100] TOTAL stated that the cost claim was not made within the timeframe set out in the *Rules of Practice* and *Directive 031* because it was not provided to TOTAL or its counsel until November 15, 2010, which is outside the 30 day timeline to submit cost claims. TOTAL also stated that it reserved the right to challenge the reasonableness of the cost claim.

[101] TOTAL submitted that Sierra Club Prairie did not show that it would be affected by the project in any greater or different way than any other member of the general public and, therefore, was not directly and adversely affected by a decision of the Board as required by Section 28 of the *ERCA*. TOTAL also submitted that the assertion made by Sierra Club Prairie that the phrase "directly and adversely affected" should be interpreted more broadly for an oil sands mining operation than other projects, was entirely unfounded. TOTAL stated that the same principles apply to all cost award applications and, where there is no potential direct and adverse effect, costs are not awarded.

[102] TOTAL addressed a member, Mike Mercredi, whom the Sierra Club Prairie stated has a legally recognized interest in lands in the Fort Chipewyan area as a member of the Athabasca Chipewyan First Nation (ACFN). TOTAL stated that Mr. Mercredi was not a witness at the hearing and did not give evidence that was tested through cross-examination. TOTAL submitted that the attempt to introduce new evidence in the cost claim concerning land that may be directly and adversely affected should not be permitted and that the evidence should be disregarded by the Board.

[103] TOTAL noted that the ACFN was represented at the hearing by legal counsel and that no evidence was put forward on behalf of the ACFN of any potential direct and adverse effect on lands that any of their members have an interest in or occupy. Any collective rights Mr. Mercredi had because of his status as an ACFN member were represented by the ACFN. TOTAL submitted that the interest of Sierra Club Prairie in the project is limited to achieving policy reform on oil sands development in general.

CEAA Funding

[104] TOTAL noted that Sierra Club Prairie stated that it used a portion of the CEAA funding it received to pay Dr. Donahue's costs; however, the cost claim itself does not set out the total payment to Dr. Donahue. OSEC's cost claim stated that Sierra Club Prairie agreed to pay $1575.00 towards Dr. Donahue's participation in the proceeding and that the remaining $24 893.20 would be paid by OSEC. This would leave $18 425.00 out of the total CEAA

funding to pay for other costs related to the proceeding, including those of Dr. Kevin Timoney, Peter Cizek, and Stephen Hazell.

[105] TOTAL stated that no information had been provided regarding the amounts claimed by Dr. Timoney or Mr. Cizek and that Dr. Timoney did not participate as a witness at the hearing. TOTAL submitted that Sierra Club Prairie's unilateral decision to decide what costs CEAA's funding would cover resulted in only Mr. Hazell's costs being disclosed in the cost claim. TOTAL submitted that it should not be responsible for a shortfall in CEAA funding that results in Sierra Club Prairie's inability to cover Mr. Hazell's costs.

[106] TOTAL submitted that if Sierra Club Prairie qualified as a local intervener, it should be directed to file a revised cost claim showing all of the costs it incurred, allowing for an assessment of whether those costs were reasonable and how much (if any) of such costs exceeded $20 000.

Views of Sierra Club Prairie

[107] Sierra Club Prairie submitted that the concerns raised by TOTAL are without merit and should be rejected by the Board.

[108] Sierra Club Prairie stated that the cost claim was provided to the Board within 30 days after the close of the proceedings as required by the *Rules of Practice* and *Directive 031*. Although Section 55(3) of the *Rules of Practice* requires participants to serve a copy of the claim on the other participants, it does not specify a time frame for doing so. Under *Directive 031*, there is no legal obligation to serve a copy of the claim on other participants, only that participants "should" serve a copy of a claim on other participants.

[109] Sierra Club Prairie also stated that TOTAL's assertion that Sierra Club Prairie "must have an interest in land that will be affected in a manner greater than land in the general community" in order to meet the requirement for a direct and adverse effect on its interest in land is incorrect, as was determined in *Kelly v. Alberta (Energy Resources Conservation Board)*, which states in paragraph 32 that

> Nowhere is the requirement that the Appellants [the local intervenor] must establish that they may be affected in a different way or to a greater degree than members of the general public. In concluding otherwise in interpreting its own governing statute, the Board made an error in law of a type for which the standard of review is that of correctness. The ERCB's decision was incorrect and cannot stand for that reason.

[110] Sierra Club Prairie responded that TOTAL's argument that it is not entitled to rely on the interests in land held by Mr. Mercredi in claiming costs because he is a member of the AFCN is incorrect and contrary to his right to freedom of association and his equality rights under Section 2(d) and Section 15, respectively, of the *Canadian Charter of Rights and Freedoms*.

[111] TOTAL submitted that in *Guerin v. The Queen*,[6] the Supreme Court of Canada held that Indian reserve lands are held by the Crown and set aside for the common benefit of the band. However, individual members of First Nations have interests in such reserve lands. In *Beckman*

[6] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.

v. Little Salmon/Carmacks First Nation,[7] the Supreme Court of Canada held at paragraph 169 that Johnny Sam, a member of the Little Salmon/Carmacks First Nation "had rights as the holder of the trapline. He had the same rights as anyone else where procedural fairness is concerned." Individual band members have their own interests "even when faced by active opposition by members of the same group" according to the British Columbia Supreme Court in *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*[8]

[112] In *Osoyoos Indian Band v. Oliver (Town)*,[9] the Supreme Court of Canada held that clear and plain intent by the Crown is required to take away an interest in land on reserves; conclusive evidence is required to support such a taking.[10] The Court further held that the courts must not deal with interests in reserve lands in an overly technical manner as they are *sui generis*.[11]

[113] Sierra Club Prairie stated that a determination that Mr. Mercredi's interest in the Athabasca River delta reserves of the ACFN under the *Indian Act* is not an "interest in land" under the *ERCA* would be discriminatory and wrong legally. Sierra Club Prairie Canada maintained that such a determination would constitute differential treatment on a prohibited ground, relating to Mr. Mercredi's status as a band member or aboriginal person, or to his place of origin. Such differential treatment would be demeaning to Mr. Mercredi's dignity because it stigmatizes his interests as being synonymous with those of ACFN's council.

[114] Sierra Club Prairie confirmed that it does not have the right to represent the interests of the ACFN, nor did it do so in the cost claim. Mr. Mercredi is a member of Sierra Club Prairie, but as a member of the ACFN he has an interest in land that will be directly and adversely affected by the project.

[115] Sierra Club Prairie also submitted that Mr. Mercredi's rights under the *Canadian Charter of Rights and Freedoms* to be a member of Sierra Club Prairie and to have representation along with other Sierra Club Prairie members in Alberta in hearings, such as the Joslyn North Mine Project, are not related to any agreements between the AFCN Council and TOTAL. As a Canadian citizen, Mr. Mercredi is entitled to enjoy the same fundamental freedoms and rights set out in the *Canadian Charter of Rights and Freedoms* as other citizens, in addition to the aboriginal and treaty rights he enjoys as a member of the ACFN, pursuant to Section 35 of the *Constitution Act (1982)*.

[116] Sierra Club Prairie stated that it presented Mr. Mercredi's treaty number as evidence in the cost claim that Mr. Mercredi is a member of the ACFN and, by necessary implication, that he has an interest in ACFN reserve lands located in the delta of the Athabasca River. The Board heard uncontroverted evidence at the hearings that existing oil sands mines are contaminating the Athabasca River and that the Joslyn North Mine Project would add to that contamination.

[117] The fact that Mr. Mercredi was not a witness at the hearings is not required by the *Rules of Practice* or by *Directive 031*, nor is it relevant to the process set out in the *Rules of Practice* for reviewing and setting awards.

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[7] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53.
[8] *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, 1999 CanLII 2837, paragraph 12.
[9] *Osoyoos Indian Band v. Oliver (Town)*, [2001] 3 S.C.R. 746, 2001 SCC 85.
[10] See paragraph 40 of *Osoyoos Indian Band v. Oliver (Town)*.
[11] See paragraphs 41 to 44 of *Osoyoos Indian Band v. Oliver (Town)*.

[118] Sierra Club Prairie participated in the hearings to present scientific evidence that the project would directly and adversely affect aquatic and terrestrial ecosystems, particularly by contaminating the Athabasca River, and that the interests in land held by at least one of Sierra Club Prairie's members would be directly and adversely affected by the project.

CEAA Funding

[119] Sierra Club Prairie stated that its cost claim is limited to costs associated with representation provided by Mr. Hazell leading up to and during the hearing. Sierra Club Prairie noted that under the participant funding arrangement with CEAA, the funding provided to Sierra Club Prairie is required to be expended on the activities listed in the agreement, which do not include costs for Mr. Hazell's representation.

[120] Sierra Club Prairie maintained that the funding provided through CEAA is not relevant to the cost claim, but stated that it would be pleased to submit detailed information on expenditures related to the CEAA funding if this would assist the Board in arriving at a determination with respect to its cost claim.

Views of the Board

Timing of Sierra Club Prairie's Filing and Serving of its Cost Claim

[121] Section 55(3)(a) of the *Rules of Practice* requires a participant to file a claim for costs within 30 days after the proceeding is closed. The Board considers a proceeding closed when the record for that proceeding is closed, which is normally the day that the last evidence or argument is filed with the Board. *Decision 2011-005* states that November 8, 2010, was the close of the record of the Joslyn North Mine Project proceeding. Sierra Club Prairie's cost claim was filed within the 30 days provided in the *Rules of Practice*.

[122] While it is correct that Section 55(3) does not expressly state a time frame within which other participants are to be served with a copy of a cost claim, the Board expects parties to serve such copies upon other participants at the same time the claim is filed with the Board. The provision does, however, state that a participant "shall" serve a copy of its cost claim on other participants, not "should" as Sierra Club Prairie submitted.

Sierra Club Prairie's Status as a Local Intervener

[123] Sierra Club Prairie's argument that it qualifies as a local intervener is based on its assertion that it has members with interests in land that would be affected by the project. As previously stated, when determining the status of an unincorporated association or coalition of hearing participants, the Board's practice has been to consider the group as having the characteristics and attributes of its individual members.

[124] Sierra Club Prairie stated that it has two members living in Fort McMurray but did not identify them by name or provide any other information about them; however, the Board cannot rely on this assertion in making a determination on whether Sierra Club Prairie qualifies as a local intervener. Only one member, Mr. Mercredi, was identified by name by Sierra Club Prairie. The Board is only able to find that Sierra Club Prairie qualifies as a local intervener if it concludes that Mr. Mercredi meets the test in Section 28(1) of the *ERCA*. In its cost claim, Sierra

Club Prairie argued that Mr. Mercredi's aboriginal and treaty rights, as a member of the ACFN residing near Fort Chipewyan, would be affected by the project.

[125] In the Board's opinion, Sierra Club Prairie's reliance on Mr. Mercredi's membership to establish its status as a local intervener for cost award purposes is problematic. First, Mr. Mercredi did not participate in the Joslyn North Mine Project proceeding and the Board cannot find any evidence in the hearing record that the matter of what rights Mr. Mercredi has was raised. In fact, the Board cannot find any reference to Mr. Mercredi in the hearing record. The only information the Board has about Mr. Mercredi are the untested submissions by Sierra Club Prairie in its cost claim. The Board, therefore, has no reliable information upon which to conclude that Mr. Mercredi has an interest in, occupies, or is entitled to occupy land that may be directly and adversely affected by the project.

[126] Second, and equally fatal to the cost claim, is that the legal rights in land asserted by Sierra Club Prairie on Mr. Mercredi's behalf appear to be, or be derived from, aboriginal and treaty rights that are protected under Section 35 of the *Constitution Act* (*1982).* Section 10 of the *Administrative Procedures and Jurisdiction Act* defines a "question of constitutional law" as including "a determination of any rights under the Constitution of Canada or the *Alberta Bill of Rights.*" As a result, Part 2 of the *Administrative Procedures and Jurisdiction Act* applies to any inquiry or finding the Board may be asked to make in relation to Mr. Mercredi's aboriginal or treaty rights. Section 12 of the *Administrative Procedures and Jurisdiction Act* requires Sierra Club Prairie to have filed and served a notice of question of constitutional law in order for the Board to have the ability to consider the question of what aboriginal or treaty rights Mr. Mercredi has. No such notice was given, either in this cost proceeding or the Joslyn North Mine Project proceeding conducted by the Joint Review Panel.

[127] The Board considers that Sierra Club Prairie knows or ought to know the notification requirements in this regard. In a letter dated September 29, 2010,[12] the Joint Review Panel confirmed to all hearing participants that it did not have any questions of constitutional law before it for which a notice that complied with the *Administrative Procedures and Jurisdiction Act* had been given. Counsel for the Joint Review Panel addressed the letter during the hearing on the afternoon of September 29, 2010.[13] On the first page of the letter, it stated, in part, the following:

> The Panel wishes to be absolutely clear that it has no jurisdiction to make decisions concerning constitutionally protected aboriginal rights. Accordingly, the Panel does not intend to permit the questioning of witnesses, or otherwise receive evidence in written or oral form, where the purpose of that appears to be to establish or refute an aboriginal or treaty right

and on page 2 it stated

> The Panel wants to provide each of you with the following direction that may assist you to prepare your respective questions and oral evidence; however, the Panel wants to be clear that these directions apply equally to all the participants in this hearing.

[12] Exhibit 002-040: "Letter from Gary Perkins (Legal Counsel for the Joint Review Panel) to Non-Status Fort McMurray Band Descendants and to Mr. Harvey Scanie and Mrs. Nancy Scannie, dated September 29, 2010."

[13] Volume 3 of the transcript for the hearing of Total E&P Joslyn Ltd.'s Application for an Oil Sands Mine and Bitumen Processing Facility, Joslyn North Mine Project, September 29, 2010, Line 15, Page 632, to line 9, page 634.

- As stated above, the Panel has no jurisdiction to consider a question of constitutional law, including what aboriginal rights a person or a group of persons may or may not have;
- the Panel therefore will not permit the questioning of witnesses, or otherwise receive evidence - whether in written or oral form - if the purpose of that appears to be to establish or refute an aboriginal or treaty right.

[128] Given all of the above, Sierra Club Prairie has not provided any reliable information upon which the Board can conclude that Mr. Mercredi meets the local intervener test under Section 28(1) of the *ERCA*. Therefore, the Board has decided that Sierra Club Prairie is not a local intervener and is not entitled to an award of local intervener costs. Accordingly, Sierra Club Prairie's cost claim is dismissed.

ORDER

[129] The Board hereby orders that

1) TOTAL pay local intervener costs to OSEC in the amount of $120 957.48, plus GST in the amount of $5 952.61, for a total amount of $126 910.29. This amount must be paid to Ackroyd LLP as the submitter of the claim at

Ackroyd LLP
1500 First Edmonton Place
10665 Jasper Avenue
Edmonton, Alberta T5J 3S9

and that

2) the cost claim made by Sierra Club Prairie be dismissed.

Dated in Calgary, Alberta, on February 2, 2012.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

J. D. Dilay, P.Eng.
Joint Review Panel Chair

<original signed by>

D. McFadyen
Joint Review Panel Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

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