Alberta Energy Regulator

Shell Canada Energy

Application to Amend Approval 9756
Jackpine Mine Expansion Project
Fort McMurray Area

Costs Awards
April 1, 2014

ALBERTA ENERGY REGULATOR
Costs Order 2014-002: Shell Canada Energy, Application to Amend Approval 9756, Jackpine Mine Expansion Project, Fort McMurray Area

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Introduction

Background

[1] In December 2007, Shell Canada Energy (Shell) applied to the Energy Resources Conservation Board (ERCB/Board), in accordance with the *Energy Resources Conservation Act* (*ERCA*) and section 13 of the of the *Oil Sands Conservation Act* (*OSCA*), for an amendment to Jackpine Mine—Phase 1 (Phase 1) Approval No. 9756 to increase bitumen production at its Jackpine Mine (JPM). Shell also applied to Alberta Environment and Sustainable Resource Development (ESRD)[1] under the *Environmental Protection and Enhancement Act* (*EPEA)* and the *Water Act* for an amendment to and renewal of its Phase 1 *EPEA* operating approval (no. 153125-00-00), for an amendment to and renewal of an existing *Water Act* licence, and for a new *Water Act* licence. Shell submitted an environmental impact assessment (EIA) report to ESRD, the Canadian Environmental Assessment Agency (CEAA), and the ERCB.

[2] The JPM is located about 70 kilometres north of Fort McMurray. The Jackpine Mine Expansion Project (the Project) includes additional mining areas and associated processing facilities, utilities, and infrastructure.

[3] On September 20, 2011, Canada's Minister of the Environment and the Chairman of the ERCB signed the *Agreement to Establish a Joint Review Panel* (Panel Agreement) for the Project, putting in place a three-member joint review panel (the Panel) to review the Project on behalf of the ERCB and CEAA. The Panel considered the application at a public hearing that began in Fort McMurray, Alberta, on October 23, 2012, and concluded in Edmonton, Alberta, on November 21, 2012.

[4] On June 17, 2013, the *Responsible Energy Development Act* (*REDA*) came into force in Alberta. The *ERCA,* which established the ERCB, was repealed and the Alberta Energy Regulator (AER) was created. In accordance with the terms of *REDA,* the AER assumed all of the ERCB's powers, duties, and functions under Alberta's energy resource enactments, which includes the *OSCA.* Throughout this transition from the ERCB to the AER, the authority of the AER continued without interruption in accordance with the *REDA Transition Regulation.* As a result, the ERCB will be referred to in this costs order as the AER regardless of whether the organization was known at the time as the ERCB or the AER.

[1] Alberta Environment and Alberta Sustainable Resource Development were combined in 2012 to form Alberta Environment and Sustainable Resource Development.

[5] On July 9, 2013, the AER issued *Decision 2013 ABAER 011: Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756* (the Hearing Decision) approving the application subject to certain conditions.

Costs Claims and CEAA Participant Funding

[6] CEAA provided financial support to participants in the hearing through its Participant Funding Program. The CEAA allocated $119 970 among the following five funding applicants to help with their review of the EIA and with their participation in the public hearing: John Malcolm on behalf of Non-Status Fort McMurray/Fort McKay First Nation (NSFMFM) and Clearwater River Paul Cree Band No. 175 (Clearwater Band) (these groups and Mr. Malcolm will be collectively referred to as John Malcolm); Patricia Whiteknife; Amanda Annand; Sierra Club Canada (Prairie Chapter); and the Oil Sands Environmental Coalition (OSEC).

[7] CEAA also allocated $357 050 among the following five Aboriginal groups to help with their review of the EIA and with their participation in the public hearing, including prehearing engagement and consultation activities with the federal government that were linked to the EIA: Athabasca Chipewyan First Nation (ACFN); Mikisew Cree First Nation (MCFN); Métis Nation of Alberta Association Region 1 (MNA); Fort McKay First Nation (FMFN); and Fort McMurray No. 468 First Nation (FMMFN).

[8] On February 7, 2013, ACFN applied to the ERCB for an award of costs in the amount of $619 418.70. On March 8, 2013, Shell submitted its response to ACFN's cost claim. On April 9, 2013, ACFN submitted a reply to Shell's submissions and revised its cost claim to $608 794.24.

[9] On January 3, 2013, FMMFN applied for an award of costs in the amount of $37 048.79. On March 8, 2013, Shell submitted its response to FMMFN's cost claim. On April 9, 2013, FMMFN submitted its reply to Shell's submissions.

[10] On February 7, 2013, John Malcolm applied for an award of costs in the amount of $48 133.84. On March 8, 2013, Shell submitted its response to John Malcolm's cost claim. On April 9, 2013, John Malcolm submitted a reply to Shell's submission.

[11] On February 4, 2013, the MNA applied for an award of costs in the amount of $114 242.43. On March 8, 2013, Shell submitted its response to MNA's cost claim. On April 9, 2013, MNA submitted a reply to Shell's submissions.

[12] On December 19, 2012, OSEC applied for an award of costs in the amount of $155 202.32. On March 8, 2013, Shell submitted its response to OSEC's cost claim. On April 9, 2013, OSEC submitted a reply to Shell's submission.

[13] In a letter dated June 8, 2013, counsel for ACFN requested permission to file an affidavit of Dr. Petr Komers (provided with the letter) to respond to comments on ACFN's cost claim that were made in a letter from Shell's counsel dated March 8, 2013. ACFN and Shell agreed that ACFN's request could be put in abeyance until after the Panel's decision report on the Project was issued. The Panel made a decision on ACFN's request at the beginning of September 2013 and provided its instructions to the AER's Law Branch staff member who was coordinating the cost claim proceeding. The AER considers the close of the cost process to be September 11, 2013.

The AER's Authority to Award Costs

[14] In determining who is eligible to submit a claim for costs, the AER is guided by the *Alberta Energy Regulator Rules of Practice* (*Rules)*, in particular section 58(1)(c) and section 62, which state the following:

> 58(1)(c) "participant'" means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator has decided to conduct binding dispute resolution, but unless otherwise authorized by the Regulator, 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.
>
> 62(1) A participant may apply to the Regulator for an award of costs incurred in a proceeding by filing a costs claim in accordance with the Directive.
>
> (2) A participant may claim costs only in accordance with the scale of costs.
>
> (3) Unless otherwise directed by the Regulator, a participant shall
>
> (a) file a claim for costs within 30 days after the hearing record is complete or as otherwise directed by the Regulator, and
>
> (b) serve a copy of the claim on the other participants.
>
> (4) After receipt of a claim for costs, the Regulator may direct a participant who filed the claim for costs to file additional information or documents with respect to the costs claimed.
>
> (5) If a participant does not file the information or documents in the form and manner, and when directed to do so by the Regulator under subsection (4), the Regulator may dismiss the claim for costs.

[15] When determining whether to exercise its discretion to award costs, the AER is guided by Division 2 of Part 5 of the *Rules* and Appendix D of *Directive 031: REDA Energy Cost Claims Directive* (*Directive 031*). Sections 58.1 and 64 of the *Rules* state the following:

> 58.1 The Regulator shall consider one or more of the following factors when making a decision in respect of an application by a participant for an advance of funds request, an interim award of costs or a final award of costs:
>
> (a) whether there is a compelling reason why the participant should not bear its own costs;
>
> (b) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
>
> (c) in the case of an advance of funds, whether the submission of the participant will contribute to the binding dispute resolution meeting or hearing;
>
> (d) in the case of interim costs, whether the participant,
>
> (i) has a clear proposal for the interim costs, and
>
> (ii) has demonstrated a need for the interim costs;
>
> (e) whether the participant has made an adequate attempt to use other funding sources;
>
> (f) whether the participant has attempted to consolidate common issues or resources with other parties;

(g) in the case of final costs, whether an advance of funds or interim costs were awarded;

(h) whether the application for an advance of funds of for interim or final costs was filed with the appropriate information;

(i) whether the participant required financial resources to make an adequate submission;

(j) whether the submission of the participant made a substantial contribution to the binding resolution meeting, hearing or regulatory appeal;

(k) whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission;

(l) whether the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Regulator;

(m) the conduct of any participant that tended to shorten or to unnecessarily lengthen the proceeding;

(n) a participant's denial of or refusal to admit anything that should have been admitted;

(o) whether any step or stage in the proceedings was

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(p) whether the participant refused to attend a dispute resolution meeting when required by the Regulator to do so;

(q) the participant's efforts, if any, to resolve issues associated with the proceeding directly with the applicant through a dispute resolution meeting or otherwise;

(r) any other factor that the Regulator considers appropriate.

64 The Regulator may award costs to a participant if it finds it appropriate to do so in the circumstances of a case, taking into account the factors listed in section 58.1.

[16] The Panel wishes to emphasize some of the principles that guided its decisions in this cost proceeding. As stated in the introduction paragraph of *Directive 031*, the purpose of awarding costs is to reduce the financial strain on participants who attend and participate in a hearing. Reducing financial strain does not necessarily mean eliminating financial burden or providing full indemnity for hearing costs. Cost awards are also not based on whether a participant "succeeded" in its intervention but on whether the intervention was helpful to the review process and the costs were reasonable considering the issues at play in the hearing.

[17] The Panel recognizes that parties made their claims and submissions in this cost proceeding relying on the legal authorities in force at the time, which was before *REDA* came into effect and the *ERCA* was repealed. The Panel also notes that the legislation repealing the *ERCA* and enacting *REDA* did not provide for "grandfathering" or any other graduated transition of the AER's cost authority and rules. At the time the AER made the cost award decisions in this energy cost order, the only legal authority for doing so was under the *REDA* cost regime. The distinction between the authority of the Panel under the *ERCA* and under *REDA* is of note in this cost proceeding in two ways. First, under section 28 of the *ERCA*, the AER had authority to grant costs only to local interveners as defined in the *ERCA.* As discussed more fully below in the discussion of OSEC's, MNA's, and FMMFN's cost claims, the fact that the concept of "local

intervener" does not exist in *REDA* does not change OSEC's, MNA's, and FMMFN's entitlement to costs, whether considered under the *ERCA* or under *REDA.*

[18] The second element is the introduction of the factors enumerated in section 58.1 of the *Rules*. In making its cost decisions, the Panel was required to apply at least one of these factors. The Panel notes that many factors listed in section 58.1 are the same or similar to factors that existed under the *ERCA*'s cost regime, factors that were relied on and referred to by the cost applicants and Shell in their respective submissions. The Panel also notes that section 58.1(r) of the *Rules* allows the Panel to consider any other factor it considers appropriate.

[19] In this unique case where cost claimants made decisions about whether and how to participate in the hearing under the *ERCA* cost regime, and submissions in this cost proceeding were provided while that regime was still in effect, the Panel considers that it needs to have regard primarily for those factors from section 58.1 that align with factors in the *ERCA* cost regime. The Panel believes that doing so is appropriate and fair in the circumstances. Specifically, the Panel will not be considering the factor in section 58.1(b) of the *Rules* because that factor was not part of the cost regime in effect when the parties made decisions about incurring costs for the purposes of the hearing.

[20] The Panel wishes to note two other factors that it considered when it assessed the claims in this cost proceeding. In the decision *Kelly v. Alberta (Energy Resources Conservation Board)*[2], the Court of Appeal of Alberta stated that AER hearings are not adversarial in nature and therefore cost awards should not be based on the extent to which a participant's intervention succeeded in persuading the hearing panel's decision:

> [the AER's] hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived "success" of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are "successful" when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

[21] Although this statement was made by the court in relation to the local intervener cost regime under the *ERCA*, that was the regime in force at the time of the hearing and when the cost applicants would have been making decisions about incurring or forgoing costs in relation to their participation in the hearing. With reference to section 58.1(a) of the *Rules*, the Panel has decided that these circumstances are a compelling reason why participants in the hearing should not bear their own costs.

[22] A final factor to note is the Panel Agreement, which directed the Panel to conduct a public review of the Project application in a way that provided opportunities for timely and meaningful participation by the public including specifically Aboriginal persons and groups. It also instructed the Panel to receive information from Aboriginal groups about the nature and scope of asserted or established Aboriginal and treaty rights in the area of the Project and to reference that information in its report. This also indicates to the Panel that the success or failure of an

[2] 2012 ABCA 19, at paragraph 31.

intervention is not necessarily a good indicator of the usefulness of the information provided by that hearing participant.

[23] The Panel notes that many of the items or amounts claimed by the cost applicants were not challenged by Shell. If an item and the amount claimed for it meets the AER's requirements for an award, the Panel has generally awarded the cost claimed (as reflected in the tables of cost awards attached to this decision) even though the item may not be specifically addressed in the "Views of the Panel" parts of this decision. One can consider that the Panel found these amounts to be reasonable and directly and necessarily related to the proceeding.

[24] The Panel notes that some cost submissions contained extensive argument about the merits of certain evidence provided in the hearing. The Panel addressed the difficulties these kinds of arguments present in its counsel's letter to the parties dated November 28, 2013. While the Panel recognizes that the usefulness of evidence for which costs are claimed, and of an intervention generally, are issues that may be relevant to the Panel's cost decisions, it believes that the cost process is not the proper venue for a detailed re-arguing or for entirely new arguments about the merits of a witness's or a participant's evidence in the hearing. Lengthy cost submissions in this regard are not particularly helpful and in fact can hinder the progress of a cost proceeding. The Panel has, nevertheless, considered all of the submissions made in this cost proceeding. The absence in this decision of a reference to a particular submission or aspect of a submission does not indicate that the Panel did not consider such information.

Cost Claim of Athabasca Chipewyan First Nation

[25] On February 6, 2013, ACFN submitted a cost claim for legal fees in the amount of $231 133.75, expert fees of $225 623.45, honoraria of $9000, disbursements and expenses of $71 038.68, and GST of $26 312.03, plus a 10 per cent administration fee, for a total cost claim of $619 418.70.

[26] On April 9, 2013, ACFN submitted a revised cost claim for legal fees in the amount of $225 754.75, expert fees of $223 877.75, honoraria of $8200, disbursements and expenses of $69 771.60, and GST of $25 845.21, plus a 10 per cent administration fee, for a revised total cost claim of $608 794.24.

Views of Shell

[27] Shell did not dispute that ACFN is a "local intervener" for the purposes of section 28 of the *ERCA*; however, Shell did submit that many of the costs claimed by ACFN were excessive or were not reasonably or necessarily related to ACFN's intervention.

[28] Shell said that it provided ACFN with advance intervener funding of $202 505 and that it was not clear whether this advance was deducted from ACFN's cost claim. If it was not, Shell requested that ACFN provide detailed accounts of the costs covered by the advance funding, and Shell asked to be given an opportunity to comment on whether such costs are recoverable under *Directive 031* and the AER's regulations.

[29] ACFN claimed an administration fee equal to 10 per cent of ACFN's total intervention costs to compensate ACFN's Industrial Relations Committee (IRC) for work it did to prepare for

the hearing. Shell understood that this amount was in addition to the $2500 preparation honoraria ACFN claimed for the IRC and in addition to the fees claimed for three IRC members who participated in the hearing. Shell said that the administration fee was completely arbitrary and contrary to the scale of costs in *Directive 031*. It also noted that Shell and other oil sands developers provide significant annual funding to the IRC to facilitate precisely this type of work (i.e., understanding projects and participating in their review). This annual funding is over and above the project-specific funding that Shell and other developers provide to the IRC to facilitate Traditional Land Use (TLU) studies and other community initiatives that inform project EIAs. Therefore, while the IRC invested considerable time and resources in the Project review (as did most of the parties that participated in the hearing), there was no basis for claiming a 10 per cent administration fee for the IRC. Shell asked the AER to refuse this part of ACFN's cost claim.

[30] ACFN also claimed expert fees for each of the three IRC witnesses who appeared at the hearing, namely Lisa King, Doreen Somers, and Nicole Nicholls, on the basis that these witnesses were experts in consultation. Shell said that these witnesses are not experts for the purposes of *Directive 031*. The directive allows local interveners to recover the costs of hiring external experts to support a party's intervention, but the only costs that intervening parties themselves are entitled to receive are daily honoraria for participating in the hearing and, in some cases, an honorarium for coordinating the intervention. The IRC is already funded by industry to facilitate reviews of proposed projects and to participate in regulatory reviews. Given the complexity of this hearing, Shell said that awarding the IRC the maximum preparation honorarium under *Directive 031* ($2500) is reasonable, even though the directive states that this honorarium is typically not available when the intervener hires a lawyer to prepare the intervention.

[31] The only additional cost the IRC is entitled to claim under the directive is an attendance honorarium ($100 per half day) for each IRC witness while that witness was giving evidence, being cross-examined, or directly assisting counsel. This is consistent with how the AER has historically treated individuals who testify on behalf of Aboriginal groups.[3] Ms. King, Ms. Somers, and Ms. Nicholls each appeared for one and a half days to give evidence and be cross-examined. Shell acknowledged that Ms. King and Ms. Somers assisted ACFN's counsel in the cross-examination of Shell's witnesses. They also attended closing arguments in Edmonton and may then have assisted ACFN's counsel. The other days in which Ms. King, Ms. Somers, and Ms. Nicholls attended the hearing were to observe the proceedings. Shell said that does not justify awarding attendance honoraria. As a result, Shell said that the appropriate amount of funding for the IRC witnesses is $900 for each of Ms. King and Ms. Somers (equal to three half days of evidence/cross-examination, one full day assisting counsel during cross-examination, and two full days assisting counsel during closing argument) and $300 for Ms. Nicholls (equal to three half days of evidence/cross-examination). Meal and hotel costs should also only be available for those witnesses for days they participated in the hearing or for which their attendance was necessary for that participation, not for days these witnesses attended the hearing as general observers.

[32] ACFN claimed attendance honoraria for all ten of its community witnesses. Shell said that while *Directive 031* provides that attendance honoraria are generally available for a maximum of

[3] Shell gave the example of local intervener costs related to an application by Suncor Energy Inc. for the Steepbank Extension and Voyageur Upgrader, in *ECO 2007-001*, on page 17.

six witnesses, this hearing was particularly complex and so all ten community witnesses should be awarded attendance honoraria. As with the IRC witnesses, however, these honoraria should only be available for the days the witnesses gave evidence or were subject to cross-examination, which was three half days for each witness (i.e., $300 per witness). Meal and hotel costs should also only be available for those witnesses for days they participated in the hearing or if their attendance was necessarily for that participation, not for days they attended the hearing as general observers.

[33] Shell said that Dr. Patricia McCormack presented for five minutes before having to leave the hearing for scheduling reasons, but nevertheless claimed 39.5 hours for preparing presentations and speaking notes plus 14 hours for attending the hearing to present evidence (over and above her claim for travel time). Shell argued that these hours far exceed the number of hours that were required for Dr. McCormack's participation in the hearing. In addition, Dr. McCormack's expert evidence was focused entirely on the ethnohistory of the ACFN community and how ACFN culture has been impacted over time. Shell argued that while this detailed report may be interesting and help people understand the history of the ACFN community, it would not have helped the Panel understand the potential effects of the Project on ACFN culture or the ACFN community. As a result, Shell requested that Dr. McCormack's costs be denied or at least reduced considerably.

[34] Shell said that Dr. Patt Larcombe presented at the hearing for about five minutes and was not made available for cross-examination because of scheduling constraints, but she claimed 16 hours for preparing a PowerPoint presentation and 24 hours for attending the hearing (over and above her claim for travel time). Shell argued that Dr. Larcombe made no contribution to the hearing, so these costs should be denied. Shell said that Dr. Larcombe's narrative of encroachment explained various pressures on the ACFN community through history but it did not address any specific impacts from the Project. Shell also said that since neither it nor the Panel was able to test this evidence, it should have been given little to no weight and the Panel should reduce Dr. Larcombe's costs accordingly. Dr. Larcombe also claimed $675 for GIS mapping to support her narrative of encroachment, and Shell said it was not clear how these costs were necessary for Dr. Larcombe's report or ACFN's intervention.

[35] Shell said that Bruce Maclean claimed 21 hours for preparing a hearing presentation and 29 hours to attend the hearing (plus travel cost), but he did not make any presentation at the hearing. Shell also said that Mr. Maclean made no contribution to the hearing, so these costs should be denied or reduced considerably.

[36] With respect to the Management and Solutions in Environmental Science (MSES) witnesses (Petr Komers, Sarah Hechtental, and Sheri Gutsell), Shell said that the costs claimed were excessive (almost $100 000) and unreasonable given that Shell previously provided ACFN with $300 000 in funding for a technical review of the Project application and subsequent submissions (including the Muskeg River Diversion Alternative and the draft No Net Loss Plan), and MSES was ACFN's primary consultant in these reviews. Shell argued that this funding should have provided the MSES experts with sufficient information about the Project to inform their reports. In addition, ACFN's cost claim noted that participant funding from the CEAA was used to fund the partial completion of the MSES reports. Shell said it was not clear why an additional $100 000 in funding was necessary to complete the MSES reports, particularly given that the reports themselves were simplistic and of minimal value. For example, Dr. Komers filed

a report claiming that by 2042 there would be no undisturbed areas left within ACFN's self-defined regional study area (RSA).[4] Shell argued that his conclusions were based on purely mathematical calculations that had no support in scientific literature. He also ignored the fact that large parts of ACFN's RSA were conservation areas and parks. Shell said that these conclusions did not present a reasonable prediction of cumulative effects in the region and should have been given little to no weight. Similarly, Dr. Gutsell's expert report concluded that reclamation simply does not work. Shell said that Dr. Gutsell ignored the legislative standards for reclamation, as well as CEMA's recent *Guidelines for Reclamation to Forest Vegetation in the Athabasca Oil Sands Region* which provides over 400 pages of information about reclamation techniques and monitoring results in the oil sands region.

[37] Shell said that most of the MSES reports concerned regional issues (e.g., terrestrial disturbance, migratory birds and tailings ponds, reclamation techniques) that were not specific to the Project. As a result, these reports were not relevant to the Panel's consideration of whether the Project is in the public interest, and Shell asked the AER to reduce MSES's costs accordingly.

[38] Shell also said that MSES claimed costs for several individuals who were not witnesses and who did not file any evidence in the hearing, namely Brian Kopach, Nina Modeland, and Zoran Stanojevic. Shell argued that ACFN provided no justification for why these costs were necessary for ACFN's intervention and submitted that all of these costs should be denied.

[39] Shell argued that the costs claimed by the Firelight witnesses (Craig Candler and Alastair MacDonald) were unreasonable. Shell said that Dr. Candler provided several reports that purported to assess impacts of the Project on ACFN traditional land and resource use but that Dr. Candler's approach was inconsistent with both CEAA guidance and the nature of Aboriginal rights. Shell argued that his approach had several methodological shortcomings that limited their value, e.g., 25 habitation sites could mean 25 different cabins or it could mean one cabin that 25 different people visited over the course of years. Shell said that this report (and the associated testimony) should have been given little to no weight and that Firelight's costs should be reduced accordingly. Shell also said that Firelight claimed administrative support costs but provided no justification for why these costs were necessary or should be awarded. Shell submitted that all of these costs should be denied.

[40] Shell said that the ACFN's expert witnesses claimed significant costs for changing flights and that in some cases the change fees were more than double the original flight costs. Shell argued that these fees were incurred because of poor planning by ACFN. Several individuals at the hearing were able to reschedule their return flights by paying nominal change fees (e.g., Martin Carver, Sarah Hechtenthal, Dr. Larcombe); however, others rebooked new flights at the last minute at more than double the original cost (e.g., each of the Firelight witnesses). Shell said that most ACFN experts originally booked flights for a very narrow window even though it was reasonably foreseeable that delays in the hearing would cause these witnesses to miss their flights. Shell argued that ACFN or its experts should have mitigated this risk by ensuring that flights could be changed with minimal extra cost. Shell said that it should not be penalized for ACFN's poor planning, particularly since Shell was very flexible during the hearing to accommodate the schedules of ACFN's experts.

[4] Exhibit 006-0130, Adobe 3, 4, 10, 11, and 16.

[41] Shell also said that ACFN's legal counsel claimed several costs that were not reasonable or appropriate. These include the following:

- Costs for Eamon Murphy to travel to Fort Chipewyan on October 24 and again on November 1. These costs were not necessary for ACFN's intervention and should not be recovered
- Legal fees for research into challenging the Board's ultimate decision on the Project (October 11, 16, and 17). Again, these costs were not necessary for ACFN's intervention and should not be recovered
- Legal fees for preparing media materials (October 20)
- Legal fees incurred between October 26 and October 29 to support ACFN's application—which was not necessary for ACFN's intervention—to adjourn the hearing
- Legal fees for recovering intervener costs (August 28 and 29 and September 4, 6, 7, 10, 20, and 21), as *Directive 031* states that these costs are not recoverable
- Hotel charges for Ms. Biem and Mr. Murphy in excess of the maximum daily allowance under *Directive 031* for their stay in Edmonton during the final week of the hearing

[42] Shell said that ACFN's legal counsel claimed the costs of seven return flights between Fort McMurray and Victoria during the hearing, in addition to claiming the travel time for each of these trips. This number of return flights to Victoria was not necessary for ACFN's intervention, particularly given that Ms. Biem kept a hotel room in Fort McMurray for the duration of the hearing (including the weekends when she returned to Victoria). Ms. Biem also claimed travel costs for a November 9 flight between Fort McMurray and Grande Prairie, and Shell said that ACFN provided no justification for these costs and therefore they should be denied.

[43] Shell said that it was not clear why ACFN's translator required seven days of preparation time at $250/day ($1750 total). Shell argued that these costs were not necessary for ACFN's intervention and they should be denied.

[44] Shell also said that there were discrepancies between the costs claimed by ACFN and the receipts provided with ACFN's cost claim. These include the following:

- Flight receipts for Ms. Biem total $1644.69, but she claimed flights amounting to $3172.72.
- No receipts were provided for Ms. King's airfare or hotels.
- No receipts were provided for Chief Adam's hotel charges.
- No receipts were provided for Marvin L'Hommecourt's flight charges.
- Mr. L'Hommecourt also claimed considerable mileage costs. No justification was provided for Mr. L'Hommecourt requiring both flight and mileage costs to travel to the hearing.

[45] ACFN claimed other costs that Shell argued were not recoverable under *Directive 031* and should be denied:

- Hotel costs for Nicole Nicholls before the start of the hearing
- Travel mileage for Nicole Nicholls before the start of the hearing
- Search fees incurred by Martin Carver
- Photocopies and printing in excess of 10 cents per page, where ACFN claimed 15 cents and 35 cents depending on the type of printing
- Meals in excess of the daily maximum
- In form E2 of ACFN's cost claim, there appeared to be several calculation errors; for example, in the calculation of preparation fees for Chad Day, Camille Israel, and Jay Nelson. The summary of disbursements in form E3 for Woodward & Company is also inconsistent with the numbers in form El, the summary of total costs claimed.

Views of AFCN

Advance Intervener Funding

[46] ACFN said that $202 505 provided as advance funding should be deducted from the final amount of the cost award to be paid by Shell. ACFN's cost claim included all eligible costs incurred by ACFN after the notice of hearing was issued, and the advance funding was applied to these costs. ACFN claims total costs of $608 794.24, and after deducting the advance funding of $202 505, the outstanding cost for which an award is sought is $406 289.24.

Fees Related to Scheduling

[47] ACFN said that Shell challenged the honoraria, fees, and disbursements incurred by ACFN's community and expert witnesses for days when the witnesses were in Fort McMurray for the hearing but did not provide direct or cross-examination evidence. ACFN submitted that those honoraria, fees, and disbursements were reasonably and necessarily incurred on the basis of schedules agreed to by all interveners and approved by the Panel.

[48] ACFN said that it cooperated with the Panel's counsel and other interveners to ensure that its witnesses were available in accordance with the agreed order of presentation of evidence. An initial hearing schedule was presented to the Panel on October 29 and was found to be acceptable. ACFN was to begin its direct evidence on November 5. When it became apparent that Shell's witnesses would be testifying longer than anticipated, ACFN again cooperated with other counsel to draft a revised schedule. The revised schedule, which was distributed on Friday, November 2, had ACFN's witnesses giving evidence on Tuesday, November 6.

[49] ACFN explained that in order to ensure that its witnesses were available in accordance with the agreed order of presentation of evidence, ACFN arranged for its panelists to arrive in Fort McMurray on November 5 and November 6. Witnesses who resided in Fort McMurray were asked to book those days off work. ACFN did not begin to present its evidence until the afternoon of November 7. In an effort to cooperate with the scheduling needs of ACFN witnesses

and other interveners, ACFN broke its witness panel into several sessions, which resulted in some witnesses not presenting until Friday, November 9.

Administration Fee

[50] ACFN referred to the evidence given by Ms. Somers that the independently conducted organizational review of ACFN's IRC found the seven-employee organization actually required 37.5 full-time-equivalent staff to deal with its ever-mounting regulatory workload. ACFN said that Shell is a member of the Oil Sands Developers Group and has had access to the organizational review of ACFN's IRC. ACFN also said that current IRC fees do not come close to covering the costs associated with coordinating interventions. ACFN's intervention required significant internal telephone, fax, copying, and scanning costs in addition to the staff time required to attend to the tasks that are discussed in ACFN's cost claim. ACFN indicated that these tasks were carried out by staff members Krissie Anderson, Amanda Annand, and Hazel Mercredi, and that Ms. Somers and Ms. King also contributed time that was unrelated to their preparation as witnesses or to the monitoring of the hearings on behalf of the organization. ACFN said that the administration fee reflects the reasonable and necessary work and resources that were contributed by the IRC to ACFN's intervention and is within the AER's considerable discretion to award. ACFN understands that the intention of the $2500 preparation honoraria may be to address these types of costs; however, ACFN said that $2500 is insufficient in these circumstances. ACFN therefore requested that the AER award the 10 per cent administration fee, and said that ACFN would be satisfied having any amount that may be awarded under preparation honoraria subtracted from the amount awarded for the administration fee.

Lisa King, Nicole Nicholls, and Doreen Somers

[51] ACFN said that the costs associated with the participation of Ms. King, Ms. Somers, and Ms. Nicholls were reasonable and necessary for ACFN's intervention. It noted that Shell did not dispute the expertise or the contribution to the proceeding of these witnesses; rather, Shell contended that ACFN was not entitled to recoup fees for the services of these three participants because they were not "external" experts.

[52] ACFN said that in *ECO 2012-002*, OSEC was awarded fees for employees who provided evidence as experts on matters in which they brought experience. Shell did not dispute that OSEC staff members with particular expertise, such as Mark Huot and Simon Dyer, were entitled to an hourly rate; rather, Shell disputed the reasonableness of the rates charged. ACFN indicated it believes Shell is suggesting that IRC staff members who provide expertise on behalf of Aboriginal groups are not to be valued in the same manner as those who provide expertise on behalf of non-Aboriginal groups such as OSEC. ACFN said that Ms. King and Ms. Somers each brought significant experience to the proceeding and devoted time preparing their presentations for the purpose of helping the Panel understand complex issues related to Project-specific and cumulative impacts on treaty rights, culture and traditional use, mitigation measures, and Shell's consultation efforts. Moreover, Ms. Nicholls, who also contributed substantial experience and expertise to the proceedings, is external to the IRC. ACFN noted that Ms. Nicholl's claimed hourly rate is 40 per cent of the rate established by *Directive 031* for a professional with her years of experience.

Dr. Patricia McCormack

[53] ACFN said that Dr. McCormack provided direct evidence for nearly half an hour and was prepared to present for a longer period but shortened her presentation to facilitate the orderly conduct of the hearing. She was available for cross examination. ACFN said that it should not be penalized for its efforts to ensure the orderly conduct of the hearing.

[54] ACFN said that Shell displayed a fundamental lack of understanding of Dene culture when it asserted that Dr. McCormack's report did not help the Panel understand the potential effects of the Project on ACFN's culture or community. ACFN submitted that many of the questions Dr. McCormack answered in her report specifically required discussion about culture and way of life. ACFN said that Dr. McCormack's evidence is precisely the type of information required for the understanding of Chipewyan culture, the nature and scope of ACFN's treaty and Aboriginal rights and interests, and the potential impacts of the Project. In particular, Dr. McCormack's work supplied information that could have helped the Panel conduct the cumulative impacts assessment on Aboriginal rights and interests in relation to the pre-industrial case. ACFN argued that Dr. McCormack's ethnohistorical report was invaluable for understanding traditional Dene concepts of land use and ownership.

[55] ACFN said that Dr. McCormack's evidence was particularly relevant to the following:

- Panel Agreement, section 6.1: "The Joint Review Panel may receive information from Aboriginal groups related to the nature and scope of asserted or established Aboriginal and treaty rights in the area of the project, as well as information on the potential adverse environmental effects that the project may have on asserted or established Aboriginal and treaty rights."

- Panel Agreement Terms of Reference, Part II, heading: Scope of the Environmental Assessment, section 3(c): "effects of the project on asserted or established Aboriginal and treaty rights."

- Panel Agreement Terms of Reference, Part III, heading: Aboriginal Rights and Interests, in its entirety

- Panel Agreement Terms of Reference, Part III, heading: Cumulative Effects Assessment: "The Joint Review Panel should focus its consideration of cumulative effects on key valued components. Without limiting itself thereto, the following components should be considered... "asserted or established Aboriginal and treaty rights and interests... the cumulative effects assessment should provide a justification and description of temporal boundaries and include, but not be limited to... a pre-industrial case to allow the Joint Review Panel to take into account the effects that may have already been experienced prior to the project."

[56] ACFN also said that Dr. McCormack provided educated guidance regarding the reliability of Shell's Cultural Impact Assessment.

Patt Larcombe

[57] ACFN said that Patt Larcombe was prepared to deliver oral evidence concerning the report, *Narrative of Encroachment Experienced by the Athabasca Chipewyan First Nation* (the

Encroachment Report), and a PowerPoint presentation that she had filed. Ms. Larcombe was available to answer questions in writing, and this arrangement was approved by the hearing pane1. At the time, Shell expressed no concerns with either Ms. Larcombe's shortened presentation or with written cross-examination, indicating that it had no cross-examination questions for her. Ms. Larcombe made herself available for an ACFN intervention that was supposed to have started on November 5. ACFN said that its counsel worked with the Panel's counsel to arrive at a schedule for November 8 that would have allowed Ms. Larcombe to deliver her presentation in full; however, that schedule was delayed, and by the time it became apparent that Ms. Larcombe would not have an opportunity to speak in her allotted time it was too late for her to make alternative travel arrangements.

[58] ACFN said that the Encroachment Report included many maps of encroachments experienced by ACFN, several of which required GIS services to produce.

[59] ACFN submitted that Ms. Larcombe's evidence was of great assistance to the Panel. The Encroachment Report addressed encroachment from the late 1800s to the present day, and also provided information about potential and planned projects that could continue to affect ACFN's rights and interests. ACFN said that the report helped the Panel understand the effects of such encroachment on community well-being and culture. In particular, the report provided detail about the nature, location, and quantity of encroachments and related impacts on ACFN's rights and culture that was not provided in Shell's evidence or elsewhere. ACFN submitted that the Encroachment Report provided useful information about historical, current, and future impacts, and a conceptual framework for understanding those impacts that could have helped the Panel to discharge its mandate, in particular its mandate to conduct a cumulative effects assessment on asserted and established treaty and Aboriginal rights and interests.

Bruce Maclean

[60] ACFN said that Mr. Maclean's hourly rate is 41 per cent of the *Directive 031* allowable rate for a professional with six years' experience. ACFN asked that this difference be taken into account when assessing the reasonableness of his fees. ACFN said that Mr. Maclean provided evidence that was directly relevant to the question of impacts on ACFN's treaty rights, in particular the question of whether a threshold relevant to ACFN's rights had already been exceeded. Mr. Maclean explained the program the community has undertaken, in the absence of government action, to monitor a resource that is integral to its rights practices. ACFN said that his report and PowerPoint presentation provided graphic evidence, based on current data, of the problems ACFN members experience when they attempt to travel by water to exercise their rights. This evidence supported the mitigations ACFN requested regarding the Aboriginal Base Flow.

[61] ACFN said that Mr. Maclean did not provide direct oral evidence at the direction of the Panel, given in light of time constraints in the hearing and upon assurance that Mr. Maclean's oral testimony was not necessary because his written evidence had already been reviewed by the Panel. Mr. Maclean was available for oral cross-examination and was also questioned in writing. ACFN said that it should not be penalized for cooperating to ensure the orderly conduct of the hearing.

MSES Witnesses: Dr. Petr Komers, Dr. Sherri Gutsell, and Sarah Hechtenthal

[62] ACFN submitted that Shell incorrectly said that an additional $100 000 in funding was necessary to complete MSES reports. MSES invoices also represent costs for three expert witnesses to prepare for, travel to, and provide evidence at the hearing and to help counsel with cross-examination, as well as for associated costs for administrative support and disbursements. ACFN asserted that the fees were reasonable and necessary for its intervention. MSES hourly rates for each of Dr. Komers, Dr. Gutsell, and Ms. Hecthenthal were within allowable rates under *Directive 031*.

[63] ACFN advised that the MSES witnesses arrived on the evening of November 5 to be available on November 6, but they did not have the opportunity to present their evidence until November 9. About $19 800 in fees were incurred while MSES witnesses waited to give their evidence.

[64] ACFN said that several MSES reports had been completed at least one year before the hearing and that a review was required in order to prepare direct evidence and to prepare for cross examination on those reports. ACFN also said that while preparing a PowerPoint presentation and speaking notes, MSES witnesses reviewed and compiled substantial amounts of technical information specific to the Project, then placed the Project in the context of regional issues and cumulative effects on valued traditional resources with the objective of informing the Panel's assessment of cumulative impacts on ACFN's rights and interests. The type of information presented by MSES was directly related to the Panel's mandate regarding environmental effects, the cumulative impact assessment, and determining whether the Project was in the public interest "having regard to the effects of the project on the environment." The MSES witnesses also had to review a lot of information that was submitted by Shell, other interveners, and government agencies in the summer and fall prior to the hearing, including Shell's response to the joint review panel's information requests (September 7, 2012) and Shell's response to interveners (October 15, 2012). Hearing transcripts, exhibits, and Shell's undertaking responses given before November 6 were also reviewed during witness preparation. ACFN said that all of this information was thoroughly reviewed and reconciled with previous MSES submissions, then integrated as part of the hearing preparations undertaken by each MSES witness to ensure that the information presented was current, relevant, and did not repeat the evidence presented by other parties.

[65] ACFN said that the evidence provided by MSES went far beyond providing independent technical reviews of Shell's work. MSES evidence filled in some of the gaps that were left in Shell's information. Examples include providing evidence regarding moose populations and existing linear disturbances that Shell could have accessed but failed to provide; evidence of the impacts on certain key wildlife resources relied upon by ACFN; and evidence of direct and adverse effects of the Project on wildlife movement, habitat loss, migratory bird mortality, and mitigation efficacy. MSES also submitted comprehensive responses to written questions from the Panel.

[66] ACFN said that Dr. Komers' report was well supported by scientific literature and that Shell's contention that it was simplistic and of little value ignored the rigorous scientific methods applied and described in the report. Dr. Komers supplied a reliable and comprehensive analysis of the rate of anthropogenic land-cover change, and highlighted the inadequacy of the data submitted by Shell for its cumulative effects assessment.

[67] ACFN said that Dr. Gutsell applied project-specific information from Shell's reclamation plan and baseline field data to support her opinion about the likelihood of Shell's success in reclaiming vegetation types. Dr. Gutsell presented evidence based on her experience with current reclamation operations, including personal observations of Shell's reclamation efforts at the Jackpine Mine. ACFN submitted that Dr. Gutsell did not ignore the legislative standards for reclamation or CEMA's *Guidelines for Reclamation to Forest Vegetation in the Athabasca Oil Sands Region*. Dr. Gutsell was clear that she is familiar with the legislative standards and CEMA guidelines, and she said that she had read the CEMA guidelines several times. ACFN asserted that Dr. Gutsell gave cogent reasons for why these guidelines did not figure prominently in her opinion.

[68] ACFN said that Mr. Brian Kopach and Ms. Nina Modeland provided administrative support to MSES in producing reports and PowerPoint slides, provided logistical support for travel, and filed receipts and did invoicing and other paperwork at the rate of $45 per hour, which is allowed under *Directive 31*. Costs claimed for Mr. Kopach's and Ms. Modeland's time on invoice 1507 have been adjusted to reflect the allowable administrative rate of $45 per hour.

[69] ACFN advised that Zoran Stanojevic is a GIS analyst with 13 years experience who developed the algorithms used for the mapping and area calculations included in the migratory bird hazard report. ACFN said that Mr. Stanojevic's technical expertise and work was necessary to produce the report, but his role was of an extremely technical nature that was not suitable for oral testimony. Shell did not have cross-examination questions about the GIS work underlying the MSES reports. ACFN said that if there had there been such questions, an undertaking to obtain answers from Mr. Stanojevic could have been provided.

Firelight Witnesses: Dr. Craig Candler and Alistair McDonald

[70] ACFN said that Dr. Candler's fees were reasonable and necessary for ACFN's intervention, and well below the *Directive 31* limit for a professional with 17 years experience. ACFN submitted that it was incorrect for Shell to say that Dr. Candler's approach was inconsistent with CEAA guidance. Dr. Candler's approach integrated and relied on the *Cumulative Effects Assessment Practitioners Guide*, as well as widely accepted standard guidance documents such as the United Nation's *Comprehensive Guide for Social Impact Assessment*. ACFN asserted that for Shell to state that Dr. Candler's approach is inconsistent with the nature of Aboriginal rights revealed a misapprehension of a foundational principle of Aboriginal law and the reality of rights practice: that section 35 rights are collectively held but individually exercised.

[71] ACFN also said that Dr. Candler provided a thorough description of his methodology in section 4 of ACFN's Integrated Knowledge and Use Report, and supported it with references to widely accepted literature. Shell was only able to specify one "shortcoming" in his report, namely the 25 habitation values example. ACFN said that the cultural-value-based approach employed by Dr. Candler is an established hallmark of social scientific data quality in the field of use and occupancy mapping.

[72] ACFN submitted that Mr. Macdonald's fees were reasonable, necessary, and well within the limits set by *Directive 031* for a professional with eight years experience. He only billed 6.5 hours to prepare his oral evidence. Mr. McDonald provided a supplemental social, economic, and cultural effects submission to fill some of the gaps identified in Shell's material so that the

Panel could better discharge its mandate. He worked closely with the ACFN community to provide a nuanced and realistic portrait of the social, economic, and cultural issues faced by ACFN as a result of oil sands development and the potential for effects from the Jackpine Mine Expansion, and he suggested appropriate mitigation measures. Mr. Macdonald assisted the Panel by providing a substantial depth and breadth of information on social, economic, and cultural effects.

[73] ACFN said that Dr. Craig Candler and Alistair MacDonald each rescheduled multiple flights and cancelled other engagements in order to accommodate hearing schedule changes. The cost of flight changes normally included both a flight change fee and a difference in fare fee. Where less expensive fare types were not available, maintaining the participation of Dr. Candler and Mr. MacDonald required payment of a substantial difference in fare fees. All costs incurred were necessary for the participation of Dr. Candler and Mr. MacDonald. Administrative staff was required to coordinate changes in the schedule, including cancelling previous engagements and cancelling or rescheduling multiple flights at the last minute, which involved numerous phone calls and long wait times. Firelight administrative staff supported the filing of required receipts, invoices, and paperwork, and provided other logistical and needed administrative support.

Dr. Martin Carver

[74] ACFN submitted that Dr. Carver's hourly rate was $95 per hour less than the allowable maximum for a professional with more than 20 years experience. ACFN requested that this difference be taken into account when assessing the reasonableness of his fees.

[75] ACFN said it believed the essence of Shell's comments on page 24 of its response to ACFN's cost claim to be that Dr. Carver did not conduct original field research in support of his evidence. ACFN said that the fact Dr. Carver was not taking measurements himself was irrelevant to the value of the data compilation and original analysis he provided regarding water quantity issues. In ACFN's submission, Dr. Carver's work was needed to provide an informed understanding of the likely project-specific and cumulative hydrological impacts of the Project on ACFN's rights and interests. Dr. Carver's evidence was necessary in part because Shell's hydrology-related assessments contained significant errors, omissions, and biases. Dr. Carver ensured that hard data and scientifically sound analysis of the likely project-specific and cumulative impacts were before the Panel. His work included active review of the most relevant parts of Shell's EIA documents and Shell's witnesses' oral evidence, the gathering of data on the historical and current hydrograph of the Lower Athabasca River, and in-depth review and analysis of the Project and cumulative impacts within each of the Phase 1 and Phase 2 Water Management Frameworks for the Lower Athabasca River.

Legal Fees and Disbursements

[76] ACFN said that Mr. Murphy did not travel to Fort Chipewyan on October 24, and no such costs have been claimed. The November 1 trip was within the hearing phase of the proceeding and was necessary in order for Mr. Murphy to prepare the members of ACFN's witness panel residing in Fort Chipewyan to give testimony on November 5. Most of these individuals were first-time witnesses. The time spent in witness preparation was clearly reasonable and necessary to ACFN's intervention, and contributed to the orderly conduct of the hearing. It was more cost-

effective for Mr. Murphy to travel to the witnesses than for all of the witnesses to travel to Fort McMurray before their scheduled hearing date.

[77] In regards to legal fees incurred on October 11, 16, and 17, ACFN said that the 3.8 hours logged by Matt Boulton on October 11 and the 0.3 of an hour logged on October 17 should not have been included in the claim. All other entries logged on those dates were for time spent developing ACFN's submission on the Panel's jurisdiction, prepared in response to Alberta's request and the Panel's invitation, and were reasonable and necessary for ACFN's intervention.

[78] On October 20, ACFN removed the 0.25 entry for reviewing media materials.

[79] In response to Shell's comments on legal fees incurred October 26 to 29 for ACFN's application to adjourn the hearing, ACFN submitted that the costs were reasonable and necessary for its intervention. In its notice of hearing, the Panel invited submissions on questions of constitutional law. ACFN viewed its constitutional law questions as integral to its intervention. ACFN used a procedure available to it under the *Rules*, as parties are entitled to do. ACFN submitted that it acted responsibly in order to advocate for the full scope of its intervention being heard by the Panel and to minimize the possibility that a re-hearing would be necessary.

[80] ACFN conceded that fees related to recovering intervener costs are not recoverable, and it removed fees for the following entries from its cost claim:

- Jenny Biem: 28 Aug. 0.4; 29 Aug. 2.7; 6 Sept. 0.3; 7 Sept. 1.2; 10 Sept. 0.8; 20 Sept 0.15; 21 Sept. 0.2
- Matt Boulton: 27 Aug. 2.7; 27 Aug. 1.0; 28 Aug. 3.2

[81] For entries over one hour in length where costs were mentioned as part of a list of tasks undertaken by counsel, ACFN reduced the amount claimed by 50 per cent and said it trusted this would be acceptable to the AER, as follows:

- Ms. Biem: September 4, 3.0—fees reduced by 50 per cent
- Mr. Murphy: September 4, 1.5—fees reduced by 50 per cent

[82] ACFN said that during the Edmonton part of the hearing, Ms. Biem and Mr. Murphy stayed at the hotel in which the hearing was held, thereby eliminating commuting costs (i.e., taxi and travel time). ACFN noted that the disbursement was supported by a receipt.

[83] In response to Shell's submission that costs claimed for ACFN's counsel's travel to and from Fort McMurray were not reasonable, ACFN said that the Panel structured its sitting schedule in recognition that many out-of-town participants would be travelling home on weekends. ACFN also said that for a process that began on October 23 and concluded on November 21, seven return trips to Fort McMurray and two to Edmonton, between two people, was reasonable. ACFN said that Fort McMurray hotel charges for Ms. Biem were only claimed for days that she was in Fort McMurray.

[84] In response to Shell's submission that it was unreasonable for Ms. Biem to claim the cost of her flight from Fort McMurray to Grand Prairie on Friday, November 9, ACFN advised that

Ms. Biem had an obligation in Grande Prairie on November 10, and at a cost of $588.13, the flight to Grande Prairie was less than most flights from Fort McMurray to Victoria.

Translator Allan Adam

[85] ACFN said it has requested further clarity from Mr. Adam regarding the charges on his invoice but that Mr. Adam did not bill for seven days of preparation time. Mr. Adam's daily rate for waiting and travel time is $500, and $250 reflects a half day charge. ACFN said that Mr. Adam billed his time in half days because he was under the mistaken impression that the AER would be paying for half his waiting and travel time. Mr. Adam billed 2.5 days (or 5 half days) for his time spent waiting for ACFN's witness panel to be called on November 5, 6, and 7; and 1.5 days for the time to actually set up his equipment and provide translation services on November 7 and 8. Mr. Adam billed 1 day (or two half days) for his travel time from Saskatchewan to Fort McMurray and back (about 11.5 hours of driving each way). ACFN submitted that the charges were reasonable and that Mr. Adam's participation was required to ensure that ACFN was able to provide key evidence.

Discrepancies Alleged by Shell

[86] ACFN submitted that Shell incorrectly alleged that flight receipts from Ms. Biem only total $1644.49, but the claim for her flight costs amounts to $3172.72. ACFN said that receipts for all her flights in fact total $3172.72 and copies of them have been filed in this cost proceeding.

[87] Shell noted that no receipts were provided for Lisa King's airfare or hotels. ACFN responded that these expenses were included due to a clerical error and have been removed.

[88] Shell noted that no hotel receipts were provided for Chief Adam's accommodation. ACFN said that the Fort McMurray hotel charges for translator Allan Adam were mistakenly attributed to Chief Adam.

[89] ACFN said that a flight charge for Marvin L'Hommecourt was included due to a clerical error and has been removed. Mr. L'Hommecourt only incurred mileage charges to travel to Fort McMurray to provide evidence.

Costs Shell States are not Recoverable

[90] ACFN said it appreciates that *Directive 031* provides guidelines for recoverable costs, but it submitted that the directive also provides the AER with discretion to consider awarding other fees and expenses in light of the particular circumstances of each matter. This discretion is considerable, as was recognized in *ECO 2013-001*, [5] with reference to the Supreme Court of Canada decision in *Smith* v. *Alliance Pipeline Ltd.* ACFN submitted that in the context of its vigorous intervention, the complexity of the hearing, and the substantial contribution ACFN made to a better understanding of the issues, the following charges should be awarded as reasonable and necessary for ACFN's intervention.

[91] ACFN submitted that Nicole Nicholls's pre-hearing expenses should be awarded because she provided evidence that was necessary and she made a key contribution to a better understanding of the issues. ACFN said that Ms. Nicholls was a first-time hearing witness and

[5] *Re Sinopec Daylight Energy Ltd,* at para. 26, citing to *Smith v. Alliance Pipeline Ltd.* 2011 see 7.

she travelled to Fort McMurray to work with IRC staff to prepare evidence for the hearing. As project manager on the Shell file for multiple years, her experience was necessary for ACFN to prepare its intervention. Her travel and fees were necessarily incurred in relation to the hearing part of the proceeding.

[92] ACFN said that its legal counsel's practice is to bill printing and copying at cost: $0.15 for black and white copying/printing and $0.35 for colour copying/printing. Meals in excess of the daily maximum have been supported by receipts. ACFN noted that while a few days may have exceeded the scale-of-costs rate, the overall amounts claimed were well below the maximum total amount that could have been claimed. For example:

Eamon Murphy:
Days in Fort McMurray and Edmonton for hearing purposes: 20
Directive 031 daily rate allowance: $40.00
Potential meal claim: $800.00
Actual amount claimed: $657.01
Difference: $142.99

Jenny Biem:
Days in Fort McMurray and Edmonton for hearing purposes: 25
Directive 031 daily rate allowance: $40.00
Potential meal claim: $1000.00
Actual amount claimed: $394.80
Difference: $605.20

[93] ACFN said that its form E2 has been reviewed for calculation errors. In some instances, spreadsheet formulas were incorrectly applied and these errors have been rectified. While reviewing its original claim in light of Shell's comments, ACFN noticed three more clerical errors and has corrected the claim accordingly:

Form E3—Chief Adam's honoraria; the total has been reduced from $1800 to $1000;
Form E4—doubling of Ms. Hecthenthal's airfare change fee, now claimed once
Form E4—doubling of GST on MSES airfare, now claimed once.

[94] ACFN said in conclusion that the costs it claimed in relation to its intervention in Shell's application for Project approval are reasonable and were necessary for ACFN's intervention. ACFN submitted that it made its best efforts to cooperate with the Panel's counsel and other interveners to ensure the orderly conduct of the hearing and to put forth a vigorous and responsible intervention that contributed substantially to an understanding of the issues.

Views of the Panel

[95] ACFN is a Treaty 8 First Nation, and the Project lies within its traditional territory. Shell did not take issue with ACFN's entitlement to make a cost claim. ACFN was a participant in the hearing within the meaning of section 58(1)(c) of the *Rules*. The Panel finds that ACFN is entitled to an award of costs under the *Rules* and *Directive 031*.

[96] One point of contention between Shell and ACFN relates to awarding costs for periods during which ACFN's witnesses, experts, and translator were available at the hearing but not

presenting because Shell's witnesses, or other witnesses, were giving their evidence. ACFN argued that it should not be penalized by having to bear the costs it incurred because the hearing did not follow the schedule that had been agreed upon by the Panel, the Panel's counsel, and hearing participants and their counsel.

[97] In its opening remarks, the Panel told participants that the hearing needed to be a continuous process that was not interrupted by witnesses not being available to give evidence when it was their turn to do so. The Panel was entitled to expect that participants and their counsel would use best efforts to estimate the progress of the hearing to ensure timely transitions between witness panels, but it also recognized that the hearing process is dynamic and not always predictable. Although ACFN said that the hearing did not proceed in accordance with the agreed upon schedule, the Panel views the forecasting efforts by counsel as a prediction of the progress of the hearing and not as an agreement on scheduling. The hearing did have an agreed-upon order of participation; however, it was not a "scheduled" process in the sense that witnesses were designated specific times for giving evidence. Given that background, the challenge for hearing participants was to strike a balance between the need to have witnesses available at the appropriate time and the desire to not have them sit idle unnecessarily during the hearing while they waited for their opportunity to give evidence. The Panel's expectation is that parties will be reasonable in their decisions about arrangements they make for witnesses to arrive at and depart from the hearing. The Panel will address the matter further in its reasons relating to ACFN's expert witnesses, set out below.

Legal Counsel, Woodward & Company, Lawyers LLP

[98] ACFN was represented by Woodward & Company, Lawyers LLP. ACFN claimed legal fees in the amount of $225 754.75, disbursements and expenses of $28 173.73, and GST of $12 696.42, for a total claim for legal services of $266 624.90. This amount was reduced from ACFN's original claim in response to comments by Shell about certain legal fees and disbursements.

[99] Shell said that legal fees incurred between October 26 and October 29 to support ACFN's application to adjourn the hearing were not necessary for ACFN's intervention. The Panel notes that the adjournment application was made under the *Rules* and was a request that ACFN was entitled to make in the hearing. Although the application was not granted, the Panel gave it serious consideration and has decided that the costs relating to the adjournment application were reasonable and were incurred for purposes directly related to the hearing. The other cost claim items that relate to legal fees and that remain in dispute between Shell and ACFN are disbursement items.

[100] Considering ACFN's substantial intervention in the hearing, the length and complexity of the hearing, and the delegation of tasks between members of the Woodward & Company firm, the Panel has decided that the professional fees claimed by ACFN for legal services are reasonable and were directly and necessarily incurred for purposes relating to the hearing. The Panel awards ACFN legal fees of $225 754.75.

[101] Shell contested some of the disbursements claimed by ACFN's legal counsel. Shell said that costs for Mr. Murphy's travel to Fort Chipewyan on November 1, 2012, were not incurred for the purposes of ACFN's intervention. The Panel is satisfied with ACFN's explanation that Mr. Murphy was preparing community witnesses in Fort Chipewyan and therefore those travel

costs were directly related to the hearing. Shell also questioned the need for legal counsel's seven return flights between Fort McMurray and Victoria over the course of the hearing, plus once when counsel travelled to Grande Prairie and not Victoria. Considering ACFN's explanation for the Grande Prairie trip, the length of the hearing, and ACFN's use of counsel, the Panel agrees with ACFN that the travel costs claimed are reasonable and were directly related to ACFN counsel's participation in the hearing.

[102] Shell noted that accommodation costs claimed for legal counsel in Edmonton for the argument part of the hearing exceed the scale of costs. ACFN responded that counsel stayed in the same hotel in which argument took place and that was a reasonable decision. The Panel notes that the daily charge is only $30 above the scale of cost limit and believes in that case it was reasonable for counsel to stay in the hotel containing the hearing venue. The Panel has decided to award those accommodation costs as claimed.

[103] Photocopying and printing done by ACFN's counsel were charged by counsel in excess of the $0.10 per page rate stipulated in the scale of costs. ACFN referred to the higher rates for copying charges that were claimed by Shell in its bill of costs filed with the Court of Appeal of Alberta for its application for leave to appeal the Panel's constitutional law decision. In the Panel's opinion, costs that Shell may have recovered in that court action provide no guidance on the question of what costs should be awarded in this cost proceeding. The Panel has decided that ACFN's award for copying and printing costs that were invoiced by its legal counsel will be at the scale of costs rate of $0.10 per page.

[104] Except as otherwise indicated above, the Panel awards ACFN the amounts claimed for disbursements for its legal counsel in accordance with the revised cost claim filed by ACFN.

Community Witness Panel

[105] In the afternoon of November 7, 2013, ACFN presented a community witness panel comprising 13 individuals, including Elders Rene Bruno, Charlie Voyageur, and Pat Marcel. The hearing ended at 5:50 p.m. that day and the Elders were then excused. ACFN claimed an $800 attendance honorarium for each of the Elders. The other 10 community witnesses continued to give their evidence the following day, November 8, throughout the day. ACFN claimed an $800 honorarium for each of six of those witnesses, and a $1000 honorarium for Chief Allan Adam, who also gave argument on November 21 in Edmonton. ACFN did not claim honoraria for the remaining three community witnesses, namely Nicole Nicholls, Lisa King, and Doreen Somers, but instead it claimed professional fees for those participants. In addition, the IRC claimed a $2500 preparation honorarium and an administration fee (as a professional fee) of $55 344.93.

[106] *Directive 031* states that a $100 attendance honorarium is available for each half day that a witness is participating in a hearing. Honoraria are not paid for other times during the hearing unless the witness is actively assisting counsel or a similar representative, or is presenting argument. In addition to honoraria, witnesses are entitled to personal disbursements that are reasonable and that are directly and necessarily incurred to attend and participate in a hearing. The Panel does not consider that there is a reason in this case to deviate from the practice of awarding witness honoraria for community witnesses, and will award $100 for each half day that an ACFN witness participated in the hearing plus reasonable personal disbursements. Although the AER's normal practice is to award accommodation and meal costs at the rate of one day for each day or part of a day that a witness participated in a hearing, the Panel recognizes that Fort

McMurray is a relatively remote location for which travel options (arriving and departing) are limited—whether one travels by air or by vehicle to a major centre such as Edmonton or Calgary. As the AER has said, the scale of costs limit for accommodation costs may not fairly represent market rates for nightly accommodation in Fort McMurray. The Panel therefore believes it is reasonable in most cases to reimburse accommodation at the rate actually billed, for each day that a travelling witness participated in the hearing plus one other day—i.e., the day before or after his or her participation.

[107] Shell said that although *Directive 031* provides that large participant groups are generally restricted to claiming attendance honoraria for no more than six individuals, it could accept the AER granting attendance honoraria to all ten ACFN community witnesses. The Panel agrees with the suggestion and has decided to grant an attendance honorarium for each of ACFN's community witnesses.

Elder Rene Bruno

[108] Mr. Rene Bruno gave evidence on the afternoon of November 7, and the Panel awards a $100 honorarium for that attendance. The Panel also awards personal disbursements of $138.09 for airfare, $330.72 for accommodation (two nights), and $80 meal allowance (two days).

Elder Charlie Voyageur

[109] Mr. Voyageur gave evidence on the afternoon of November 7, and the Panel awards a $100 honorarium for that attendance. The Panel also awards personal disbursements of $138.09 for airfare, $330.72 for accommodation (two nights), $80 meal allowance (two days), and $35 for taxi fare.

Elder Pat Marcel

[110] Mr. Marcel gave evidence on the afternoon of November 7 and the Panel awards a $100 honorarium for that attendance. The Panel also awards personal disbursements of $138.09 for airfare, $330.72 for accommodation (two nights), $80 meal allowance (two days), and $35 for taxi fare.

Raymond Cardinal

[111] Mr. Cardinal gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. Mr. Cardinal did not claim travel or accommodation costs, and his evidence indicated that he resided in Fort McMurray. The Panel also awards $80 meal allowance (two days) for Mr. Cardinal.

Marvin L'Hommecourt

[112] Mr. L'Hommecourt gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. The Panel also awards personal disbursements of $620.88 for accommodation (three days), $120 meal allowance (three days), and $240.38 for vehicle mileage.

Leslie Laviolette

[113] Mr. Laviolette gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. Mr. Laviolette did not

claim long-distance travel expenses, although he said in evidence that he resided in Fort Chipewyan. The Panel also awards personal disbursements of $496.08 for accommodation (three days), $120 meal allowance (three days), and $33.25 for taxi fare.

Jonathan Bruno

[114] Mr. Jonathan Bruno gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. The Panel also awards personal disbursements of $138.09 for airfare, $496.08 for accommodation (three days), and $120 meal allowance (three days). Mr. Bruno claimed a late check-out fee for November 9, but he was not participating in the hearing that day, so the Panel will not award that amount.

Kim Marcel

[115] Mrs. Marcel gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. The Panel also awards personal disbursements of $138.09 for airfare, $496.08 for accommodation (three days), $120 meal allowance (three days), and $50 for taxi fare.

Beatrice Deranger

[116] Mrs. Beatrice Deranger gave evidence on the afternoon of November 7 and during the day on November 8. The Panel awards a $300 honorarium for those attendances. Mrs. Deranger did not claim travel or accommodation costs, and during her evidence she said that she resided in Fort McMurray. The Panel also awards $80 meal allowance (two days) for Mrs. Deranger.

Chief Allan Adam

[117] Chief Adam gave evidence on the afternoon of November 7 and during the day on November 8. He also gave argument on November 21 in Edmonton. The Panel observed that Chief Adam was present during many other days of the hearing and from time to time engaged in discussions with ACFN counsel. The Panel has decided to award a $1000 attendance honorarium for Chief Adam, as claimed by ACFN, which is equal to five days attendance giving evidence, giving argument, or instructing counsel. The Panel also awards personal disbursements of $138.09 for airfare and $200 meal allowance (five days), as claimed by ACFN. ACFN clarified that it was not claiming accommodation costs for Chief Adam.

Professional Fees Claimed for Nicole Nicholls and IRC Employees Lisa King and Doreen Somers

[118] ACFN claimed professional fees for each of Lisa King, Doreen Somers, and Nicole Nicholls. The Panel understands that Ms. King and Ms. Somers are employed by the IRC. At the time of the hearing Ms. Nicholls was an independent consultant hired by the IRC, however, she had been an IRC employee from 2008 until June, 2012. Shell asserts that none of these witnesses is an expert for the purposes of *Directive 031* and therefore the Panel should only award attendance honoraria for their participation. Shell cited *ECO 2007-001* in support of its position.

[119] Under the heading, "Costs for Experts and Consultants," *Directive 031* states the following:

> A participant may hire one or more experts or consultants to assist in preparing for and presenting at a hearing. Those experts may be registered professionals, may carry on a consulting business, or

> may be expert in a certain field due to practical experience or specialized training. An expert's assistance with a submission must be related to that person's expertise.
>
> It is important that participants finalize their fee arrangements with their experts and consultants before they agree to use their services. If the participant's lawyer considers that the assistance of an expert or consultant is necessary, the lawyer must consult with the participant before hiring such assistance and explain how the expert or consultant wants to be paid.
>
> Actual costs for services such as typing may qualify for a costs award if properly documented with a copy of the expert's account and sufficient detail to demonstrate that all items billed were necessary and related to the application or proceeding. (Emphasis added)

[120] *Directive 031* does not state that professional fees will not be awarded for experts or consultants who are also the cost claimant's employees or contract personnel; however, the references to hiring an expert in the excerpt above indicate that in deciding to award professional fees the AER must be satisfied that the expert or consultant's work is dedicated to the hearing, in the sense of being commissioned for the hearing and not intended for other purposes. In other words, the cost claimant would not have hired the expert to do the work "but for" the claimant's participation in the hearing.

[121] The difficulty when a hearing participant claims professional fees for its own employees or other personnel is apparent when one considers that an employee is constantly engaged in the entire spectrum of the business of his or her employer and only some of that work may relate to a matter that is set for hearing. On the other hand, hired experts and consultants appearing before the AER are engaged periodically to provide services in relation to a particular hearing and generally must provide a comprehensive accounting for the services rendered for that hearing. No such accounting is due from an employee to an employer. The AER has therefore, historically, not awarded professional fees for services provided by a participant's own personnel in the normal course of their duties. The Panel believes that the question in this costs proceeding, whether the IRC's employees or Ms. Nicholls's participation should be awarded as professional fees, depends on whether the expert work for which the fees are claimed was dedicated to the ACFN's intervention in the hearing (i.e., it meets the "but for" test) or was done as part of the witness's overall responsibilities to the IRC.

[122] Lisa King said that she is an environmental specialist with an environmental sciences degree and is the director of the IRC. Her will-say statement indicated that she has a bachelor of science degree in environmental and conservation sciences from the University of Alberta. She said that she has worked for the IRC for nine years. In her evidence she described the work of the IRC, which includes facilitating consultation with industry and government, reviewing applications and government proposals, and stewarding numerous projects for the ACFN. She also described her own traditional land use and her personal experience with oil sands development in the area.

[123] Doreen Somers said she was originally from Ontario and that she held Treaty 9 rights. She testified about the importance of treaty rights for Aboriginal peoples, the shortcomings of existing consultation practices, the need for capacity building, problems ACFN members have had with *Public Lands Act* access requirements, and she commented on the traditional resource use management plan (TRUMP) proposal that was described by Nicole Nicholls.

[124] Nicole Nicholls was a consultant to the IRC at the time of the hearing and had previously worked for the IRC. She said that when she was an IRC employee she was one of two main IRC contacts for the Project (the other being Lisa King) and had been involved in consultations concerning the Lower Athabasca Regional Plan (LARP) and the Phase 2 Water Management Framework. She described the TRUMP proposal, and she identified a number of flaws in the consultation processes used in the region.

[125] The Panel notes that although Ms. King holds a bachelor's degree in environmental and conservation sciences, ACFN's expert witnesses filed reports and gave expert evidence on the subject matters in which Ms. King has her university degree. ACFN's written submission included several reports that were addressed by the ACFN's expert witness panel, and none of those expert reports were authored by or addressed in detail by Ms. King, Ms. Somers, or Ms. Nicholls.

[126] The Panel acknowledges that some of the work done by Ms. King and Ms. Somers may have been specific to the ACFN's intervention in the hearing, however, it is still work that was undertaken in the context of their employment or engagement with the IRC and not as a discrete and dedicated task. For example, the consultation issues they addressed in their evidence may arise for any development that is proposed within the ACFN's traditional lands and the issues are not focused on or limited to the Project.

[127] The Panel is not satisfied that the work done by Ms. King and Ms. Somers within their respective areas of expertise was sufficiently dedicated to the ACFN's intervention in the hearing to attract an award of professional fees. In other words, the "but for" test is not met in relation to this part of the ACFN's claim for professional fees. The Panel has therefore concluded that Ms. King and Ms. Somers participated in the hearing as part of ACFN's community witness panel and not as expert witnesses. The Panel wishes to be clear that this finding is in no way a measure of their contributions to ACFN's intervention or of their respective personal abilities and qualifications. It is simply a finding that their participation as witnesses in the hearing did not fall within the category of "experts and consultants" under *Directive 031*, for which the AER may consider awarding professional or consulting fees. As a result, the Panel will award each of them an attendance honorarium plus reasonable personal disbursements.

[128] Ms. King gave evidence on the afternoon of November 7 and during the day on November 8. The Panel will award an honorarium for those attendances equal to three half days. In addition, as the IRC director and one of the two IRC representatives responsible for ACFN's intervention, the Panel accepts that Ms. King also assisted ACFN's counsel and other witnesses (community and expert) during the hearing. Shell suggested a total honorarium of $900, representing three half days that Ms. King was empanelled to give evidence, one full day assisting counsel during cross-examination, and two full days assisting counsel during argument. The Panel notes that ACFN questioned Shell's witnesses for parts of three hearing days and Canada's witnesses for part of another day. The Panel believes it is appropriate to grant an award that reflects two full days that Ms. King assisted counsel in cross-examination plus two full days of argument. The Panel therefore awards an attendance honorarium of $1100 (eleven half days) for Ms. King's participation in the hearing. Ms. King did not claim travel or accommodation expenses; however, she did claim taxi fares and airport parking charges that were supported by receipts. The Panel awards personal expenses of $83.60 for taxi fare and $45.60 for airport parking, as claimed by ACFN. The Panel also awards $320 meal allowance (eight days). Ms.

King claimed other expenses on behalf of the IRC, and the Panel will address those costs in the section below that discusses the IRC's claim.

[129] Ms. Somers gave evidence on the afternoon of November 7 and during the day on November 8. Shell indicated that Ms. Somers also appeared to assist counsel in the same manner that Ms. King assisted. The Panel agrees with that observation and as a result has decided to award an honorarium of $1100 for Ms. Somers's participation in the hearing (11 half days). The Panel also awards personal disbursements of $627.25 for airfare, $320 meal allowance (8 days) and $147.60 for taxi fares. Ms. Somers also claimed fuel expenses on behalf of the IRC, and the Panel will address that item in the section below that discusses the IRC's claim.

[130] ACFN claim professional fees of $3625 for Nicole L Nicholls Consulting, for 36 hours of hearing preparation, 14 hours of hearing attendance on the day Ms. Nicholls gave her evidence and the preceding day, and 8 hours of travel. The Panel considers that Ms. Nicholls's participation in the hearing can be distinguished from that of Ms. King and Ms. Somers due to the unique circumstances of her involvement with the proceeding. If, during the proceeding, Ms. Nicholls had been an ACFN employee or consultant working on the matters she addressed in her evidence, the Panel would have awarded her participation with an attendance honorarium in the same way it has awarded Ms. King and Ms. Somers's participation. The Panel notes, however, that Ms. Nicholls had not been an employee of the IRC for several months prior to the hearing, rather, she was an independent consultant engaged for the specific purpose of sharing with the Panel the information and expertise that she acquired while working for the IRC. She is the only person who could have provided this evidence; no other person is suited to give evidence about what Ms. Nicholls learned while working for the IRC over a period of four years. The Panel also notes that the invoice from Nicole L Nicholls Consulting indicates that the services for which the fees are claimed are hearing preparation in October, 2012 and attendances at the November hearing. None of the fees that are claimed are intended to compensate Ms. Nicholls for work she did when she was an IRC employee. The Panel considers that Ms. Nicholls was a consultant engaged for the specific task of giving evidence about the work she did when she was an IRC employee, and that the fees claimed for Nicole L Nicholls Consulting are reasonable, and were directly and necessarily incurred in relation to the hearing. The Panel has decided to award fees of $3625 for Ms. Nicholls's participation in the hearing, as claimed by ACFN in form E4.

[131] ACFN also claimed personal disbursements for Nicole Nicholls of $1736.37, comprised of accommodation, meals, and personal vehicle mileage. Ms. Nicholls claimed accommodation expenses of $652.62 for the period October 25 to 27, 2012, for hearing preparation in Fort McMurray. The hearing was not sitting during those days and therefore those expenses are not eligible for an award. She also claimed $883.75 for vehicle mileage for two return trips from St. Lina, Alberta to Fort McMurray. Only one of those trips was related to her attendance as a witness in the hearing, so the Panel awards $442 for mileage costs. Ms. Nicholls gave evidence on the afternoon of November 7 and during the day on November 8. ACFN claimed $200 for meals for Ms. Nicholls but *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. The Panel has previously decided that witnesses are also eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $120.00 for meals for Ms. Nicholls.

IRC

[132] The IRC claimed professional fees of $29 429, which the Panel understands is the total of professional fees charged by Ms. King and Ms. Somers. The Panel has already stated its reasons why it is not prepared to award those professional fees.

[133] The ACFN also claimed a 10 per cent administration fee of $55 344.93. ACFN argued that the value of time and resources dedicated by the IRC to the ACFN's intervention in the hearing far exceeds what ACFN would recover through this cost proceeding and other participant funding programs if ACFN is not awarded an administration fee. The scale of costs states that although some claims for administrative support services may be considered, the AER will not recognize a claim for overhead that is based on a percentage of the fees or disbursements claimed. The Panel restates that cost awards are intended to reimburse some but not all of the costs that are directly and necessarily incurred by a claimant to participate in a hearing. The AER has consistently refused to award administrative fees or similar charges that are general in nature and that are not directly and necessarily incurred in relation to participation in a hearing. The Panel has decided not to award the administration fee claimed by ACFN.

[134] The IRC claimed a preparation honorarium of $2500, which is the maximum amount permitted under the scale of costs. Shell did not take issue with this part of the claim. The Panel believes it is appropriate to award a $2500 preparation honorarium for the IRC's work organizing and coordinating ACFN's intervention before the start of the hearing. The AER acknowledges that a preparation honorarium is not normally awarded to a party when its counsel is responsible for coordinating an intervention; however, in this case it is apparent that the IRC was directing the ACFN's participation in the proceeding from the time the Project application was filed until approximately the time the notice of hearing was issued.

[135] On its revised form E4, the IRC claimed disbursements costs of $3680.92 (after deducting personal disbursements attributable to Nicole Nicholls, Lisa King, Doreen Somers, and translator Allan Adam). One item claimed is "McMurray Aviation Charter, 5 Nov.," in the amount of $1829.56, for which the (apparent) corresponding receipt names four individuals, only one of whom appeared at the hearing for ACFN. The Panel is not prepared to award this cost item, but it is prepared to consider a further explanation from ACFN about the charge.

[136] The IRC claimed $57.31 for fuel for the IRC vehicle that was used to transport witnesses to and from the Fort McMurray airport. *Directive 031* allows a hearing participant to recover mileage charges if a personal vehicle is used to travel to or from the hearing venue. An award for mileage is considered to include reimbursement for fuel and other vehicle operating costs. To qualify for mileage costs, the vehicle must be used to travel between urban centres a distance of at least 50 kilometres. A cost panel will generally not consider a separate award for fuel charges because it has no ability to confirm that the fuel that was purchased was entirely consumed while the vehicle was being used for purposes directly related to the hearing. This part of the cost claim is not awarded.

[137] Translator Allan Adam provided a $4860.25 invoice to the IRC for translation services. The amount of $750 is shown on that invoice as a charge for "equipment rental costs includes set up and tear down," and that amount corresponds with a disbursement cost ("equipment rental") that appears on form E4 under translator Allan Adam. There is no receipt to indicate that translator Allan Adam himself rented equipment in order to provide the services, so the Panel

considers that the rental charge claimed as an IRC disbursement is the same charge that appears on the invoice from Allan Adam to the IRC and is not a separate disbursement. The Adam invoice also includes a charge for mileage that is the same amount claimed as mileage for translator Allan Adam on form E4. The Panel has therefore decided to disregard all disbursements claimed by the IRC on form E4 under translator Allan Adam and will instead consider those to be personal disbursements associated with the professional fees claimed for translator Allan Adam's services as indicated on his invoice, together with his accommodation expenses of $744.64.

[138] The Panel has decided to award the other amounts claimed by the IRC as disbursements as follows: $895 for meeting rooms and $149.22 for office supplies.

Translator Allan Adam

[139] Translation services were obtained by ACFN from Allan Adam (who is not Chief Adam) in relation to the evidence given by its community witness panel, which gave evidence for one and one-half days. The Panel finds that the following charges were directly and necessarily incurred for the service: $1035.25 for return mileage from La Ronge, Saskatchewan; $750 equipment rental; and $1125 for translation services. Given that the translation equipment had to be transported by vehicle a substantial distance from its base in La Ronge, and given the uncertainty over the exact date the ACFN witnesses would be presenting, the Panel is prepared to award accommodation and meal costs in the amounts claimed of $744.64 and $200, respectively. With respect to the invoiced amounts for waiting time on November 5, 6, and 7, and travel time back to La Ronge, the Panel is prepared to award an amount equal to 3.5 days at $375/day (half the rate charged for translation services), for the further amount of $1312.50.

Expert Witnesses

[140] In its comments on ACFN's cost claim, Shell said that several of ACFN's expert witnesses did not provide helpful information or charged excessive amounts for their work, or Shell gave other reasons why the costs claimed should not be awarded. As a general comment, the Panel considers that the Panel's obligations under the Panel Agreement provided for a broad scope of inquiry, including the responsibility to receive information about Aboriginal interests and to consider the cumulative effects of the Project. The Panel's mandate was not restricted to assessing project-specific impacts or interests that were confined to the proposed Project area. The Panel had regard for that mandate and for the direction from the Court of Appeal of Alberta that "all interventions are 'successful' when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view," when it assessed the cost claims for ACFN's expert witnesses.

Firelight Group Witnesses

[141] ACFN claimed professional fees of $28 485 and disbursements and expenses of $6297.76 for the participation of the Firelight Group's witnesses, Craig Candler and Alastair McDonald. Dr. Candler has a Ph.D. in his area of expertise and has been recognized as a leading Canadian anthropologist. He provided expert reports and gave evidence concerning impacts on traditional land uses, resources, and culture. Dr. Candler invoiced ACFN for 47 hours of preparation and for 43 hours for attending the hearing. Dr. Candler gave evidence during the evening of November 8 and in the morning of November 9. The billing report that was provided for him indicates a total of 16 hours hearing attendance on those two days, so the Panel has assumed that 27 hours

hearing attendance must represent time before November 8 that he was waiting in Fort McMurray to give evidence in the hearing. He also invoiced for 17 hours travel time at half his hourly rate.

[142] Dr. Candler's evidence and reports addressed the potential for impacts on Aboriginal persons and on the use of lands and resources by Aboriginal persons. These are subject matters the Panel was required to consider when it conducted its assessment. Dr. Candler's participation helped the Panel in those areas of its mandate. He provided an integrated knowledge and use report for the Project (combined with the Pierre River Mine project) that was substantial and that indicates to the Panel that the 47 hours claimed for preparation time is appropriate.

[143] Dr. Candler's claim for hearing attendance, specifically the 27 hours Dr. Candler appears to have been in Fort McMurray and waiting to be called as a witness, poses a dilemma for the Panel. As indicated at the outset of this part of this cost decision, the Panel was very clear that the hearing had to be a continuous process that was not stopped due to witnesses not being available. Participants therefore needed to make responsible decisions about scheduling their witnesses for arrival at and departure from Fort McMurray. As a result, the Panel cannot fault ACFN for its decision to bring Dr. Candler and its other expert witnesses to Fort McMurray on November 5, 2012. On the other hand, the Panel has difficulty imposing the entire burden of ACFN's decision on Shell, which would be the case if the Panel awarded hearing attendance costs as claimed.

[144] The Panel believes that expert witnesses, certainly professionals who regularly or even occasionally appear for parties in regulatory hearings, understand that the hearing process is unpredictable and subject to unforeseeable interruptions and delays. The Panel expects that witnesses who are waiting for a whole day or more to give their evidence in a hearing can, to some extent, use that time productively to accomplish tasks that are not related to the hearing. In this case it must have been evident to ACFN by the close of the hearing on Friday, November 2, that its expert witnesses would not likely be giving evidence on Monday, November 5. Bringing them to Fort McMurray that day with instructions that they be prepared to do other work while waiting to give their evidence would have been prudent.

[145] In assessing "waiting time," the Panel has decided it will consider that a party's expert witness or consultant is participating in the hearing (for cost award purposes) for the days that he or she is empanelled to give evidence in the hearing plus one other day. This recognizes the need for a party or its counsel to prepare a witness after the witness arrives in Fort McMurray and/or to confer with a witness after he or she is discharged by the Panel. To balance the sharing of waiting time costs that unfortunately result from having an unpredictable hearing schedule, the Panel has decided to award "waiting time," when an expert was present in Fort McMurray, at the same rate as travel time—i.e., at half the expert's hourly rate. This standard will only be applied to whole days of "waiting time," meaning that it will not apply to any part of a day when an expert was empanelled as a witness in the hearing. The intent of this is not to penalize experts who make themselves available for AER hearings; rather, it is to impose an equitable sharing between the applicant and other participants of the risk that expert witnesses will be waiting for long periods to give evidence in a hearing.

[146] Given the foregoing, the Panel awards professional fees for Dr. Candler as follows: 47 hours of preparation plus 24 hours of hearing attendance at $210 per hour; and 19 hours waiting time plus 17 hours travel time at $105 per hour.

[147] Mr. MacDonald considered the socio-economic and cultural impacts of the Project. He addressed the "gap analysis" that was performed by the Firelight Group and the supplemental social, economic, and cultural effects submission that was filed on behalf of ACFN. This information helped the Panel fulfill its mandate. Mr. MacDonald invoiced ACFN for 6.5 hours of preparation and 32 hours for attending the hearing. He gave evidence in the morning of November 9. The billing report that was provided for him indicates a total of 6 hours hearing attendance on that day, so the Panel has assumed that 26 hours hearing attendance must represent time before November 9 that he was in Fort McMurray but not empanelled to give evidence in the hearing. He also invoiced for 8 hours travel time.

[148] ACFN's claim for Mr. McDonald's participation is a relatively modest amount, particularly if one subtracts the attendance fees for the period when he was waiting to give his evidence. The Panel has decided to award fees for Mr. McDonald's participation as follows: 6.5 hours of preparation plus 14 hours of hearing attendance at $180 per hour; and 18 hours waiting time plus 8 hours travel time at $90 per hour.

[149] ACFN claimed 15 hours of "miscellaneous administrative support" for the Firelight Group at the rate of $45 per hour. In its response submission ACFN indicated that administrative staff supported the filing of receipts, invoices, and paperwork and provided other logistical and administrative support necessary to produce reports and PowerPoints. *Directive 031* states that fees may be awarded for the costs of secretarial work or clerical services that are provided in connection with professional services. Discretion to award such fees is normally exercised where, in order to provide services in a cost-effective way, there is a delegation of duties that the professional would otherwise be required to perform. The AER normally does not award administrative support fees for general administrative services because that kind of support is considered to be subsumed in a professional's fees. In this case, the administrative support appears to be of the general services type rather than a delegated task. As a result, the Panel has decided not to award the administrative support fees claimed by ACFN for the Firelight Group.

Firelight Group Disbursements

[150] ACFN claimed personal disbursements of $3270.10 for Dr. Candler and $3027.66 for Mr. MacDonald. These expenses include airfare (including change fees and fare differential fees for both witnesses), accommodation, meals per diem, taxi fares, and parking charges. The Panel has reviewed the receipts provided for these and, except as stated in the following paragraphs, has decided that the charges were incurred for the purposes of the hearing, are reasonable, and are within the scale of costs (except for accommodation costs, for which the charges are reasonable for Fort McMurray accommodation).

[151] Under the cost heading "Additional Travel Expenses – Document Transport, Change Fees, etc." ACFN claimed $150 for Dr. Candler and $90 for Mr. MacDonald. No receipts appear to have been provided for these charges and there is no better explanation that would help the Panel understand what the charges relate to and how they were incurred for the purposes of the hearing. As a result, the Panel does not award the costs of either of those expense items.

[152] ACFN claimed airfare of $2247.46 for Dr. Candler. Dr. Candler travelled from Victoria to Fort McMurray on November 5, with a return flight booked for November 7. The return fare was $1308.98. He then incurred a change fee of $61 that appears to relate to a seat selection on the two return flights he had booked (Fort McMurray to Vancouver, Vancouver to Victoria). He subsequently changed his return destination from Victoria to Montreal, incurring change fees and a fare differential charge of $1191.68. The Panel has decided that it will not award the seat selection fee for the return flight from Fort McMurray to Victoria that Dr. Candler did not use. The Panel also does not believe that the entire cost for Dr. Candler to change his return flight destination to Montreal should be borne by Shell, and it will not award that part of the claim. The Panel noted that airfare paid by ACFN's counsel for flights from Fort McMurray to Victoria ranged between $550 and $814, with the prevailing rate being about $700. The Panel has decided that it is reasonable to award ACFN $700 for a "notional" airfare for Dr. Candler to return to Victoria from Fort McMurray.

[153] ACFN claimed airfare of $1645.37 for Mr. MacDonald. It appears that Mr. MacDonald travelled from Edmonton to Fort McMurray on November 5, with a return flight booked for November 7 (the arrangements being the same as Dr. Candler originally made). The fare for that return trip was $707.25. The return flight was not used, presumably because he had not yet given his evidence, and it appears that the part of the fare relating to that flight was forfeited. Mr. MacDonald booked a new flight from Fort McMurray to Edmonton, leaving at 7:55 pm on November 9, at a fare of $581.12. Given that the progress of the hearing proved to be unpredictable, the Panel finds that the airfares were reasonably and necessarily incurred and has decided to award them as claimed. Mr. MacDonald also changed the departure time for his November 9 flight, from 7:55 pm to 2:05 pm, presumably because the hearing ended early that day. The change fees and fare differential for that change totalled $357, which the Panel noted is less than what Mr. MacDonald may have been entitled to charge ACFN for the seven hours of travel time that he would otherwise have incurred waiting for the later flight. The Panel has decided that the change charges were reasonably incurred and will also award those amounts.

[154] The Panel awards the personal disbursements for the Firelight Group witnesses in the amounts claimed by ACFN in form E4, less $792.68 as indicated above, with the result that the award is $5505.08.

MSES Witnesses

[155] ACFN claimed professional fees of $88 291.50, and disbursements and expenses of $7381.34, for the participation of the MSES witnesses Petr Komers, Sarah Hechtenthal, and Sheri Gutsell. The MSES witnesses gave their evidence on November 9, when the hearing commenced at 8:30 a.m. and ended at 2:40 p.m. The Panel notes that ACFN claimed fees for 44 hours attending the hearing for each of the MSES witnesses. Similar to its claim for the Firelight Group witnesses, ACFN claimed hearing attendance fees for the time the MSES witnesses were present in Fort McMurray and waiting to give their evidence. The Panel has decided that for each of the MSES witnesses it will consider awarding 16 hours for hearing attendance and 28 hours of waiting time at travel time rates (i.e., at one-half the expert's hearing rate).

[156] Dr. Komers has a Ph.D. in Wildlife Ecology and is an adjunct professor at the University of Calgary. He provided expert reports and gave evidence on Shell's assessment of the land disturbance that would result from the Project, and on the effect of Project-related land disturbance on terrestrial resources and traditional land uses. ACFN claimed professional fees for

Dr. Komers of $18 620.00 for 98 hours of hearing preparation. AFCN filed an affidavit in this proceeding to respond to the comments about Dr. Komers's work that were made by Shell in its costs submission. The disagreement between ACFN and Shell appears to be over the quality and reliability of Dr. Komers's expert evidence, including the methodologies he used and the conclusions he stated in his written reports and oral evidence.

[157] While it may not have agreed with all of the details of Dr. Komers's evidence, the Panel considered Dr. Komers's methodologies to be sound, that the assumptions used in and the limitations of the model he used were adequately explained, and that Dr. Komers's participation in the hearing helped the Panel's understanding of cumulative effects. The Panel has decided to award fees for Dr. Komers's participation as follows: 98 hours of preparation at the rate claimed of $190 per hour; 16 hours of hearing attendance at the rate claimed of $270 per hour; and 28 hours waiting plus 16 hours travel at $135 per hour.

[158] Ms. Hechtenthal has a master's of science in avian ecology from the University of Calgary and has work experience in wildlife rescue and response. She provided expert reports and evidence on the potential effects of the Project on birds and bird mortality, including both project effects and cumulative effects, and on the effectiveness of deterrent systems. ACFN claimed professional fees for Ms. Hechtenthal of $17 930 for 163 hours of hearing preparation. For this part of ACFN's claim, the Panel agrees with Shell's comment that the preparation hours are excessive and the Panel has decided that it will consider awarding fees for 100 hours of preparation by Ms. Hechtenthal.

[159] Ms. Hechtenthal's participation helped the Panel's understanding of the potential effects of the Project on birds, including migratory birds as specifically required under the Panel Agreement. The Panel has decided to award fees for Ms. Hechtenthal's participation as follows: 100 hours of preparation at the rate claimed of $110 per hour; 16 hours of hearing attendance at the rate claimed of $160 per hour; and 28 hours waiting plus 16 hours travel at $80 per hour.

[160] Dr. Gutsell has a Ph.D. in plant population and community ecology with a focus on forest dynamics and fire ecology. She has work experience conducting environmental impact assessments and developing closure and reclamation plans. She provided evidence about the effectiveness of the terrestrial mitigation measures proposed by Shell, in particular Shell's strategy for reclaiming upland vegetation. ACFN claimed professional fees for Dr. Gutsell of $11 200 for 70 hours of hearing preparation.

[161] Dr. Gutsell's evidence helped the Panel's understanding of the likelihood that Shell's proposed mitigation would effectively reclaim upland vegetation in the closure landscape. The Panel has decided to award fees for Dr. Gutsell's participation as follows: 70 hours of preparation at the rate claimed of $160 per hour; 16 hours of hearing attendance at the rate claimed of $230 per hour; and 28 hours waiting plus 16 hours travel at $115 per hour.

MSES Witnesses' Disbursements

[162] ACFN claimed personal disbursements of $2605.40 for Dr. Komers, $2639.29 for Ms. Hechtenthal, and $2311.98 for Dr. Gutsell. This includes claims for airfare (including one $50 change fee for Ms. Hechtenthal), accommodation, and taxi fares for the MSES witnesses. The Panel notes that receipts were provided for these charges and it finds that the costs were directly and necessarily incurred by the MSES witnesses to participate in the hearing. The Panel awards

the personal disbursements claimed by ACFN for the MSES witnesses for airfare, accommodation, and taxi fares in the amounts claimed by ACFN in form E4. The MSES witnesses also each claimed a meal per diem of $200. For the reasons previously given in this costs order, the Panel awards each witness a meal per diem of $80, representing a $40 per diem for the day the witness was empanelled to give evidence and for one more day.

[163] Ms. Hechtenthal also claimed $727.10 for rental car charges and $50 for "additional travel expenses—document transport, change fees, etc." The Panel has reviewed the receipt provided for the rental car and has decided that the costs were incurred for the purposes of the hearing and are reasonable as being within the range of charges for rental cars in Fort McMurray. The Panel awards the rental car charges as claimed by ACFN. No receipt was provided for the $50 additional travel expenses and no explanation was offered to help the Panel understand what the charges relate to and how they were incurred for the purposes of the hearing. As a result, the Panel does not award the $50 claimed for additional travel expenses.

Claims for Other MSES Charges

[164] ACFN also claimed professional fees for Brian Kopach and Nina Modeland, who were not witnesses or participants in the hearing. ACFN explained that these individuals provided administrative support to MSES and ACFN said it was claiming costs for their services at the $45 per hour rate that is allowed under *Directive 031*. The Panel has decided that this part of the claim relates to true administrative support services that are internal to MSES and not to delegated tasks that may be considered for an award (as previously discussed in this costs order). The Panel does not award any part of the ACFN's cost claim for the services provided by Brian Kopach and Nina Modeland.

[165] ACFN claimed $1800 for services provided by Zoran Stanojevic of MSES. ACFN explained that Mr. Stanojevic is a GIS analyst with 13 years' experience and that he developed the algorithms used for the mapping and area calculations that were included in MSES's migratory bird hazard report. ACFN said that Mr. Stanojevic's technical expertise was necessary to produce the report and it filed a copy of his curriculum vitae as part of its hearing submission. The Panel accepts the explanation given by ACFN and notes that the amount claimed is modest. The Panel considers that the GIS services provided by Mr. Stanojevic represent a specific task that was delegated to him by the MSES witnesses because he was qualified to perform the work. The Panel has decided to award the amount of $1800 claimed by ACFN for Mr. Stanojevic's services.

Other ACFN Experts

[166] Paul Jones has a Ph.D. in biochemistry and a prior degree in zoology with a specialization in fish toxicology. He is an associate professor at the University of Saskatchewan School of Environment and Sustainability. Dr. Jones gave evidence about a study he was working on to assess the health status of fish on the Slave and Athabasca Rivers. ACFN claimed professional fees for Dr. Jones of $2450.00, for 15 hours of hearing attendance on the day he gave his evidence and the preceding day, and 19 hours of travel.

[167] Dr. Jones addressed the fish sampling procedures used in the study, the analysis that was done on fish, and the preliminary results from the study. He stated that the study provided a brief snapshot in time of the condition of fish down the length of the river systems. The Panel notes that Dr. Jones's evidence was not specific to the Project or oils sands development generally: it

was about fish in two Alberta river systems. Dr. Jones indicated that the study was a work in progress and stated that it had generated only a few preliminary conclusions. Dr. Jones's participation provided limited assistance to the Panel, however, the Panel notes that the fees claim is for a relatively small amount. The Panel has decided to award one-half the fees claimed by ACFN for Dr. Jones's participation in the hearing, having regard for the limited relevance and helpfulness of his evidence.

[168] ACFN claimed personal disbursements of $1993.50 for Dr. Jones, comprised of airfare, accommodation, meals, taxi fares, and car rental. The Panel's information is that Dr. Jones flew from Saskatoon to Fort McMurray on November 6, gave his evidence on November 8, and then rented a car on November 8 to drive back to Saskatoon. On his return trip he stopped in Vegreville in the evening of November 8, and ACFN claimed accommodation costs for that stay. ACFN also claimed the costs to refuel the rental car in Lloydminster and Saskatoon.

[169] Although Dr. Jones provided receipts for the meals he claimed, *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. Previously in this costs order the Panel decided that witnesses would also be eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $80.00 for meals for Dr. Jones, and not the $162.91 that ACFN claimed.

[170] The Panel notes that receipts were provided for the remaining personal disbursements claimed by ACFN for Dr. Jones. The Panel finds that those costs were directly and necessarily incurred by Dr. Jones to participate in the hearing. The Panel is satisfied that the amount of fuel Dr. Jones purchased for the rental car in Lloydminster was wholly consumed on his trip between Fort McMurray and Saskatoon, and that Dr. Jones was required by the rental car agreement to return the rental car with the fuel tank full. This distinguishes the fuel charges claimed in this instance from other such claims that were not awarded by the Panel. Except for the meal claim addressed above, the Panel awards the personal disbursements claimed by ACFN for Dr. Jones in the amounts claimed by ACFN in form E4.

[171] Martin Carver has a Ph.D. in resource management science and a master's degree in engineering. He stated that the focus of his career has been assessing the effects of land use activities on aquatic ecosystems, particularly in the context of climate change. ACFN claimed professional fees for Dr. Carver of $39 375, for 175 hours of preparation, 42 hours of hearing attendance, and 16 hours of travel.

[172] Dr. Carver addressed water quantity issues, including the potential for cumulative or project effects on river flows, and the effects of climate change and the implementation of the Water Management Framework on lower Athabasca River flows. Shell stated that Dr. Carver's costs should be reduced substantially because his report did not contain original science. The Panel disagrees and considers that an expert witness does not need to complete original research in order for his or her evidence to be helpful to a hearing panel.

[173] The Panel finds that Dr. Carver's analysis and critique of the methods used by Shell in its hydrological assessment assisted the Panel's understanding of the limitations and uncertainties associated with Shell's assessment. The Panel has reviewed the detailed timesheet provided by Aqua Environmental Associates and considers that the 175 preparation hours claimed for this witness are excessive. The Panel has decided that it will award fees for 100 hours of preparation

by Dr. Carver. Dr. Carver gave his evidence in the evening of November 8, although the ACFN claimed fees for 42 hours that Dr. Carver attended the hearing. The Panel has decided to award ACFN for 16 hours hearing attendance and 26 hours of waiting time at travel time rates (i.e., at one-half Dr. Carver's hearing rate). The total fees awarded to ACFN for Dr. Carver's participation are 116 hours at $175 per hour for hearing preparation and attendance, 26 hours waiting time at $87.50 per hour, and 16 hours travel time at $87.50 per hour.

[174] ACFN claimed personal disbursements of $2574.14 for Dr. Carver, comprised of airfare, accommodation, meals, mileage, taxi fares, parking, administrative support fees (internet searches/retrievals), and a flight change fee of $50. The Panel's information is that Dr. Carver drove from Nelson, B.C. to the Cranbrook airport for flights to Calgary and then Fort McMurray. He returned to Nelson on November 9, flying and driving in the reverse sequence.

[175] ACFN claimed $200 for meals for Dr. Carver but *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. The Panel has previously decided that witnesses are also eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $80.00 for meals for Dr. Carver. ACFN also claimed a $50 internet search and retrieval fee, for which a receipt was provided. The Panel has no other information about this service and would normally consider that such charges are support services that are subsumed within the fees charged by an expert. The Panel will not award ACFN this $50 fee.

[176] The Panel notes that receipts were provided for the other personal disbursements claimed by ACFN for Dr. Carver. The Panel finds that these costs were directly and necessarily incurred by Dr. Carver to participate in the hearing. The Panel therefore awards the personal disbursements claimed by ACFN for Dr. Carver in the amount claimed in form E4, less the part of the meal claim that exceeds $80 and the $50 internet search and retrieval fee discussed above.

[177] Bruce Maclean provided a presentation entitled "ACFN Community Based Monitoring, Final Report on the 2011 Water Quantity Monitoring." He did not give direct evidence in the hearing but he was presented as a witness to answer questions. He also provided written undertaking responses to questions from the Panel secretariat. ACFN claimed professional fees for Mr. Maclean of $3607.50, for 21 hours of preparation, 29 hours of hearing attendance, and 11 hours of travel. ACFN stated that the rate claimed for Mr. Maclean—$65 per hour—is 41% of the maximum rate that *Directive 031* permits ACFN to claim for Mr. Maclean's services.

[178] The Panel considers that Mr. Maclean's participation was helpful. His evidence on water levels in the Athabasca River and their impact on transportation and TLU activities provided information on a matter of importance to ACFN and other Aboriginal groups. The Panel does not agree with Shell that Mr. Maclean's fees should be significantly reduced because of the limited time he presented in the hearing, and the Panel notes that this was done to accommodate the hearing schedule. The Panel had regard for Mr. Maclean's evidence, and there was an opportunity for Shell to cross-examination Mr. Maclean or request undertakings to provide responses.

[179] The Panel has reviewed the invoices provided by Maclean Environmental Consulting and notes that six of the hours claimed for hearing attendance actually relate to further preparations by Mr. Maclean before he travelled to the hearing, and eight hours were for preparing

undertaking responses after Mr. Maclean left the hearing. Given that, the Panel has decided that it will award fees for 27 hours of preparation, and 23 hours for attendance at the hearing or preparing the undertaking response, at the rate claimed of $65 per hour. The Panel will also award fees for 11 hours of travel time at the rate claimed of $32.50 hour.

[180] ACFN claimed personal disbursements of $1501.86 for Mr. Maclean, comprised of airfare, accommodation, meals, and taxi fares. ACFN claimed $200 for meals for Mr. Maclean but *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. The Panel has previously decided that witnesses are also eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $80.00 for meals for Mr. Maclean and not $200 that was claimed. The Panel notes that receipts were provided for the other personal disbursements claimed by ACFN for Mr. Maclean. The Panel finds that these costs were directly and necessarily incurred by Mr. Maclean to participate in the hearing. The Panel therefore awards the personal disbursements claimed by ACFN for Mr. Maclean in the amount claimed in form E4, less the part of the meal claim that exceeds $80.

[181] Patricia Larcombe provided the report "Narrative of Encroachment Experienced by the Athabasca Chipewyan First Nation" and participated as a witness in the hearing for only a few minutes in the evening of November 8. ACFN claimed professional fees for Dr. Larcombe of $14 690, for 89 hours of preparation and 24 hours of hearing attendance.

[182] Shell said that the fees awarded for Dr. Larcombe should be reduced substantially because she only made a cursory appearance in the hearing. The Panel does not agree with that assertion. Dr. Larcombe appeared willing to provide more extensive oral evidence on her report but scheduling difficulties prevented that. She agreed to answer written questions through an arrangement that was approved by the Panel and which the Panel considers to have been reasonable in the circumstances. In addition, the Panel believes that Dr. Larcombe's report helped the Panel to understand the cumulative effects of development on ACFN's land uses and rights. It also helped the Panel assess the Project in the context of regional development and land use. Dr. Larcombe's report was particularly helpful in light of the limitations in Shell's own cultural assessment that the Panel identified.

[183] The Panel has reviewed the invoices provided by Symbion Consultants and notes that Ms. Larcombe charged for eight hours attending the hearing on each of November 6, 7 and 8. The Panel will award ACFN fees for Dr. Larcombe for eight hours of waiting time on November 6, at $65 per hour, and for 16 hours of hearing attendance on November 7 and 8, at the claimed rate of $130 per hour. The Panel also awards ACFN hearing preparation fees for Dr. Larcombe for 89 hours at $130 per hour, as claimed by ACFN. ACFN did not claim travel time for Dr. Larcombe.

[184] ACFN claimed personal disbursements of $2745.78 for Dr. Larcombe, comprised of airfare, accommodation, meals, taxi fares and a third party invoice for services. ACFN claimed $160.00 for meals for Dr. Larcombe but *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. The Panel has previously decided that witnesses are also eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $80.00 for meals for Dr. Larcombe and not $160 that was claimed.

[185] ACFN claimed a disbursement of $675 for an invoice from Sofa Logic Inc. to Symbion Consultants, for services described in the invoice as "Athabasca Meetings, project management and mapping including revisions, Business Consultancy & Intelligence Services." In its costs submission ACFN stated "the Encroachment Report includes many maps of encroachments experienced by ACFN, several of which required GIS services to produce." The Panel finds the explanation of the services, in both the third party's invoice and ACFN's cost submission, to be so vague that it cannot conclude if or how the services were directly and necessarily incurred for the hearing. The Panel is not prepared to award this disbursement but may reconsider the matter if ACFN provides the Panel and Shell with a better explanation for the claim.

[186] The Panel notes that receipts were provided for the other personal disbursements claimed by ACFN for Dr. Larcombe. The Panel finds that these costs were directly and necessarily incurred by Dr. Larcombe to participate in the hearing. The Panel therefore awards the personal disbursements claimed by ACFN for Dr. Larcombe in the amount claimed in form E4, less the part of the meal claim that exceeds $80 and the $675 third party disbursement.

[187] Patricia McCormack is professor emerita in the Faculty of Native Studies at the University of Alberta. She stated that she has 45 years' of academic experience studying and publishing about Fort Chipewyan and other northern histories and cultures. She provided a report and presentation on Chipewyan ethnohistory, and a critique of the cultural assessment that was prepared by Shell's consultant. ACFN claimed professional fees for Dr. Larcombe of $8550.00, for 39.5 hours of preparation, 14 hours of hearing attendance, and 7 hours of travel.

[188] Shell stated that Dr. McCormack presented to the Panel for only five minutes before leaving for scheduling reasons, and that her evidence related to ACFN culture over time and was not related to the Project. Shell stated that costs for Dr. McCormack should be denied entirely or substantially reduced.

[189] The Panel considers that Dr. McCormack's report and evidence helped the Panel to understand Dene culture and the effects of the Project on culture, particularly in light of the limitations in Shell's cultural assessment that the Panel identified. The Panel does not agree that the award for her fees should be reduced due to the limited time she presented in the hearing as this was also done to accommodate the hearing schedule. It was clear that Dr. McCormack was prepared to present for a longer period of time and her written report, which was extensive, helped inform the Panel's decision. The Panel has decided to award $8550 to ACFN for Dr. McCormack's professional fees, as claimed by ACFN in form E4.

[190] ACFN claimed personal disbursements of $1610.11 for Dr. McCormack, comprised of airfare, accommodation, meals, taxi fares and parking. ACFN claimed $120.00 for meals for Dr. McCormack but *Directive 031* is clear that witnesses are only entitled to claim a $40 per diem for meals on days they are actively participating in the hearing. The Panel has previously decided that witnesses are also eligible for a meal per diem for one additional day. The Panel therefore awards ACFN $80.00 for meals for Dr. McCormack and not $120 that was claimed.

[191] The Panel notes that receipts were provided the other personal disbursements claimed by ACFN for Dr. McCormack. The Panel finds that these costs were directly and necessarily incurred by Dr. McCormack to participate in the hearing. The Panel therefore awards the

personal disbursements claimed by ACFN for Dr. McCormack in the amount claimed in form E4, less the part of the meal claim that exceeds $80.

Table 1. Summary of ACFN Cost Award

Legal fees claimed	Legal fees awarded	Reduction	Disbursements and expenses claimed	Disbursements and expenses awarded	Reduction
$225 754.75	$225 754.75	$0.00	$28 173.73	$26 384.88	$1788.85

Expert	Fees claimed	Fees awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
IRC (includes honoraria for L. King and D. Somers)	$31 929.00	$4 700.00	$27 229.00	$4608.69	$2558.27	$2050.42
Nicole Nicholls	$3 625.00	$3 625.00	$0.00	$1736.37	$562.00	$1174.37
A. Adams	$2 875.00	$2 437.50	$437.50	$2729.89	$2729.89	$0.00
Firelight Group	$28 485.00	$24 720.00	$3 765.00	$6297.76	$5505.08	$792.68
MSES	$88 291.25	$67 700.00	$20 591.25	$7381.34	$6886.39	$494.95
P. Jones	$2 450.00	$1 225.00	$1 225.00	$1993.50	$1910.59	$82.91
M. Carver	$39 375.00	$23 975.00	$15 400.00	$2574.14	$2404.14	$170.00
B. MacLean	$3 607.50	$3 607.50	$0.00	$1501.96	$1381.96	$120.00
P. McCormack	$8 550.00	$8 550.00	$0.00	$1610.11	$1570.11	$40.00
P. Larcombe	$14 690.00	$14 170.00	$520.00	$2745.78	$1990.78	$755.00
10% Admin Fee	$55 344.93	$0.00	$55 344.93			$0.00

Intervener	Honoraria claimed	Honoraria awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
Rene Bruno	$800.00	$100.00	$700.00	$999.53	$548.81	$450.72
Charlie Voyageur	$800.00	$100.00	$700.00	$1034.53	$583.81	$450.72
Patrick Marcel	$800.00	$100.00	$700.00	$1032.78	$583.81	$448.97
Ray Cardinal	$800.00	$300.00	$500.00	$200.00	$80.00	$120.00
Marvin L'Hommecourt	$800.00	$300.00	$500.00	$1432.54	$961.57	$470.97
Leslie Laviolette	$800.00	$300.00	$500.00	$894.69	$649.33	$245.36
Jonathon Bruno	$800.00	$300.00	$500.00	$1071.28	$754.17	$317.11
Kim Marcel	$800.00	$300.00	$500.00	$1214.89	$803.17	$411.72
Beatrice Deranger	$800.00	$300.00	$500.00	$200.00	$80.00	$120.00
Chief Adam	$1000.00	$1000.00	$0.00	$338.09	$338.09	$0.00

[192] ACFN indicated in its reply to Shell's comments on the cost claims that the amount ACFN received as an advance of intervener funding should be deducted from the total of costs awarded to ACFN. The Panel notes that this is in accordance with section 58.1(g) of the *Rules*. The Panel

therefore directs that ACFN's final award of costs will be the amount equal to the total of the amounts awarded in this cost order decision less $202 505, which is the amount of advance funding provided by Shell to ACFN.

Cost Claim of Oil Sands Environmental Coalition

[193] OSEC submitted a cost claim in the amount of $155 202.32. That amount comprises legal fees of $61 180, expert fees of $71 355, disbursements of $15 703.03, and GST of $6964.29.

Views of Shell

[194] Shell provided extensive submissions regarding the test for eligibility for costs under section 28 of the *ERCA.* Shell said that for a party to be eligible for a cost award, it must have local intervener status—i.e., it has the necessary interest in land and the land in question will or may be directly and adversely affected by the AER's decision on the proposed project.

[195] Shell submitted that the test under section 26(2) of the *ERCA*, which determines who can participate in an AER hearing, is broader than the local intervener test in section 28 that determines which parties are eligible for a cost award. The purpose of section 28 is to ensure that a person whose land may be negatively impacted by a project is not required to fund the costs of participating in the review of that project. Such an outcome would be fundamentally unfair and could be contrary to the principles of natural justice. Shell also said, however, that it would be unfair to the project proponent if it was required to pay the costs of anyone who sought to intervene in the proceeding (including the costs of hiring expensive experts and lawyers), regardless of whether they might be affected by the project. Shell submitted that the local intervener test under section 28(1) has a higher threshold than the test for intervener standing under section 26(2), and it made extensive submissions on the differences between the two tests. It also commented on the similarities and differences between these two *ERCA* tests and the standing test under *EPEA*. Shell concluded by stating that to be eligible for an intervener cost award under section 28 of the *ERCA*, a party must show that it has an interest in land and that there is a reasonable likelihood that its interest in land will be directly affected by the AER's approval of the application in question. Even if the AER believes that a party made a valuable contribution to the hearing, the AER is bound by this strict legal test set when it makes decisions about eligibility for intervener cost awards.

[196] Shell said that in order to justify an entitlement to intervener costs, OSEC provided general information about its membership and stated that some of its members resided in and around Fort McMurray. OSEC also referenced an agreement between two of OSEC's members (the Fort McMurray Environmental Association [FMEA] and the Pembina Institute) and Fort McKay Métis Local #63 that provided members of the FMEA and the Pembina Institute with access to Fort McKay Métis Local #63's lands for hiking, camping, and access to the Athabasca River. OSEC also referred to past AER decisions in which OSEC was granted local intervener costs.

[197] Shell said that several pages of OSEC's cost claim described the Project's potential to contribute to socio-economic impacts on Fort McMurray, which may affect individual OSEC members residing in Fort McMurray. In contrast, only four bullets of OSEC's claim described potential environmental effects of the Project on residents of Fort McMurray (namely effects of air emissions, particularly NO_2, and lake acidification). Shell did not dispute that the project will

likely have socio-economic effects on Fort McMurray; however, it noted that the Regional Municipality of Wood Buffalo (RMWB) intervened in the hearing to represent the interests of the community of Fort McMurray and to suggest mitigation measures for potential socio-economic impacts. In contrast, OSEC's intervention touched only briefly on socio-economic concerns and was focused almost entirely on environmental issues. Shell argued that, to the extent that individual members of OSEC reside in Fort McMurray and may experience socio-economic effects of the Project, their interests were represented by the RMWB and not by OSEC. Shell also said that OSEC did not show how socio-economic impacts of the Project on Fort McMurray could affect OSEC members' interests in land, which is what section 28 of the *ERCA* requires.

[198] With respect to OSEC's claim that its individual members' interests in land would be directly and adversely affected by environmental effects of the Project, Shell said that OSEC provided no evidence to support this assertion. Shell also said that its own evidence was that the Project will actually reduce regional SO_2 and NO_x emissions as a result of changes in emissions from Jackpine Mine Phase 1, that SO_2 and NO_x emissions from the Project will constitute less than 1 per cent of the regional total, and that Project emissions will have a negligible to low environmental effect. Shell also referred to its own evidence that the Project will have negligible acidification effects on soil, vegetation, and water receptors, and that none of the 414 lakes it modelled are predicted to become acidified as a result of the Project.

[199] Shell said that although air emissions and lake acidification were environmental issues raised by OSEC in the hearing, OSEC's primary concerns related to terrestrial impacts, species at risk, climate change, migratory birds and tailings ponds, end pit lakes, and water quality downstream of the oil sands (e.g., cumulative deposition of mercury and poly-aromatic hydrocarbons). Shell submitted that these issues were completely unrelated to any potential direct and adverse effects from the Project on OSEC members' interests in land. Shell said it was clear from OSEC's intervention that its primary concerns related to regional planning in the oil sands and not specific impacts of the Project on OSEC's interests. Shell argued that in previous decisions the AER decided that these types of general concerns do not satisfy the standing test under section 26 of the *ERCA*, let alone section 28, and it cited three AER letter decisions in support of that statement. Shell said that OSEC's claim that it is a local intervener based on having individual members residing in Fort McMurray is inconsistent with its intervention in the hearing, and it said that the AER is precluded from finding that OSEC is a local intervener for the purposes of section 28 of the *ERCA*.

[200] With respect to OSEC's reliance on the "licence to occupy" granted to the FMEA and the Pembina Institute by Fort McKay Métis Local #63, Shell said that OSEC provided no evidence to demonstrate how its recreational activities may reasonably be expected to be directly affected by the Project. It said that the licence to occupy is simply an acknowledgment by a local Métis organization that OSEC's members may use specific areas for recreational purposes, such as hiking, bird watching, camping, swimming, and boating. Shell submitted that Fort McKay Métis Local #63 does not have fee simple title to these lands; they are only leased from the province of Alberta, therefore it is unclear whether Fort McKay Métis Local #63 even has the ability to grant legal rights to use the lands to the FMEA and the Pembina Institute. Even if it does, these rights appear to be no different than the rights all residents of Alberta have to use provincial Crown lands for recreational purposes. In Shell's view, OSEC did not demonstrate that its licence to occupy gave its members an interest in lands that will be affected by the Project, and Shell cited

an ESRD decision from June 2012 that reached the same conclusion in relation to Southern Pacific Resource Corp.'s McKay Project.

[201] Shell noted that OSEC also relied on the fact that it has been granted local intervener costs in past AER proceedings, and Shell replied that the AER is not bound by any of those past decisions and that costs were awarded in those decisions based on the facts existing at the time. Shell said that the decision in this cost proceeding must be based on the facts as they exist now. In Shell's view, OSEC failed to meet the test under section 28 of the *ERCA* and should not be considered a local intervener for cost purposes, regardless of the AER's past views on the usefulness of OSEC's participation in hearings.

[202] Shell also said that if the AER nevertheless determines that OSEC is eligible for a cost award, several of OSEC's costs are not reasonable and should be denied. It referred to the two fundamental requirements for cost awards, namely

- that costs must be reasonable and directly and necessarily related to the proceeding, and
- that the intervener must have acted responsibly in the proceeding and must have contributed to a better understanding of the issues before the AER.

[203] Shell said that the AER considers the criteria set out in the *Rules* to determine the amount of intervener costs that are reasonable to award in the circumstances. Shell submitted that these criteria relate to how the intervener participated in the proceeding, the reasonableness of that participation, and the degree to which the intervener contributed to a better understanding of the issues. The AER therefore has discretion to disallow all or any part of a cost claim. Shell cited the following part of *ECO 2003-06*:

> In assessing each individual cost claim, the [AER] considers various aspects of the participant's contribution to the hearing process. Specifically the [AER] endeavors to ensure that the participant who, if awarded costs, did not unnecessarily extend the duration of the proceeding through the use of repetitive evidence or questions, or by failing to co-operate in a way that would have reduced duplication of evidence or questions. In cases where the [AER] is of the view that the participation of individuals did little to enhance the hearing process or indeed were a hindrance to the effective and efficient operation of the hearing, the [AER] will exercise its discretion by disallowing costs either in whole or in part of the amount claimed. Further the [AER] must be mindful of the scale of costs mandated under its *Rules of Practice* and only award costs in accordance with the particular parameters set out in that scale.

[204] Shell said that the applicable legislation, regulations, and guidelines provide strict criteria for awarding intervener funding, and only those costs that are reasonable and directly and necessarily related to preparing and presenting an intervention should be funded. In addition, costs must be used to contribute to a better understanding of the issues before the AER. Shell also said that if an intervener incurs costs that are not reasonable or are for purposes that do little to enhance the hearing process, such costs ought to be disallowed. Having regard for that, Shell raised concerns about the reasonableness of certain costs claimed by OSEC.

[205] Shell stated that OSEC claimed roughly 20 per cent more in costs for the Shell hearing than it did for the preceding TOTAL Joslyn North Mine hearing. Shell noted that this was the result even though OSEC received more funding from CEAA for the Shell hearing than it received for the TOTAL hearing ($68 000 compared with $41 000), and OSEC did not claim any

fees its lead legal counsel's time in the Shell hearing but OSEC claimed full legal fees for the TOTAL hearing. Shell attributed the "discrepancy in costs" partly to the fact that in the TOTAL hearing OSEC's witnesses each billed at the rate of $86.67 per hour, while for the Shell hearing each OSEC witness billed hourly rates equal to the maximum permitted under *Directive 031*. Shell asserted that OSEC significantly increased its cost claim for the Shell hearing in order to extract the maximum amount of funding from Shell. Shell said that OSEC's purpose is to advocate on behalf of environmental issues in the oil sands, and since OSEC had already received $68 000 from CEAA to fund its hearing intervention, the amount requested in its cost claim is unreasonable and should be significantly reduced.

[206] Shell said that OSEC's witnesses from the Pembina Institute and the Alberta Wilderness Association (AWA) did not provide statements of account to allow Shell to evaluate whether the hours claimed were reasonable. Shell also said that OSEC's intervention was focused on policy issues that were unrelated to the Project. Shell provided the following example from OSEC's oral evidence.

> Question: "Is it fair to say that a number of the issues that you have raised or OSEC has raised for the Panel to consider have to do with policy matters either related to the Province or the Federal Government?"
>
> Jennifer Grant: "There are. We've raised policy issues, but we've also raised the fact that in the absence of critical policy frameworks, it really comes down to the determination of the Panel as to whether or not this Project is in the public interest given the lack of policy frameworks that are at issue."[6]

[207] Shell said this demonstrates that most of OSEC's intervention was focused on provincial policy and not on the Project. Shell submitted that the AER has previously held that costs associated with presenting evidence on broad issues that are unrelated to the project considered in a hearing are not eligible for reimbursement,[7] and that "reasonable submissions do not include arguments about government policy or legislative changes, which are more properly brought before the government at the appropriate provincial or federal level."[8] Shell said that because most of OSEC's intervention focused on precisely these types of issues, OSEC's cost award should be significantly reduced.

[208] Shell said that Jennifer Grant participated in the hearing as a policy witness and did not speak to any specific issues associated with the Project. It submitted that the AER has previously decided that policy witnesses are not eligible for costs, regardless of whether they are or are not employees of the party, and that policy witnesses should only be allowed attendance honoraria because they are participating in the hearing on behalf of their organization and not as hired consultants.[9] Shell said that the AER should allow Ms. Grant an attendance honorarium for the two half days that she participated in the hearing but should not allow her claimed hourly wages as an expert witness.

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[6] Shell cited Transcript Volume 9, pages 1811-1812.
[7] Shell cited *ECO 2007-001*, page 7.
[8] Shell cited *ECO 2010-009*, page 22.
[9] Shell cited *ECO 2007-001*, at pages 13-14.

[209] Shell characterized Mark Huot's evidence in the hearing as being related to climate change and regional air emissions. Shell said that most of his presentation focused on regional, provincial, and federal policies to address these issues, and on how the Project will contribute to cumulative effects in the oil sands region. Mr. Huot agreed that climate change was a global issue, and he clarified that OSEC's primary concern in this area was related to the projected future growth of oil sands developments and not the Project specifically. Shell submitted that these issues are not related to the Project and that the costs associated with this part of OSEC's intervention should be denied. Shell also said that, with respect to his evidence on acid deposition, Mr. Huot admitted that he ignored work that had been done by the Cumulative Effects Management Association (CEMA) for the oil sands region even though the provincial Acid Deposition Management Framework that Mr. Huot relied on recommended that acid deposition be managed at the regional level, and the Terms of Reference for the Project's Environmental Impact Assessment (EIA) required Shell to follow CEMA guidance. Shell cited the following passage from *ECO 2010-009*, at page 21:

> The [AER] expects experts at its hearings to have, amongst other things, a firm understanding of the issues, materials, and applicable regulations, at the very least, before they make definitive and alarmist statements at such proceedings. Where experts who do not have these basic and essential understandings and qualifications are put before the [AER] at hearings, the result is the tendering of evidence that is not of optimal value and assistance to the [AER] in reaching its decision on a particular application.

[210] Shell said that Mr. Huot's focus on policy issues and his failure to consider CEMA guidance on acid deposition warranted a significant reduction in the amount of costs awarded for his participation.

[211] Shell said that Carolyn Campbell from the AWA is not an expert and should not charge or be awarded the maximum hourly rates for expert witnesses. Shell noted that in describing her own expertise Ms. Campbell said, "I'm not a trained biologist, certainly, but I have access to experts and of course review literature. So I would say that I'm a little more than an informed citizen, although I'm not a biologist or hydrologist by training." Shell submitted that Ms. Campbell is a high school teacher who works with the AWA to advocate for environmental policy issues. She was unfamiliar with the water commitments Shell made under the Phase 2 Water Management Framework to reduce its total withdrawal rate to 0.2 metres per second (m/s), and she made conclusions about the susceptibility of the Project landscape to forest fires that were based on logic alone and were contrary to Shell's evidence. Shell said that her conclusions were not based on any expert assessment and simply represented her own personal views. Shell submitted that Ms. Campbell should not be awarded expert fees and at most should be entitled to attendance honoraria for the days she was a witness in the hearing.

[212] Shell said that Dr. David Schindler did not provide useful information at the hearing and that he participated unreasonably. He was not familiar with the Project application, and his report included several statements that were inconsistent with the evidence in Shell's EIA. Shell submitted that Dr. Schindler conducted no new studies to inform his report and instead relied on a selection of studies by others, several of which he mischaracterized. He also ignored other studies that reached conclusions that were different from his own. Dr. Schindler did not obtain information from Syncrude about the actual effectiveness of end pit lakes, which was one of the main issues discussed in his report. Shell said that Dr. Schindler also made extreme allegations about cumulative effects in the oil sands region (e.g., catastrophic declines of macro-

invertebrates) that were completely contrary to the evidence on the hearing record and tended to cause public alarm and promote misinformation, in addition to not assisting the Panel's consideration of the Project. Shell also said that Dr. Schindler tended to use unscientific and argumentative language such as "bafflegab", "ludicrous", and "charade", and exhibited a willingness to state conclusions about matters for which he is not qualified as an expert (e.g., Aboriginal consultation), which further demonstrates the unreasonableness and unhelpfulness of Dr. Schindler's participation in the hearing. Finally, Shell noted that OSEC did not make Dr. Schindler available to be cross-examined by Shell and, as a result, Shell was unable to test the accuracy or applicability of many of Dr. Schindler's conclusions. Shell said that Dr. Schindler's participation in the hearing did not provide any value to the Panel, but that it only fostered misinformation and confusion. Shell argued that Dr. Schindler's costs should be denied completely, or at the very least the award should be significantly reduced.

[213] Shell noted that OSEC claimed $825.56 for a November 9 flight for Dr. Schindler from Fort McMurray to Edmonton, but this expense was not accompanied by a receipt. OSEC also claimed $381.12 for a November 9 flight for Dr. Schindler from Fort McMurray to Edmonton. Shell said it is unreasonable to claim two flights on the same day for Dr. Schindler. Shell also noted that one of the flights booked for Dr. Schindler was scheduled to depart Fort McMurray at 6:40 p.m.; however, during his testimony Dr. Schindler informed the Panel that he was scheduled to leave Fort McMurray at 2:05 p.m. and therefore he was not available to be cross-examined by Shell or the Panel. Shell submitted that the fact Dr. Schindler had a later flight booked that would have allowed his evidence to be tested, but OSEC failed to disclose this to the Panel and did not make Dr. Schindler available for cross-examination, is extremely concerning and should result in the Panel refusing to award any of Dr. Schindler's costs.

[214] Shell said that Dr. Glenn Miller was not familiar with the Project application and his report contained several significant errors about the Project. He admitted to having only read parts of Shell's EIA and had no experience with end pit lakes in the oil sands context. Shell said that Dr. Miller conceded that the oil sands are distinctly different from the hard rock mining operations with which he has experience. Shell submitted that Dr. Miller provided no information that was relevant or helpful to the Panel's consideration of the Project.

[215] Shell said that the costs OSEC claimed for a second return flight from Fort McMurray for Dr. Miller are unreasonable in the circumstances, given that Dr. Miller's original flights were scheduled to allow a very narrow window for his testimony at the hearing. Shell argued that this was a recurring theme at the hearing, for both OSEC and ACFN expert witnesses. Shell said that OSEC is a sophisticated party with considerable experience in regulatory hearings and that it should have been reasonably foreseeable to OSEC that any delay in the hearing would cause Dr. Miller to miss his original flight home from Fort McMurray. Shell said that it should not be penalized for OSEC's poor planning, particularly since Shell was very flexible during the hearing to attempt to accommodate the schedules of Dr. Miller and other experts. Shell submitted that Dr. Miller's costs should be denied or significantly reduced.

Views of OSEC

Eligibility for a Cost Award

[216] OSEC said that it is a coalition of public interest groups with a long-standing interest in the Athabasca oil sands area, Its membership includes the FMEA, the Pembina Institute, and the AWA. FMEA members, including Ms. Dort-MacLean, are residents of Fort McMurray and therefore have interests in and occupy lands that may be directly and adversely affected by the Project. The Pembina Institute and the FMEA are also entitled to occupy lands adjacent to Fort McKay for recreational purposes through a licence of occupation from Fort McKay Métis Local #63. OSEC said that these recreational lands may be directly and adversely affected by the Project.

[217] OSEC said that section 28 of the *ERCA* requires that a cost claimant demonstrate that there is a potential for a direct and adverse effect on the claimant's lands in order for it to have local intervener status. OSEC cited *Cost Order No. CO 99-09*, in which the AER stated, "It is not necessary for interveners to establish conclusively that direct and adverse effects will result, only that their concerns are reasonable in light of the proposed project and their residence in Fort McMurray." OSEC also cited *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, in which the Court of Appeal of Alberta stated the following at paragraph 26:

> It is unreasonable to limit section 28 to physical damage to the land…. The general purpose of the regulatory process for approval of energy projects is generally to ensure that resource development takes place in ways that will prevent or reduce the risk of physical damage to anything, including land.

[218] OSEC said that the Court of Appeal of Alberta has held that sections 26 and 28 of the *ERCA* are functionally related, and therefore statements about section 26 should be considered when interpreting section 28. The court has further held that the purpose of the right to intervene that is provided in section 26 is to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those that have only a generic interest in resource development (but no "right" that is engaged), and true "busybodies."[10] The court has also stated that granting standing and holding hearings is an important part of the process of development of Alberta's resources, and the openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself.[11]

[219] OSEC submitted that adverse effects on land under section 28 of the *ERCA* include not only physical damage to the land but also adverse effects on the value and use of land, including health and socioeconomic effects. It said that the fact that OSEC members in the area may be affected by cumulative air pollution and increases in apartment rent is sufficient to meet the test for a local intervener.

[220] OSEC said that Shell's cost submissions fail to consider the evidence presented by OSEC that its members have reasonable concerns about potential adverse effects from the Project in light of their residency in Fort McMurray and their entitlement to occupy lands near Fort McKay. This includes evidence of increased air pollution, increased demand on infrastructure

[10] OSEC cited *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, at paragraph 26.
[11] OSEC cited *Supra*, at paragraph 34.

and public services, and an increased cost of living that is related to increased rents and housing prices. OSEC also said that more safety risks associated with its members accessing and enjoying their property due to traffic problems and increasing fatality and crime rates were all reasonable concerns. OSEC noted its evidence that the Project will contribute to significant increases in potential acidifying emissions above critical thresholds in the region, including Fort McMurray and OSEC's recreational licensed lands in Fort McKay. It cited Shell's evidence that the Project will result in an additional 2117 tonnes of annual NO_x emissions in the regional air shed.[12] OSEC submitted that in Shell's air quality modelling for the base case and application case, average ambient air concentrations of NO_2 will exceed both the Lower Athabasca Regional Plan's Air Quality Management Framework level 4 limit and the Alberta Ambient Air Quality Objective limit of 45 micrograms per cubic metre ($\mu g/m^3$). OSEC further submitted that the Project will contribute to increases in regional emissions of SO_2, CO, $PM_{2.5}$, and VOCs, and that Shell's 2007 EIA indicated that in Fort McKay there will likely be a significant increase in the number of hours that odorous substances will be above odour thresholds.

[221] OSEC said that Shell assumes that a local intervener must demonstrate that a project will make a significant contribution to cumulative effects; however, section 28 refers to "adverse effects" and not "significant adverse effects." OSEC argued that impacts do not have to be significant for section 28 to be satisfied, therefore the question whether the Project contributes 1 per cent or 30 per cent is irrelevant. OSEC said that the architecture of the EIA process predetermines that each project will have a negligible contribution to cumulative effects by assessing effects at a regional scale, even though project effects are felt by local interveners at a local level.

[222] OSEC said that when Shell conceded that the Project would likely have socioeconomic effects that may be experienced by OSEC members residing in Fort McMurray but argued that their interests were represented by the RMWB and not OSEC, Shell admitted that OSEC members living in Fort McMurray have interests that may be directly and adversely affected by the Project. OSEC submitted that this admission warrants a finding that OSEC is a local intervener, and the fact that the RMWB also presented evidence relating to socioeconomic effects in Fort McMurray cannot be used to deny OSEC standing under section 28 of the *ERCA*. OSEC argued that whether the evidence of adverse effects was presented by RMWB, OSEC, another intervener, or the proponent does not matter; it is entitled to rely on the evidence provided by other interveners and Shell to establish the potential for adverse effects on its members.[13]

[223] OSEC said that whether or not Fort McKay Métis Local #63 has fee simple interest in the lands that are licensed to OSEC, or a long-term lease of those lands, is irrelevant. The grant of lease to Fort McKay Métis Local #63 does not place any restrictions on the Local's ability to grant licences of occupation to third parties, and because the lands in question are private lands, the rights granted to OSEC provide it with access that is not available to other Albertans. OSEC also said that the ESRD decision cited by Shell in its response submission relates to a different legislative provision and a different project type and location, and it is not a decision that is binding on the AER.

[12] OSEC cited Exhibit 001-051I: May 2012 SIR Response, Appendix 3.2: Air Emissions and Prediction, at page 3.
[13] OSEC cited *Kelly v Alberta,* 2009 ABCA 349, at paragraph 39.

[224] OSEC noted that it has qualified for six previous AER cost awards and said that Shell did not provide any information to indicate that considerations in this cost proceeding are so different that OSEC should not have local intervener standing.

[225] OSEC acknowledged that it does have concerns about policy and regional planning in the oil sands region, but it said that it is also concerned with project-specific impacts and that its intervention was focused on impacts of the Project and its contribution to cumulative effects. OSEC also said that its submissions and evidence on cross-examination addressed numerous issues that were specifically or directly related to the Project. OSEC submitted that some reference to regional planning in relation to the Project was necessary because the Project EIA specifically required that regional planning initiatives be considered in the assessment, and given that Shell focused on the regional scale when it assessed impacts (in order to justify impacts as being insignificant) and relied on regional planning initiatives to mitigate Project impacts.

[226] OSEC said that cost award eligibility under section 28 does not depend on success at the hearing or on the proponent agreeing with an intervener about potential adverse effects. If OSEC had agreed with Shell's views as set out in the EIA, it would not have intervened in the hearing. The fact that OSEC was able to maintain a broad scope of participation at the hearing is not a valid a reason to deny it standing under section 28. OSEC submitted that it and its members have demonstrated that their concerns about the Project are reasonable and that it is entitled to a cost award under section 28 of the *ERCA*, particularly given the potential impacts on residences in Fort McMurray and on its licensed lands near Fort McKay.

Reasonableness of Costs Claimed

[227] OSEC submitted that the 20 per cent difference in costs from those it claimed in the TOTAL Joslyn North Mine proceeding is not significant and is justified. It said that no two projects are the same and that a direct comparison of the costs associated with intervening in two different project hearings is neither reasonable nor instructive. OSEC also said that its AER cost claim was for amounts that were not covered by CEAA participant funding.

[228] OSEC said that the hourly rates claimed for its expert witnesses comply with *Directive 031*. It acknowledged that in the TOTAL Joslyn North Mine hearing the hourly rates claimed by OSEC's witnesses were substantially below *Directive 031* limits, and suggested that this accounts for some of the cost differential between the two hearings. OSEC said that the fact Ms. Buss only claimed for part of her time and Ms. Gorrie did not claim for any of her time is not a reason to deny or reduce OSEC's cost award. The exclusion of legal costs in the cost claim demonstrates that the real cost of preparing for and attending the hearing was much higher than what OSEC claimed. The exclusion of legal costs is a benefit to Shell and should not be used as a reason to deny or reduce OSEC reimbursement for its costs.

[229] OSEC said that the assessment documents for the Project were particularly complex and voluminous because the Project was originally assessed in combination with the Pierre River Mine, but was later assessed separately. There were also numerous deficiencies in Shell's assessment of the Project that needed to be rectified, as demonstrated by the many supplementary information requests and responses. OSEC noted that updates to the original 2007 EIA were produced in every year from 2008 to 2012. As such, the growing volume of material that OSEC needed to be familiar with and respond to in its written and oral submissions resulted in a corresponding increase in time spent, and therefore costs claimed, by OSEC experts.

[230] OSEC said that it in no way increased its cost claim to extract maximum value out of Shell, and it took exception to that assertion by Shell. As examples, it submitted that the claim for legal costs was significantly discounted, that Dr. Schindler did not claim for the time he spent preparing for and attending the hearing, and that OSEC witnesses slept two to a room in Fort McMurray in order to save costs.

[231] OSEC submitted that its participation in the hearing provided relevant information and contributed to a better understanding of the issues. OSEC raised the matter of provincial air quality thresholds and critical levels of potential acid input deposition being exceeded. OSEC noted in particular the very detailed submission it prepared regarding Shell's failure to consider all future foreseeable projects or activities, reasonably foreseeable forest harvesting plans, and the effects of forest fires. OSEC believed that the Panel required Shell to incorporate those considerations into its assessment as a direct response to OSEC's submissions, with the result that Shell's updated assessment more accurately detailed cumulative impacts in the planned development case, and this helped the Panel to discharge its duties.

[232] OSEC said that parts 1 and 3 of its cost claim outlined the number of hours spent by its experts preparing for and attending the hearing, and that a more detailed breakdown of the time spent by OSEC's internal experts was attached to OSEC's cost claim reply submission under the heading "Professional Fees Revised."

[233] OSEC said that Shell did not dispute any of the costs associated with Mr. Simon Dyer's participation, which totaled $15 795, and that Shell did not raise any issues about the legal fees and disbursements that were claimed. OSEC also provided the following responses to Shell's comments about claims for specific OSEC witnesses.

[234] OSEC said that Jennifer Grant was instrumental in OSEC's preparation for and attendance at the hearing. She prepared the section on water withdrawals and the protection of the Athabasca River, and she was the key liaison for OSEC's expert witnesses. OSEC also said that although it mentioned policy issues, its comments on those matters did not constitute most of OSEC's submission. It submitted that Shell quoted a statement made by Ms. Grant out of context, and that she did not suggest that policy issues were the focus of OSEC's intervention. OSEC's written submissions, its presentations at the hearing, and its closing argument demonstrate that it raised and addressed numerous project-specific issues. OSEC said that the policy issues it did raise were highly relevant to the project assessment, given that Shell was relying on government policy (LARP and the Muskeg River Management Plan) to mitigate Project impacts.

[235] OSEC said that Marc Huot's contribution to OSEC's written submission and his hearing presentation focused on project-specific impacts, including climate change emissions, impacts on changes in air quality, and the lack of mitigation for those impacts. OSEC submitted that these matters were highly relevant to the Panel's assessment of the Project. It said that climate change emissions and air quality issues were included in the Terms of Reference for both the EIA and the Panel Agreement, and that the Project will be a source of GHG, NO_x, and SO_2 emissions. Mr. Huot's statement that OSEC is concerned about projected growth of the oil sands does not diminish his contribution to the hearing because the Project is part of the projected growth of the industry.

[236] OSEC said that Mr. Huot's submission focused on project-specific contributions to climate

change and their contribution to cumulative impacts. This required a consideration of cumulative impacts that was beyond the Project itself; however, OSEC argued that was not a reason to reduce the costs awarded for Mr. Huot's participation. OSEC noted that Shell agreed in the hearing that climate change is a global issue. In its cost submissions, OSEC cited *ECO 2007-001*, in which the AER stated, "the dividing line between the particular impacts of a specific project and its contribution to regional cumulative impacts is often difficult to define." OSEC said that the fact Mr. Huot agreed that climate change is a global issue does not diminish the relevance of his participation and his contribution to the hearing, or affect OSEC's entitlement to recover costs.

[237] OSEC submitted that Mr. Huot had a firm understanding of the issues, materials, and applicable regulations, and he clearly said that he had reviewed CEMA documents, some of which Shell had ignored in its assessment (e.g., Terrestrial Ecosystem Management Framework). Mr. Huot's evidence showed that he provided a thorough, detailed, and professional analysis of the impacts of the Project on climate change and air quality that was based on a firm understanding of the issues, the relevant materials, and the regulatory scheme.

[238] OSEC said that it has been many years since Carolyn Campbell worked as a high school teacher and that she currently works for the AWA. OSEC submitted that the fact that Ms. Campbell's expertise and knowledge was acquired through practical experience is not a reason to deny or reduce OSEC's cost award. OSEC said that the Supreme Court of Canada has indicated that expertise may be gained not only through university degrees but also through experience. OSEC quoted the court as follows:

> The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.[14]
>
> ... the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.[15]

[239] OSEC said that Ms. Campbell derives her expertise from five years as a conservation specialist working on land use, terrestrial resources, and groundwater issues; her position as Director of the Alberta Water Council; and her membership in the Lower Athabasca Phase 2 Water Management Framework Committee. It submitted that Ms. Campbell would not hold these positions if she did not have intimate knowledge and experience in these areas.

[240] OSEC also said that Shell cited Ms. Campbell out of context in relation to Shell's low-flow water withdrawal commitment. Taken in proper context, Ms. Campbell's evidence demonstrated that she is knowledgeable about the Phase 2 Framework and is well aware of the low-flow allocation for the Albian Sands Mine that is recommended in the Phase 2 Framework Committee Report. OSEC submitted that Shell did not provide for the low-flow withdrawal limit of 0.2 m/s in its Project documents, but simply said before the hearing that it would comply with the Phase

[14] OSEC citing *R v Marquard*, [1993] 4 SCR 223.
[15] OSEC citing *R v Mohan*, [1994] 2 SCR 9.

2 Framework once it is implemented by the Government of Alberta.[16] As such, Ms. Campbell was correct when she said that Shell had not made a commitment to be bound by the 0.2 m/s low-flow allocation before it addressed the matter in the hearing.

[241] OSEC said that Ms. Campbell's use of the word "logic" in describing the susceptibility of the landscape to forest fires does not discredit her as an expert. She was explaining the logic in the Rooney *et al*. (2012) research on the point that loss of peat wetlands will mean a shift to a younger forest because the forest will be more susceptible to fire, and that Shell did not take this into account in its projections. OSEC also said that Ms. Campbell's conclusion in that regard is not contrary to Shell's evidence because Shell did not consider the impact that loss of wetlands would have on the potential for forest fires.

[242] OSEC said that Shell's characterization of Dr. Schindler's participation in the hearing was an objectionable assault on a leading witness. OSEC asserted that during cross-examination by OSEC's counsel, Shell admitted that Dr. Schindler's research was instrumental in improving oil sands monitoring. OSEC said that experts are not required to conduct new studies to inform their opinion; Dr. Schindler was familiar with the relevant literature, and whether he did or did not conduct his own research is irrelevant. Dr. Schindler referenced numerous recent and relevant studies in his written submission and was familiar with and able to speak to the studies that Shell relied on. In particular, Dr. Schindler brought to the attention of the Panel the Society of Environmental Toxicologists and Chemists excerpts, which outlined the most recent research findings on oil sands impacts.

[243] OSEC said that Dr. Schindler was not required to obtain information from Syncrude about end pit lakes and that his failure to do so does not discredit him as an expert. OSEC also said that Shell presented no evidence to substantiate its claim that Dr. Schindler's statements at the hearing caused "public alarm" or "misinformation."

[244] OSEC clarified that the correct receipt for Dr. Schindler's November 9 flight was the one attached to OSEC's cost claim.[17] OSEC had originally booked an evening flight on November 9 for Dr. Schindler, but he informed OSEC that he had other obligations and would not be able to take the evening flight, so that flight was cancelled. OSEC said that the cost claimed for the cancelled flight was inadvertently included and should be disregarded. OSEC also made the point that Dr. Schindler did not claim costs for any time associated with his attendance at the hearing.

[245] OSEC said that the fact that Shell disagrees with Dr. Glen Miller's evidence is not a reason for the Panel to deny his costs. OSEC submitted that it had requested a conference call to discuss the scheduling of witnesses in a general way, but that its request was denied. OSEC worked with the other parties to establish a schedule in advance of the hearing, and its counsel made substantial efforts to ensure that its experts were scheduled to be in Fort McMurray at a time that was convenient for the experts, the other parties at the hearing, and the Panel. OSEC's planning was not "poor" as Shell stated, but was in fact designed to reduce accommodation costs and fees for witnesses sitting around at the hearing. During the hearing, unexpected issues arose (fire alarms and power outages), which necessitated rearranging schedules and rebooking flights. OSEC said that it should not be penalized for the fact that unforeseeable events necessitated last

[16] OSEC cited Exhibit 001-070: Shell's Reply Submission dated October 15, 2012.
[17] OSEC provided the reference: Cost Claim, part 3 of 3, pdf pages 1-5.

minute rearranging of affairs, including rebooking Dr. Miller's flight.

[246] OSEC said that its costs were very reasonable and were directly related to the proceeding. OSEC also acted responsibly during the hearing and greatly contributed to a better understanding of the issues.

Views of the Panel

Eligibility for a Cost Award

[247] The Panel is satisfied that OSEC is qualified to receive an award of costs for its participation in the hearing. OSEC is clearly a "participant" as defined in section 58(c) of the *Rules*, which were the rules in place at the time the Panel decided these cost applications. OSEC is a group or association of persons who have been permitted to participate in a hearing for which a notice of hearing was issued.

[248] Given that the cost regime in place at the time of the hearing and when the parties made their submissions in this cost proceeding was the cost regime under the former *ERCA*, the Panel has also considered whether OSEC would qualify as a local intervener under section 28 of the *ERCA*. The Panel believes that its decision on that question supports the Panel's decision under section 58 of the *Rules* and addresses any detriment that may otherwise appear to result from the transition to the *REDA* cost regime.

[249] The Panel considered Shell's extensive submissions on OSEC's status in relation to section 28 of the *ERCA*, including Shell's argument that the case law relating to the Environmental Appeals Board should lead the Panel to conclude that the test for being "directly and adversely affected" in section 28 of the *ERCA* requires a cost applicant in an AER proceeding to show that there is a "reasonable likelihood" its interest in land will be directly affected by the project. The Panel does not agree with that assertion. As the Court of Appeal of Alberta has noted with respect to section 28 of the *ERCA*, an individual who can demonstrate that it "may be directly and adversely affected" by an energy project need not demonstrate that the risk of harm is a "certainty, or even likely."[18]

[250] The Panel is satisfied that the potential for the Project to affect lands in Fort McMurray and near Fort McKay in which OSEC members have an interest is sufficient to demonstrate that OSEC may be directly and adversely affected by the Project. The Panel notes that OSEC has received a local intervener cost award in six previous oil sands mine hearings conducted by the AER, with all of these awards coming under the *ERCA* cost regime. The facts of this matter, as they pertain to OSEC, are substantially the same as those in the earlier proceedings. OSEC's membership has not changed significantly and still includes residents of Fort McMurray and the surrounding area. The licence to use recreational land near Fort McKay still exists and in that regard the Panel has noted the decision of the Court of Queen's Bench of Alberta in *Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, 2013 ABQB 567, which is the court's decision on the Southern Pacific Resource Corp. matter that was referred to by Shell and OSEC in their respective cost submissions.[19]

[18] *Kelly v Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 at paragraph 26.
[19] The Panel acknowledges that the decision, *Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, was issued after the parties made their submissions in this cost proceeding.

[251] The Panel also notes that this finding is consistent with the following statement from *ECO 2012-002*, on page 11:

> [66] The [AER] 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 [AER'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 [AER] 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 [AER'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.

[252] In conclusion, the Panel is satisfied that OSEC qualifies for an award of costs under both section 58 of the *Rules*, which are now in force, and under section 28 of the *ERCA*, which was in force during the hearing of the Project application and when the parties made their cost submissions.

Reasonableness of Costs Claimed

[253] The Panel has considered Shell's argument that OSEC's submission was focused on policy matters to the exclusion of addressing project-specific impacts. Although OSEC did address matters that related to regional planning in the oil sands area, cumulative effects, and government policy, the Panel is satisfied that OSEC's evidence in this regard was sufficiently related to project impacts to be relevant to the proceeding. The Panel agrees with OSEC that references to policy and regional planning, as those related to the Project, were necessary. When addressing large oil sands mine projects that are long-lived and are potential contributors to cumulative or regional impacts, a participant or even a hearing panel may not be able to draw a precise line between project-specific impacts and general policy or planning matters that do not bear on the Panel's assessment of the project. In any event, the Panel finds that OSEC also addressed numerous project-specific issues in its written and oral submissions.

[254] The Panel acknowledges Shell's concerns about the difference between the costs claimed by OSEC for the TOTAL Joslyn North Mine hearing and those claimed in this proceeding (20 per cent increase). The Panel does not consider that that increase, in and of itself, demonstrates that OSEC's claim in this proceeding is unreasonable. While the two hearings have many similarities, an increase in professional fees claimed of the magnitude Shell identified does not necessarily invite the conclusion Shell suggests. Furthermore, and as acknowledged by OSEC, the rates claimed for some of its experts have increased between the two proceedings from about one-half the rates permitted under the scale of costs to the maximum permitted rates. To the extent claimed rates remain within scale and the costs were necessarily incurred, the fact that rates have increased from those claimed by OSEC for the prior proceeding does not indicate to the Panel that the present claim is unreasonable; the argument that the previous claim reflects discounted rates that ultimately benefitted Shell is just as tenable.

Legal Counsel Ackroyd LLP, Karin E. Buss Professional Corporation, Ecojustice

[255] OSEC was represented by Karin Buss of both Ackroyd LLP and Karin E. Buss Professional Corporation, and by Melissa Gorrie of Ecojustice. OSEC claimed legal fees for Ms. Buss in the amount of $61 180, disbursements and expenses for Ms. Buss of $1142.30, and disbursements and expenses only for Ms. Gorrie of $5757.89. The Panel has decided that the professional fees claimed by OSEC for Ms. Buss's legal services are reasonable and were directly and necessarily incurred for purposes relating to the hearing. The Panel awards OSEC the amount for legal fees that it claimed.

[256] OSEC claimed $25 for a "File Admin" fee charged by Ackroyd LLP. This type of charge falls within the "overhead charges implicit in the normal operation of a law firm" that *Directive 031* states are considered to be included in the legal fees awarded, and therefore this $25 cost is not awarded by the Panel. The Panel awards OSEC each of the other amounts claimed for disbursements for its legal counsel in accordance with Form E4 of the cost claim filed by OSEC. The Panel notes that Dr. Schindler's airfare appears to be have been paid by Ms. Buss, although the amount claimed appears on Form E4 under Dr. Schindler's name. The Panel will consider this part of the cost claim in relation to Dr. Schindler's participation in the hearing and not in relation to Ms. Buss's services.

[257] With regard to the absence of statements of account for AWA and Pembina Institute witnesses, the Panel notes that counsel for OSEC has sworn in the affidavit of fees and disbursements filed in the cost claim that all amounts claimed were incurred in relation to OSEC's participation in the proceeding. The Panel accepts that is generally the case with OSEC's claim, considering the size and complexity of the hearing, the amount of the costs claimed, and the participation of the AWA and Pembina Institute witnesses. The Panel also believes that the additional information submitted by OSEC in its reply to Shell's submission on the cost claims supports the conclusion that the fees incurred for the expert witnesses for whom a detailed statement of account was not submitted are reasonable, except as otherwise stated in the Panel's comments below.

Dr. Glenn Miller

[258] OSEC claimed professional fees for Dr. Glenn Miller in the amount of $8000, and personal disbursements of $2684.32. The Panel acknowledges that Dr. Miller said that his experience with end pit lakes related to hard rock mining and not the oil sands industry. But Dr. Miller's evidence did help the Panel's general understanding of end pit lakes, and the fees claimed appear to be very modest considering Dr. Miller's qualifications and years of experience. The Panel therefore finds that this part of the claim is reasonable, and it awards OSEC the professional fees it claimed for Dr. Miller.

[259] The claim for Dr. Miller's personal disbursements comprises mainly airfare and accommodation costs, including additional airfare that had to be purchased when Dr. Miller's appearance at the hearing was delayed, and the cost of one airfare appears to have been forfeited. In the preceding part of this cost order concerning the ACFN's cost claim, the Panel addressed the dilemma participants face trying to gauge the progress of the hearing and meet the Panel's stated expectation that witnesses will be in attendance so as to allow the hearing to be a continuous process. Although the events that resulted in Dr. Miller having to forfeit one airfare and purchase another at greater expense are unfortunate, in all the circumstances of the

hearing—in particular that Dr. Miller's participation was delayed by an unforeseeable power failure and false fire alarms—the Panel finds that Dr. Miller was reasonable in his decisions about travelling to and from Fort McMurray for the hearing. The Panel therefore awards OSEC the amounts it claimed for Dr. Miller's personal disbursements, including the $150 work permit that was required by law in order for him to participate in the hearing.

Carolyn Campbell

[260] OSEC claimed $10 640 professional fees for Carolyn Campbell, and personal disbursement of $874.63. The Panel notes that Ms. Campbell sits on the Water Management Framework Committee, and the work of that group was relevant to the issues in the hearing. Having obtained her expertise from practical experience as opposed to formal education does not preclude a finding that Ms. Campbell was qualified to give expert evidence on matters within her practical experience. The Panel considers Ms. Campbell to be an expert witness in the areas of water management that she addressed in her evidence, and it finds that her participation helped the Panel. The Panel has decided to award OSEC the entire amount claimed for Ms. Campbell's fees and personal disbursements.

Dr. David Schindler

[261] Dr. Schindler's expertise is acknowledged and his work on the effects of oil sands development is frequently cited. In fact, it is fair to say that Dr. Schindler has gained a measure of notoriety as a result of his views about oil sands development. OSEC must have expected that a number of hearing participants were looking forward to the opportunity to explore those views with Dr. Schindler through his participation as a witness in the hearing. But OSEC presented Dr. Schindler as a witness for only part of the day on November 9, without providing a satisfactory explanation for his limited availability. The hearing time for which Dr. Schindler was available to have his evidence tested amounted to about two hours and was wholly consumed by Syncrude's questioning of Dr. Schindler. This is not to suggest that Syncrude did anything improper; what is noteworthy is that Shell and others were not able to question Dr. Schindler in the hearing. This significantly diminished Dr. Schindler's contribution to the hearing. OSEC emphasized that it offered to have Dr. Schindler respond to written questions after he left the hearing. In the Panel's view, that may be a reasonable means of participation for some witnesses; however, it is not a satisfactory arrangement for a key witness like Dr. Schindler. In the Panel's opinion, OSEC acted irresponsibly when it failed to make arrangements for Dr. Schindler to be available in the hearing for a longer period to give Shell, the Panel secretariat, and the Panel an opportunity to question him on his evidence. If OSEC had claimed fees for Dr. Schindler's participation, the Panel would not have awarded any amount.

[262] OSEC clarified that it claimed only one airfare for Dr. Schindler, in the amount of $801.05, and $12.38 for parking. Even though the Panel would not have awarded OSEC professional fees for Dr. Schindler's attendance at the hearing, the fact is that his travel costs were incurred for hearing purposes and in the Panel's view they are reasonable as being within the expected range of costs for return flights to Fort McMurray. The Panel awards OSEC the personal disbursements it claimed for Dr. Schindler.

Simon Dyer, Pembina Institute

[263] OSEC claimed $15 795 for professional fees for Simon Dyer. Shell did not raise any concerns with this part of OSEC's cost claim. The Panel considers that Mr. Dyer's participation

helped the Panel and that the fees claimed are reasonable. The Panel awards OSEC the professional fees it claimed for Mr. Dyer's participation.

Mark Huot, Pembina Institute

[264] OSEC claimed $19 480 for professional fees for Mark Huot. The Panel considers that Mr. Huot's evidence was relevant and helpful. While the Panel may not have agreed with all of the assertions made by Mr. Huot, his participation contributed to a better understanding of issues such as climate change emissions, air quality, and the cumulative effect of air emissions. As noted by OSEC, these issues were part of the Terms of Reference of both the EIA and the Panel Agreement. The rate charged by Mr. Huot is within the scale of costs. The Panel has decided to award OSEC the full amounts claimed for Mr. Huot's participation in the proceeding.

Jennifer Grant, Pembina Institute

[265] With regard to the claim for expert fees for Jennifer Grant of the Pembina Institute, the Panel notes that Ms. Grant did not give any substantive evidence in the hearing, except when she responded to an undertaking given to Shell to describe the nature of OSEC's licence to use lands on the McKay River. That information is a factual response that relates primarily to OSEC's status as a local intervener under section 28 of the *ERCA* and does not engage expertise that informs the Panel's assessment of the Project. Although OSEC said that Ms. Grant prepared the section of OSEC's written submission on water withdrawals and protecting the Athabasca River, she was not the witness who addressed that material; Ms. Campbell was the witness for those issues. In light of these findings, the preceding discussion in this cost order about awarding a participant expert fees for its own employees, and the fact that OSEC had counsel who appeared to be responsible for organizing OSEC's intervention, the Panel has decided it is not appropriate to award expert fees for Ms. Grant's participation in the hearing. The Panel awards a $500 attendance honorarium for Ms. Grant, which is equal to 2.5 days' participation as a witness in the hearing.

Pembina Institute Disbursements

[266] OSEC totalled the amounts claimed as personal disbursements for its three Pembina Institute witnesses and listed those in one column on form E4 under the name Pembina Institute, although the supporting receipts were filed in relation to individuals. Shell did not raise any issues with this part of OSEC's cost claim. The Panel notes that the receipts provided reflect costs for airfare (including change fees) for Mr. Dyer and Ms. Grant each arriving in Fort McMurray on November 4 and departing on November 7. Mr. Huot claimed bus fare to Fort McMurray on November 5 and airfare returning to Edmonton on November 7. It appears that Mr. Huot cancelled a flight to Fort McMurray and that some or even all of the fare for that was refunded. The Panel has decided that the travel expenses claimed by OSEC for the three Pembina Institute witnesses were incurred for hearing purposes and are reasonable.

[267] Receipts were provided for accommodation in Fort McMurray for two rooms for three nights each, which coincides with Mr. Dyer's and Ms. Grant's travel to and from Fort McMurray and is consistent with OSEC's submission that some OSEC witnesses shared a room. Although the rates claimed are above the limits provided in the scale of costs, the Panel finds them to be within the range for nightly accommodation in Fort McMurray and further notes that room sharing by the witnesses helped to minimize accommodation costs.

[268] OSEC provided other receipts for photocopying, meals, taxi fares, and airport parking that all appear to be within the scale of costs and relate to the hearing.

[269] Having regard for the foregoing, the Panel has decided to award all the disbursement costs claimed by OSEC for the Pembina Institute witnesses, in the amounts set out on form E4 of OSEC's cost claim.

Table 2. Summary of OSEC Cost Award

Legal fees claimed	Legal fees awarded	Reduction	Disbursements and expenses claimed	Disbursements and expenses awarded	Reduction
$61 180.00	$61 180.00	$0.00	$1142.30	$1117.30	$25.00

Co-counsel	Fees claimed	Fees awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
M. Gorrie	$0.00	$0.00	N/A	$5757.89	$5757.89	$0.00

Expert	Fees claimed	Fees awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
Dr. G. Miller	$8 000.00	$8 000.00	$0.00	$2684.32	$2684.32	$0.00
C. Campbell	$10 640.00	$10 640.00	$0.00	$874.63	$874.63	$0.00
Dr. Schindler	$0.00	N/A	N/A	$813.43	$813.43	$0.00
S. Dyer	$15 795.00	$15 795.00	$0.00	$2395.72	$2395.72	$0.00
M. Huot	$19 480.00	$19 480.00	$0.00	$701.47	$701.47	$0.00
J. Grant	$17 440.00	$500.00[20]	$16 940.00	$1333.27	$1333.37	$0.00

Cost Claim of Fort McMurray First Nation No. 468

[270] FMMFN submitted a cost claim in the amount of $39 213.10, comprising legal fees of $33 228, legal counsel's disbursements of $3820.79, expert fees of $2061.25, and GST of $103.06.

Views of Shell

[271] Shell said that for a party to have local intervener status under section 28(1) of the *ERCA* it must demonstrate that it has the necessary interest in land and that the land in question may be directly and adversely affected by the AER's decision. The onus is on the party claiming directly affected status to show that it meets the test by providing specific information that demonstrates a degree of location or connection between the approval sought and the party's rights. Shell submitted that FMMFN did not meet the test for an award of costs.

[272] Shell said that prior to the hearing, FMMFN filed maps showing land use of the Project area by FMMFN members. Shell asserted the maps demonstrate that the Project is to be located at the extreme northern fringe of FMMFN's traditional territory and that no traditional use

[20] 2.5 days honoraria awarded in lieu of expert fees

activities occurred within the Project footprint. Also, no FMMFN witnesses were presented at the hearing to allow Shell to test FMMFN's evidence regarding traditional land use in the region by its members. As a result, little to no weight should be given to FMMFN's assertion that its members use lands in the area of the Project.

[273] Shell also said that FMMFN did not provide specific information as to how the rights it claimed may be directly and adversely affected by the Project. It argued that a mere assertion of a right does not satisfy the test for standing to participate in a hearing under section 26(2) of the *ERCA*, let alone the more stringent test under section 28 for local intervener standing. Shell cited the following statement from the Court of Appeal of Alberta in support of its argument:

> It was argued before us that the more recent case law on *prima facie* infringement of aboriginal or treaty rights changed things. But the [AER] still needed some facts to go on. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the [AER].[21]

[274] Shell also submitted that even if FMMFN qualifies for a cost award under section 28 of the *ERCA*, the costs claimed by FMMFN are not reasonable. Shell said that FMMFN's intervention was conducted entirely by its counsel, who cross-examined and presented final argument on many of the same issues that were canvassed by other parties. Shell claimed that FMMFN's participation did not contribute to a better understanding of the issues before the Panel.

[275] Shell said that considerable costs were claimed by FMMFN for the work of experts from MSES (i.e., Nina Modeland and Petr Komers) who did not appear at the hearing on behalf of FMMFN or file evidence on its behalf. Given that these individuals provided no information to assist the Panel, none of the costs claimed for these individuals should be awarded to FMMFN.

Views of FMMFN

[276] FMMFN said that Shell correctly cited the test under section 28 of the *ERCA*, and FMMFN submitted that the purpose of the test is to ensure that a person whose land may be negatively impacted by a project is not required to fund the costs of participating in the review of that project. In FMMFN's submission, that outcome would be fundamentally unfair and contrary to the principles of natural justice.

[277] FMMFN said that Shell's characterization of section 28 of the *ERCA* as a very strict legal test was in error and contrary to statements made by the Court of Appeal of Alberta in *Alberta Electric System Operator, Re,* 2009 ABCA 155 (*Re AESO*) and *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 (*Kelly v. ERCB*), and by the AER in *Shell Canada Ltd., Re*, Alta. EUB Jun 24, 2004 (*Re Shell*). FMMFN submitted that the AER has more discretion to award costs than what Shell describes in its arguments. It cited Paperny, J.A., at paragraph 22 of *Re AESO*, stating that, "An award of costs is an exercise of discretion…"

[278] FMMFN said that, contrary to what Shell suggested in its cost submission, FMMFN does not need to provide detailed and specific information to prove that FMMFN will be directly and

[21] *Dene Tha' First Nation* v. *Alberta (Energy and Utilities Board),* 2005 ABCA 68 at para. 14.

adversely affected by the AER's approval of the application. It argued that Shell's view is in direct opposition to decisions from the courts, and it cited paragraph 37 of *Kelly v. ERCB* in relation to what is required under section 28 of the *ERCA*:

> "For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs."

[279] FMMFN said that it demonstrated it has treaty rights and exercises them within the Project area. It referred to the written statements and maps it filed in the Project proceeding as demonstrating current land use by its members and that FMMFN has an interest in and actually occupies lands within the Project area, which is within FMMFN's traditional territory.

[280] FMMFN noted that in Shell's original Project application it identified four key First Nations groups that would likely be affected by the Project and said that it engaged, consulted with, and sought input from these groups as a result. The four groups are FMMFN, Athabasca Chipewyan First Nation, Mikisew Cree First Nation, and Fort McKay First Nation. FMMFN said that Shell acknowledged, from the very outset of the review process, that FMMFN has an interest in the lands within the Project area and that Shell realized FMMFN would likely be adversely affected by the Project.

[281] FMMFN said that the Project will negatively affect access to and use of FMMFN's traditional hunting and wild crafting areas, and that water, soil, and air quality on lands in which FMMFN has an interest will all be affected. FMMFN also said that having its continued representation in the hearing was useful for the AER and is in the public interest. FMMFN provided key information that was necessary for the Panel to consider in its review of the Project. FMMFN asserted that it would be fundamentally unfair and contrary to the principles of natural justice if FMMFN was required to fund its own costs for participating in the Project review.

[282] FMMFN said that the costs it claimed are very reasonable and are in fact very low for the hearing, which lasted seventeen days. FMMFN submitted that Shell did not object at length to the cost claim, and not in the manner that it did for costs claimed by other hearing participants.

[283] FMMFN submitted that it and its counsel diligently kept costs down by participating remotely, only making appearances at the hearing where necessary and reviewing the relevant parts of the transcripts from the hearing rather than attending in person. Furthermore, FMMFN's legal fees were minimized by having articling students and junior associates with lower billing rates work on matters wherever possible.

[284] FMMFN said that it specifically chose not to seat a witness panel as an additional method to keep costs reasonable. Seating a panel would have increased costs substantially, and it is likely that if a panel was seated, FMMFN's cost claim would have been 50 per cent higher. FMMFN also said that it cooperated with other interveners wherever possible to avoid duplication, including duplication of cross-examination. FMMFN also said that it proceeded first in cross-examination and questioned on environmental-assessment-related issues that were not canvassed by the other parties. Such areas included habitat issues, the planned use of the Local Study Area (LSA) and the Regional Study Area (RSA) and effects on the same, and access issues. To the extent that other parties may have covered this ground subsequently in questioning is not FMMFN's fault.

[285] In conclusion, FMMFN submitted that it not only meets the test for an award of costs but that it should be reimbursed for its full costs of the hearing.

Views of the Panel

[286] The Panel has determined that FMMFN is a group or association of persons who have been permitted to participate in a hearing for which notice of hearing was issued, as provided in section 58(c) of the *Rules*, and is therefore entitled to be considered for a cost award.

[287] The Panel is also satisfied that FMMFN would qualify for an award of costs under section 28 of the *ERCA*, which was the local intervener cost regime in place when Shell and FMMFN made their respective submissions. FMMFN is a Treaty 8 First Nation with rights under the treaty and other Aboriginal rights recognized and affirmed in section 35 of the *Constitution Act, 1982*. Shell and FMMFN disagree over the extent to which the evidence filed in the Project proceeding indicated that FMMFN members use the Project lands. The Panel notes there was evidence on the proceeding record from which the Panel could have concluded that FMMFN members were using lands on or near to the Project area, but states that such a finding is not required in order for FMMFN to be eligible for a cost award. In a previous section of this decision, the Panel stated (in relation to OSEC's eligibility for a cost award) that Project impacts are not likely to be confined to the lands actually disturbed by the Project. This finding applies equally to the question of FMMFN's eligibility for a cost award. Even if the Panel accepts Shell's position that the Project is at or beyond the northern extent of FMMFN's traditional territory, Project effects are not expected to be confined to those lands but instead will be experienced in other areas, including south towards Fort McMurray where FMMFN members use land more intensively and may even reside. The Panel is satisfied that the exercise of Aboriginal and treaty rights by some FMMFN #468 members could potentially be affected by the Project. This finding is supported by the conclusions in the Hearing Decision about the potential for the Project to affect Aboriginal traditional land use, rights, and culture.

[288] With regard to the amounts claimed, the Panel notes that FMMFN only participated in the hearing by its counsel questioning witnesses and making final argument. This participation helped the Panel meet its mandate to receive and report information about potential effects on Aboriginal groups and individuals, as required under article 6 of the Panel Agreement and its appended Terms of Reference. To the extent that FMMFN counsel's questioning may have overlapped that of other participants, the Panel believes that was not intended or unreasonable in the circumstances of the Project hearing.

[289] FMMFN was represented by MacPherson Leslie & Tyerman LLP. FMMFN's cost claim indicated that services from that firm were provided by Mr. Rangi Jeerakathil and six other individuals, although only Mr. Jeerakathil appeared at the hearing. FMMFN said this arrangement allowed its counsel to maximize efficiencies, and it accommodated a short absence by Mr. Jeerakathil during the proceeding. FMMFN claimed legal fees of $33 228, and disbursements and expenses of $3820.79. The Panel has considered the summary of professional fees claimed in relation to FMMFN's counsel and notes that 22.4 hours were claimed for Markel Chernenkoff for argument and reply, although only Mr. Jeerakathil appeared in the hearing to deliver argument. In reviewing the statement of account provided with the cost claim, it is apparent that the charges in fact relate to work done by Mr. Chernenkoff helping prepare the argument and reply. Given that correction, and considering the length and complexity of the proceeding and FMMFN's participation in it, the Panel has decided that the fees claimed by

FMMFN for its legal counsel are reasonable and were directly and necessarily incurred for purposes related to the hearing. The Panel awards FMMFN the legal fees it claimed on form E2 of its cost claim. The Panel also awards the full amount claimed by FMMFN for disbursements incurred by its legal counsel.

[290] FMMFN also claimed professional fees of $2061.25 for MSES Inc. witnesses Nina Modeland and Petr Komers. FMMFN did not present any evidence in the hearing, and neither of the MSES witnesses appeared on FMMFN's behalf to address their work. As a result, the Panel would not have been able to rely on information from these witnesses to inform its assessment of the Project in relation to FMMFN. In these circumstances, the Panel cannot conclude that the work of the MSES witnesses helped the Panel, and so none of the costs claimed by FMMFN for the MSES witnesses are awarded.

Table 3. Summary of FMMFN Cost Award

Legal fees claimed	Legal fees awarded	Reduction	Disbursements and expenses claimed	Disbursements and expenses awarded	Reduction
$33 228.00	$33 228.00	$0.00	$3820.79	$3820.79	$0.00

Expert	Fees claimed	Fees awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
Nina Modeland	$731.25	$0.00	$731.25	N/A	N/A	N/A
Petr Komers	$1330.00	$0.00	$1330.00	N/A	N/A	N/A

Cost Claim of Non-Status Fort McMurray/Fort McKay First Nation and Clearwater River Paul Cree Band No. 175

[291] The Non-Status Fort McMurray/Fort McKay First Nation and Clearwater River Paul Cree Band No.175 (Non-Status/Clearwater) claimed costs of $48 133.84. This amount comprised legal fees of $37 482, disbursements of $5944.41, and GST of $4707.43.

Views of Shell

[292] Shell said that Non-Status/Clearwater did not demonstrate that they are local interveners for the purposes of section 28 of the *ERCA*. Shell submitted that the only evidence Non-Status/ Clearwater provided in the proceeding was the oral submissions their witnesses made at the hearing, which consisted of general testimony about use of the region, history of the groups, and their consultations with Shell. Shell said that the Non-Status/Clearwater witnesses provided no evidence that the groups had legal rights that would be directly affected by the Project. It cited a previous energy cost order for which it asserted that the AER decided that the Non-Status groups did not have Aboriginal rights.

[293] Shell also said that even if one assumed that Non-Status/Clearwater had legal rights in the Project area, they provided no specific information detailing how approval of the Project would directly and adversely affect those rights. Shell submitted that Non-Status/Clearwater's cost claim should be denied.

[294] Shell said that even if Non-Status/Clearwater are local interveners, the costs they claimed were not reasonable. It said that Mr. Malcolm is experienced in regulatory proceedings and has participated in several hearings without the assistance of legal counsel. It noted that Non-Status/Clearwater obtained $41 995 from CEAA's Participant Funding Program and said that the CEAA funding should have been sufficient to cover all the costs of the groups' intervention.

[295] Regarding the claim for legal fees, Shell said that the only assistance provided by Non-Status/Clearwater's counsel in the hearing was in preparing written and oral submissions that focused on the legal status of Non-Status/Clearwater. Shell submitted that the topic was irrelevant to the question of whether the Project is in the public interest. It also said that counsel did not provide a detailed breakdown of time spent on the file that would allow an assessment of the reasonableness of the claim. In Shell's view, the limited involvement of Non-Status/Clearwater in the hearing made their claim for legal fees appear excessive. Shell submitted that Non-Status/Clearwater's claim for legal costs should be denied or reduced considerably.

Views of Non-Status/Clearwater

[296] Non-Status/Clearwater said that the oral evidence of Mr. Malcolm, Ms. Malcolm, and Ms. Cardinal demonstrated that the groups have an interest in the land that may be directly and adversely affected by the Project approval. They also said that, contrary to Shell's assertions, the AER has not decided that the groups do not have Aboriginal rights in the Project area; rather, Shell referred to decisions on the question of the Crown's duty to consult with Non-Status/Clearwater.

[297] Non-Status/Clearwater said that Shell's comments about the need for the groups to have provided a valid notice of question of constitutional law were incorrect. They said that the Panel was required to consider Aboriginal and treaty rights that were asserted in the hearing, regardless of whether a notice of question of constitutional law was filed. Non-Status/Clearwater submitted that their intervention asked the Panel to consider the potential impacts of the Project on their Aboriginal and treaty rights when the panel made its assessment of whether the Project was in the public interest.

[298] Non-Status/Clearwater said that the question of whether their members would be directly and adversely affected goes beyond considering harm to land itself and includes any potential harm related to the use of land or the health, safety, and well-being of persons or animals on the land. They submitted that the evidence of Mr. Malcolm, Ms. Malcolm, and Ms. Cardinal indicated that the Aboriginal rights to hunt, fish, and gather claimed by the groups demonstrated how they may be directly and adversely affected by the Project.

[299] Non-Status/Clearwater also referred to the Court of Appeal of Alberta's decision in *Kelly v Alberta (Energy Resources Conservation Board)*, wherein the court stated that the AER may be thwarted in discharging its mandate to provide a forum in which people can be heard on resource and development issues of public importance if its policy on cost recovery is applied too restrictively. Non-Status/Clearwater said that the geographical scope of the Project, both alone and in combination with adjacent projects, was unprecedented. It submitted that there was a correspondingly large potential for impacts from the Project and that a broad interpretation of "local intervener" was warranted.

[300] Non-Status/Clearwater responded to Shell's submission that the costs claimed were not reasonable because Mr. Malcolm had previously participated in hearings without legal counsel. They said that Shell was represented in the hearing by three lawyers even though it is a sophisticated applicant with experience in regulatory proceedings. They also said that Mr. Malcolm is not a sophisticated participant and that he was not successful in his previous regulatory interventions. Non-Status/Clearwater submitted that for Shell to suggest that the groups were less entitled to legal representation when defending their interests against a sophisticated applicant such as Shell was not only contrary to fundamental principles of justice, it was contrary to the regulatory framework governing the proceeding. They said that under the Panel Agreement, the Panel was to conduct its review in a manner that discharged the responsibilities of the AER, the requirements set out in *CEAA, 2012*, and the *Terms of Reference* appended to the Panel Agreement. They noted that one of the stated purposes of *CEAA, 2012* is to promote communication and cooperation with Aboriginal peoples on environmental assessments, and to ensure that opportunities are provided for meaningful public participation during an environmental assessment. Non-Status/Clearwater said that for the Panel to decide that Aboriginal interveners have a lesser right to counsel than a proponent whose project may infringe on Aboriginal rights would be contrary to those purposes.

[301] Non-Status/Clearwater said that their counsel, Ms. Johnston, and Mr. Malcolm both made considerable efforts to conduct the groups' participation in an efficient and effective way that focused on the groups' interests and avoided duplication. They also said that Ms. Johnston's involvement was not limited to oral and written argument; in addition to helping the groups with procedural matters, such as filing notices of questions of constitutional law and will-say statements, Ms. Johnston conducted direct and re-direct examination of the groups' witnesses, and she questioned Shell's witnesses. Non-Status/Clearwater submitted that the degree to which an intervention succeeds is not a valid consideration for determining eligibility for costs, and that a lack of success should not affect the groups' eligibility for a cost award.

[302] Non-Status/Clearwater said they were unclear about what greater level of "detailed breakdown" of counsel's time Shell believed was required. They noted that the highest category of hours claimed was for attending the hearing (100 hours) and that it was unreasonable to expect counsel to describe the specific tasks they perform while at a hearing (e.g., taking notes and discussing strategy with clients).

Views of the Panel

[303] The Panel is satisfied that Non-Status/Clearwater are qualified to receive an award of costs. They are clearly "participants" as defined in section 58(c) of the *Rules*, each being a group or association of persons who have been permitted to participate in a hearing for which notice of hearing was issued, as provided in section 58(c) of the *Rules*. In making this decision, the Panel wishes to be very clear about who, exactly, qualifies for an award of costs in relation to Non-Status/Clearwater's participation in the hearing.

[304] Mr. Malcolm has participated in several joint review panel hearings for oil sands mine projects, although not always as a representative of the Non-Status Fort McMurray/Fort McKay First Nation. In hearings in 2003,[22] he represented the Wood Buffalo First Nation; in hearings in

[22] *EUB Decision 2004-005: Canadian Natural Resources Limited, Application for an Oil Sands Mine, Bitumen Extraction Plant, and Bitumen Upgrading Plant in the Fort McMurray Area*; and *EUB Decision 2004-009: Shell*

2006[23] he represented the Wood Buffalo First Nation and Wood Buffalo Elders Society; and in a hearing in 2010[24] he represented the Non-Status Fort McMurray Band Descendants. At the 2006 hearings and thereafter, the groups represented by Mr. Malcolm have participated in hearings with a member or members of the Clearwater River Paul Cree Band No.175. All of these groups have in common the fact that none of them has been found by a hearing panel or court of law to hold treaty or other Aboriginal rights *in its own right as a distinct Aboriginal group*. One joint review panel addressed the question as follows (this example is a ruling on the legal status of the Clearwater River Paul Cree Band No.175):

> With respect to the Clearwater River Paul Cree Band #175, which I will refer to as the Clearwater Band, the Joint Panel finds that the Clearwater Band has not established that it exists as a recognized entity or distinct community of individuals with treaty or aboriginal rights that give rise to a duty to consult with it. The Joint Panel accepts the evidence of Canada and Alberta that the Clearwater Band is not a "Band" as defined in the *Indian Act*. The Joint Panel notes Canada's evidence that although the Indian Lands Registry System indicates the existence of a reserve located seven miles southeast of Fort McMurray named "Clearwater No. 175", that reserve is set aside for or occupied by the Fort McMurray #468 First Nation. The Clearwater Band's own submissions in support of its application indicated that the individuals comprising the Clearwater Band have not succeeded in their efforts to have the Band recognized.[25]

[305] In his evidence in the hearing, Mr. Malcolm acknowledged that none of the groups he has represented has been recognized as an Aboriginal group in its own right. The Panel's purpose in noting this is not to be critical of Mr. Malcolm or of his groups' participation. In fact, the Panel has no reason to believe that Mr. Malcolm and the individuals he represents are motivated to participate in hearings by anything other than a desire to improve the lot of the members of the groups. What is important, however, is that in deciding that the Non-Status/Clearwater are eligible for a cost award, the Panel has focused solely on the characteristics of the individual members of the groups, as described by the witnesses in their evidence, and has not relied at all on the arguments or assertions that the groups themselves have treaty or other Aboriginal rights.

[306] The Panel has also decided that the Non-Status/Clearwater participants would have met the *ERCA* section 28 test for a local intervener. The Panel concludes this on the basis of the witnesses' evidence of present and historical occupation and use of lands within and near Fort McMurray, and other lands closer to the Project area. The evidence before the Panel indicates that the Project will contribute to some regional impacts on traditional land users and potentially affect individuals residing in the Fort McMurray area. As noted previously in this decision, for the purposes of this cost order the Panel has adopted a holistic view of what lands might be impacted by the Project.

[307] To address one aspect of Shell's costs submissions, the Panel does not consider that Mr. Malcolm's participation without counsel in previous joint review panel hearings indicates that

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Canada Limited, Applications for an Oil Sands Mine, Bitumen Extraction Plant, Cogeneration Plant, and Water Pipeline in the Fort McMurray Area (the Jackpine Phase 1 decision).

[23] *EUB Decision 2006-128: Albian Sands Energy Inc., Application to Expand the Oil Sands Mining and Processing Plant Facilities at the Muskeg River Mine*; and *EUB Decision 2007-013: Imperial Oil Resources Ventures Limited, Application for an Oil Sands Mine and Bitumen Processing Facility (Kearl Oil Sands Project) in the Fort McMurray Area* (*EUB Decision 2006-128*).

[24] *Decision 2011-005: TOTAL E&P Joslyn Ltd., Application for the Joslyn North Mine Project*.

[25] *EUB Decision 2006-128,* at page 114.

Non-Status/Clearwater should not receive a cost award for legal services in this proceeding. The fact that a claimant has participated in previous AER proceedings without counsel does not preclude that participant from making a claim for legal costs incurred in a subsequent hearing. This is particularly so in complex matters such as the JME hearing, where all the parties and the hearing process itself can benefit from participants being represented by counsel who understand the functions and practices of a quasi-judicial tribunal in a hearing setting.

[308] The Panel does, however, consider that not all legal fees claimed by Non-Status/Clearwater for their counsel's attendance at the hearing were reasonably and necessarily incurred. The Panel noted that Non-Status/Clearwater were advised by the Panel, prior to the hearing, that the groups' participation would be limited to making a two-hour oral presentation and providing final argument. This decision resulted from the groups not filing a hearing submission in accordance with the directions given in the notice of hearing. While Shell's witnesses were being questioned, the Panel granted a request from Non-Status/Clearwater that Mr. Malcolm be permitted to question Shell's witness for one half hour. The foregoing summarizes the Non-Status/Clearwater participation in the hearing. The Panel considers that reasonable hearing costs that ought to be awarded to the groups' must be related to that participation.

[309] In the Panel's view, it was not necessary for Non-Status/Clearwater's counsel to have attended 100 hours of the hearing over the final 13 sitting days, given the limited nature of the group's permitted participation. Specifically, other than November 13 when the groups made their hearing presentation, it was not necessary for counsel to have attended the part of the hearing between the conclusion of Shell's oral evidence on November 6 and the beginning of final argument on November 21 because Non-Status/Clearwater would not be questioning the intervener witnesses that were presented during that period. Mr. Malcolm could have monitored the hearing during that period, and he was in fact in attendance at the hearing for several of those days, and Ms. Johnston could have been engaged in other matters, outside the hearing room, and reviewed the transcripts of the hearing to keep current on hearing developments. The Panel has decided that it is reasonable to award legal fees of $12 960 for Non-Status/Clearwater's counsel attending the hearing. This amount is equal to 54 hours at the rate claimed for Ms. Johnston and is intended to reflect her attendance for seven hearing days (calculated as 7/13 x 100 hours claimed) as follows: the four days within the claim that Shell was giving evidence; one day for Non-Status/Clearwater's hearing presentation; and two days for final argument.

[310] Non-Status/Clearwater claimed $6408 for their counsel's hearing preparation fees. In considering this part of the claim, the Panel noted that Non-Status/Clearwater's participation in the hearing was similar to that of FMMFN (i.e., it questioned Shell's witnesses and provided final argument), but FMMFN's counsel claimed more than double the amount of preparation fees. The Panel does not have details of the preparation work that was done by Non-Status/Clearwater's counsel; however, the Panel believes the amount claimed is reasonable considering the complexity and length of the proceeding and Non-Status/Clearwater's participation in the hearing. The Panel awards the entire amount claimed for counsel's preparation fees.

[311] Non-Status/Clearwater also claims professional fees for its counsel's travel time to and from the hearing in the amount of $4374. Having regard for the comments below describing the difference between awarding counsel professional fees for attending the hearing and awarding the costs incurred for counsel to be present in Fort McMurray while the hearing is sitting, the

Panel considers that the travel costs were necessarily incurred for the purposes of the hearing, and it has decided to award counsel's fees for travel time in the amount claimed by Non-Status/Clearwater.

[312] Non-Status/Clearwater also claimed personal disbursements for their legal counsel in the amount of $6154.[26] The Panel finds that the disbursements claimed were incurred for the purposes of the hearing and are within amounts permitted under the scale of costs (except for accommodation costs, for which the charges are reasonable for Fort McMurray accommodation). The Panel has decided to award the entire amount claimed by Non-Status/Clearwater for their counsel's personal disbursements. In so deciding, the Panel acknowledges that it is awarding personal disbursements for travel, accommodation, and meals for the same period that it declined to award counsel's hearing attendance fees. The Panel does not believe it is being inconsistent in its awards because there is a difference between awarding professional fees for time that counsel or other professionals could have been engaged in other productive tasks (as described previously in relation to the claim for ACFN's expert witnesses) and awarding out-of-pocket costs that were incurred to travel to the hearing location. The distinction can be further explained as follows. The AER expects counsel to anticipate when he or she will not need to attend parts of a hearing, and it expects counsel to make plans to work on other matters during those times. It may nevertheless be prudent for counsel to still travel to the hearing location and essentially be "on stand-by" in case the hearing takes an unexpected turn that requires counsel's attendance. In other words, it may be a reasonable decision for counsel to incur costs to be present at the hearing location even though he or she does not expect to be active in the hearing, and at the same time it may be unreasonable for counsel to be paid fees for simply being in attendance without expecting to be an active participant in the hearing.

[313] Shell noted that Non-Status/Clearwater were allocated $41 995 by CEAA to fund their intervention. The groups were in fact allocated $83 990 for the Project and Pierre River Mine project combined, and they indicated that that amount was divided equally between the two project interventions. The groups said they are only applying for a cost award for the part of their project costs that were not paid by the CEAA participant funding allocation.

[314] Shell submitted that the CEAA participant funding allocated to Non-Status/Clearwater was adequate to cover the costs of the groups' intervention and that no additional costs should be needed or awarded. Shell is correct that hearing costs that have been recovered by a cost applicant from other funding are not to be awarded by the AER. This is reflected in section 58.1(e) of the *Rules*, which says that "whether the participant has made an adequate attempt to use other funding sources" is relevant to the AER's decision on a cost claim. The Panel is satisfied that CEAA participant funding allocated to Non-Status/Clearwater is not compensating the same costs that the groups claim in this cost proceeding. Non-Status/Clearwater said that the CEAA funding was applied to hire an expert witness to review the Project's environmental impact assessment and to retain legal counsel to help with hearing preparation. The Panel has no information about the groups' hiring of or paying for an expert witness and no such expert was involved in the hearing on Non-Status/Clearwater's behalf. But the groups do not claim any expert costs in this proceeding, and as a result if there is an accounting owed by them for the

[26] Form E4 indicates $698.95 is claimed for accommodation for Mr. Malcolm; however, Non-Status/Clearwater's submission on the cost claim states that that amount was paid by Mr. Malcolm for Ms. Johnston's accommodations for one week of the hearing. The Panel therefore considers that the entire disbursement claim relates to counsel's participation in the hearing.

allocation of funds for expert assistance, it is not owed to the Panel and must be owed to CEAA participant funding officials. Furthermore, the panel has no information about what amount, if any, of CEAA participant funding has been paid to Non-Status/Clearwater's legal counsel for her services or expenses. In Non-Status/Clearwater's cost submission, which was signed by Ms. Johnston, she said that the groups are only applying to the AER for the part of their costs that are not covered by the CEAA participant funding award. Given the reasonableness of the claim for counsel fees and the assurance given by Ms. Johnston that no attempt is being made to recover legal fees twice, which assurance the Panel relies on, the Panel has decided that it is not necessary to make any reductions from the costs awarded to Non-Status/Clearwater on account of CEAA participant funding that was allocated to the groups.

Table 4. Summary of Non-Status/Clearwater Cost Award

Legal fees claimed	Legal fees awarded	Reduction	Disbursements and expenses claimed	Disbursements and expenses awarded	Reduction
$37 482.00	$23 742.00	$13 740.00	$6154.00	$6154.00	$0.00

Cost Claim of Metis Nation of Alberta Region 1 and Others

[315] A cost claim was filed by Bishop Law claiming participant costs in the amount of $143 163.92. This comprises legal fees of $67 836, expert fees of $61 029.95, disbursements of $8740.69, and applicable GST. Bishop Law said that the claim was "filed on behalf of the Métis Nation of Alberta Region 1, Fort McMurray Metis Local 1935, Fort Chipewyan Local 125, Bill Loutitt, Frank LaCaille, Harvey Sykes, John Grant, Edward Cooper, Mike Guertin, Joe Hamelin, Kurtis Gerard, Fred (Jumbo) Fraser, Barb Hermensen, Elder Ray Ladaouceur, Gabriel Bourke, Ernest Thacker and Guy Thacker." For ease of reference, the panel will refer to that collection of groups and individuals as "MNA et al." to differentiate that collective from the Métis Nation of Alberta Region 1 itself, which the Panel will refer to in this order as "MNA."

Views of Shell

[316] Shell said that MNA has not demonstrated that it is a local intervener for the purposes of section 28 of the *ERCA*. It submitted that MNA is a political organization that purports to represent specific Métis individuals and communities but that it does not represent all Métis individuals and communities. Shell said that Fort McKay Métis Local #63 is not represented by MNA and that MNA's cost claim does not include Fort Chipewyan Métis Local #125 (Local 125), to which Shell made a payment for hearing costs outside of the *Directive 031* process.

[317] Shell said that MNA filed information in the project proceeding that purported to show traditional land use by Métis individuals within the region. Shell submitted that most of the information was historical and that evidence of historical land use in the region does not demonstrate that any Métis individual's or community's current use of lands for traditional purposes will be affected by the project so as to satisfy section 28 of the *ERCA*. Shell also said that MNA presented several witnesses at the hearing who use land within the Project RSA, and Shell argued that many of these individuals were members of Local 125, which is not included in MNA's cost claim. Furthermore, all of the MNA witnesses who currently use lands within the RSA use lands located far to the north of the Project, lands that will not be directly affected by the Project. Shell said that the *Mark of the Métis* atlas that was filed by MNA during the hearing

contains a variety of maps showing Métis Local 1935 (Local 1935) TLU sites. Shell noted that, except for a single moose hunting site near the project, no TLU sites were identified within the LSA. Shell said that MNA provided no specific information about how the moose hunting site would be directly and adversely affected by the Project.

[318] Shell said that it is not sufficient for the MNA to assert that the exercise of traditional rights within the Project area will be impacted if the Project proceeds; MNA must satisfy the AER that a direct and adverse impact on the exercise of a particular legal right might result if the Project is approved. Shell argued that even if one assumes there are Métis rights in the vicinity of the Project, MNA did not provide specific information detailing how approval of the Project would directly and adversely affect those rights. Shell submitted that MNA has not demonstrated that it is a local intervener under section 28 of the *ERCA*.

[319] Shell argued that even if MNA is found to be eligible for a cost award, the costs claimed are not reasonable. Shell said that MNA received over $80 000 in participant funding from CEAA, and it is not clear how that funding was used. Shell submitted that in order to prevent double recovery of costs, $40 000 should be deducted from MNA's cost award.

[320] Shell also said that most of MNA's intervention was focused on (i) demonstrating that Métis have Aboriginal rights in the region by filing historical information that attempts to satisfy the Supreme Court of Canada's test in *R.* v. *Powley;*[27] and (ii) seeking greater recognition of Métis by the Government of Alberta and encouraging the development of Métis consultation guidelines. Shell submitted that neither of these objectives is specific to the Project and, based on the AER's past guidance,[28] the costs incurred by MNA in relation to these objectives (being most of MNA's costs) should not be recovered under *Directive 031*.

[321] Shell said that the Tough and Anuik expert report was entirely focused on the history of Métis in the region and on demonstrating that MNA meets the *Powley* test. Shell submitted that this information was irrelevant to the Panel's assessment of the potential impacts of the Project and whether the Project was in the public interest. Shell argued that the costs relating to this report should be completely disallowed.

[322] Shell noted that MNA claimed professional fees for its historian, Peter Fortna, based on expert witness rates. Shell said that his expertise was entirely related to historical use of the region by Métis families and individuals and not current land and resource use. Shell also said that although Mr. Fortna helped prepare MNA's October 1 submission and gave oral evidence on potential impacts of the Project, his testimony was clear that MNA's assertions of Project effects on water quantity and quality and on McClelland Lake were based on community members' perceptions and on assumptions made without considering any of Shell's evidence. Shell submitted that these assumptions were completely inconsistent with the conclusions in Shell's EIA and were of no assistance to the Panel. Shell also said that the costs claimed for Mr. Fortna were for logistical support (e.g., organizing travel for MNA witnesses) and that his participation

[27] 2003 SCC 43.

[28] Shell gave the following examples: Local Intervener Costs in Relation to an Application by Suncor Energy Inc. for the Steepbank Extension and Voyageur Upgrader, EUB *Energy Cost Order ECO 2007-001*, 21 February 2007, at 7; Local Intervener Costs in Relation to an Application by TOTAL E&P Canada Ltd. for an Oil Sands Bitumen Upgrader, ERCB *Energy Cost Order ECO 2010-009*, 15 December 2010, at 22; Local Intervener Costs in Relation to Applications by Shell Canada Limited for Well, Facility and Pipeline Licences, ERCB *Energy Cost Order ECO 2011-008*, 7 November 2011 at 53.

in the parts of the hearing concerning the notices of questions of constitutional law was not necessary and the corresponding costs claimed are not reasonable. Shell summarized by stating that because Mr. Fortna's expertise is as an historian and Métis history was not relevant to the Panel's consideration of the Project, and because Mr. Fortna was unfamiliar with the Project application, none of his costs should be awarded. Shell also submitted that if, alternatively, the Panel finds Mr. Fortna's involvement in the hearing was useful, only Mr. Fortna's expert costs that were directly related to his expertise should be awarded.

[323] Shell said that the costs related to Mr. Fortna presenting to MNA representatives after the hearing to discuss the hearing and next steps (including his return travel costs from Calgary to Lac La Biche) were not necessary for MNA's participation in the hearing and should be denied.

[324] Shell said that the claims for expert fees for Teresa Maillie should be denied because no explanation or justification for these fees was provided. Shell also said that the following claimed items should be denied because they are not recoverable under *Directive 031*:

- counsel's legal fees related to recovering intervener costs
- *Mark of the Métis* study printing costs ($625), which had already been filed on the record
- costs of gas
- costs for meals taken before the hearing began
- office supply costs.

Views of MNA et al.

[325] MNA et al. said that their cost claim was a reasonable amount for a hearing in Fort McMurray that lasted several weeks, that their counsel and experts attended the hearing only when absolutely necessary, and that they also relied on their consultants and members to represent them.

[326] MNA et al. submitted that Shell did not challenge their standing at the hearing, and Shell acknowledged in final argument that Local 125 and Local 1935 have legal interests that may be affected by the Project. Some MNA members[29] also have their own legal interests in lands (outside of the rights of the Métis collective), and they gave evidence about project impacts on their legal interests that Shell did not challenge in the hearing. MNA et al. cited *Kelly v. Alberta (Energy Resources Conservation Board)* [30] as being directly on point on the meaning of "may be directly and adversely affected" in section 28 of the *ERCA*, and submitted that section 28 does not require proof that an asserted legal interest will be affected by the project.

[327] In response to Shell's submission that Local 125's cost claim had been satisfied, MNA et al. said that they accepted an offer of partial payment of Local 125's hearing costs, which Shell had committed to pay, and that this arrangement is outlined in MNA et al.'s letter dated February 4, 2013, that was attached to their cost submission. They also said, however, that

[29] MNA et al. identified Barb Hermensen, John Grant, Mike Guertin and Frank LaCaille (members respectively of Local 125 (Fort Chip), Local 1935 (Fort McMurray) and Local 1909 (Lac La Biche)) as each having testified that she or he has a registered trapline and associated Crown lease of trapping cabins.
[30] 2012 ABCA 19.

there was no agreement that the amount paid by Shell was commensurate with Local 125's hearing costs.

[328] MNA et al. said that Mr. Fortna's assistance greatly reduced the overall costs of the intervention. In the intervention, he played a dual role that was necessitated by MNA et al.'s limited resources. Mr. Fortna and his colleague at Willow Springs gathered and presented evidence of Métis use of the RSA and LSA. Mr. Fortna also spent many hours before and during the hearing coordinating the intervention, both before and after legal counsel was retained. He monitored the hearing while legal counsel was not in attendance in order to anticipate when the Métis witness panel would be needed to present its evidence. He also coordinated witnesses' attendance, helped witnesses prepare, and prepared and presented an expert report. MNA et al. said that all of this was necessary and helped the Panel understand MNA's concerns. They submitted that Mr. Fortna's fees are extraordinarily reasonable for the amount of work he completed.

[329] MNA et al. said that CEAA allocated them participant funding of $42 500 for the project hearing, and $12 500 of that funding was directed towards legal fees relating to Crown consultation issues, which CEAA accepted as part of the mandate. Also, $13 000 of the CEAA funding was allocated for honoraria and travel for the Métis witness panel, with the result that no claim was made in this cost proceeding for witness honoraria or travel costs. MNA et al. clarified that CEAA has a comprehensive cost process and does not advance participant funding until invoices are provided. Mr. Fortna has been working to help the participants recover CEAA funds.

[330] MNA et al. said that their counsel and experts have not double billed for their services.

[331] MNA et al. submitted that the Panel Agreement states that the intervener cost processes of the two organizations (the AER and CEAA) will not be inconsistent. They argued that the fact that CEAA awarded costs to MNA et al. for their participation in the hearing is an acknowledgment that MNA members were considered to hold an interest in land that may be affected by the Panel's decision. They indicated that a contrary decision by the AER would be inconsistent with that, and not in accordance with the purpose of intervener costs as discussed by the Court of Appeal of Alberta in the *Kelly v. Grizzly* decision.

[332] With respect to the specific cost items highlighted by Shell, MNA et al. said the following:

- Legal fees of $882, including GST, relating to the cost claim were included in error.
- The *Mark of the Métis* atlas had to be purchased by Bishop Law, and the invoice is included in the cost claim,
- The cost of gas was claimed because Ms. Bishop borrowed Mr. Fortna's car, which was more economical than her renting a vehicle.
- Meals purchased before the hearing were related to meetings with experts and clients, and the charges are not excessive.
- Office supply costs of $214.77, including GST, were for the purchase of binders and tabs for the hearing submissions.

[333] MNA et al. said that their intervention was mounted on a shoestring budget and their members, counsel, and experts were thrifty. They provided the examples that Mr. Clem Chartier did not claim any costs for travel or his time, experts whose reports could be tendered with consent were not called as witnesses, and non-counsel monitored the hearing in order to minimize counsel fees.

Views of the Panel

[334] The Panel is satisfied that MNA et al. are eligible for an award of costs. As previously stated in this order, the test for qualifying for an award for costs from the AER is whether the cost applicant is a "participant" as defined in section 58(c) of *REDA*. It is clear that MNA et al. satisfies that test because they are a group that was permitted to participate in the hearing.

[335] The Panel also believes that MNA et al. would satisfy the local intervener test under section 28 of the *ERCA*. Several MNA et al. members testified that they exercised Aboriginal and private rights (including ownership or occupation of lands) in areas that may be affected by the Project. The Hearing Decision states that the Project might result in the TLU activities of some Métis individuals being adversely affected, although impacts might not be significant. The Panel considers that some of the individuals making up MNA et al. are the Métis individuals referred to in that finding by the Panel. Having regard for *Kelly v Alberta (Energy Resources Conservation Board)*,[31] the Panel considers that the MNA et al. would have met the local intervener test in section 28 of the *ERCA*.

[336] Although the Panel has decided that MNA et al. qualifies for an award of costs, the Panel considers that certain of the costs claimed are not reasonable, or are not allowed under the scale of costs, and should not be awarded in this cost order.

[337] As noted in the Hearing Decision, a considerable amount of MNA et al.'s evidence related to their historical rather than current use of the land. Although the Panel was directed in the Panel Agreement to report what it heard about asserted Aboriginal rights, that was not the focus of the hearing as set out in the notice of hearing; the focus of the hearing was the Project application and the Panel's assessment of the environmental effects that might result if the Project proceeded, including the effects on asserted or established treaty rights, TLU, and culture. The Panel was also very clear to participants that it would not be making any determinations about the strength or validity of rights asserted by Aboriginal groups or individuals. Shell did not challenge the rights asserted by MNA et al.'s witnesses in the hearing, and the validity and strength of the claimed rights was not an issue the Panel needed to decide. As a result, much of the evidence provided by MNA et al. on historical use of the land provided diminishing returns of evidentiary value and was of limited assistance to the Panel. In particular, the extensive evidence MNA et al. gave in the hearing about what they perceived to be the Crown's failure to recognize Métis rights or to adequately consult with Métis groups was only marginally helpful.

[31] 2012 ABCA 19.

Legal Counsel Bishop Law

[338] MNA et al. was represented by Bishop Law, for whom MNA et al. claimed legal fees in the amount of $67 836, and disbursements and expenses of $6683.79. The claim included legal fees for Ms. Debbie Bishop of $61 740 and for Ms. Tarlan Razzaghi of $6096. Only Ms. Bishop appeared at the hearing and Ms. Razzaghi's services appear to have related to preparing hearing submissions and hearing witnesses. MNA et al. clarified that a part of the CEAA participant funding they were allocated was applied to legal fees that are not being claimed in this cost proceeding. The Panel is satisfied with the explanation that MNA et al. were not attempting to recover the same legal fees in this cost proceeding. MNA et al. also clarified that including $840 for legal fees relating to their cost application was a mistake.

[339] The Panel noted that counsel for MNA et al. did not claim travel time separately from other billed time but instead billed travel time at half the actual time; i.e., she billed 12.5 hours at full rate for 25 hours of actual travel time. For the purposes of assessing and awarding costs the Panel has calculated actual travel time and made an award for that separate from the award for other billed legal services (see below). The Panel has therefore reduced the claim for Ms. Bishop's legal services (other than travel time) by $3500, which equals the 12.5 hours billed for travel time.

[340] With the clarifications provided above, the Panel considered that the amount claimed by MNA et al. for legal fees for preparation and attendance at the hearing is $63 496.[32] The Panel is satisfied that the legal fees claimed by MNA et al. were incurred for the purposes of the Project proceeding. The questions that remain are whether the legal fees claimed are reasonable, having regard for whether the intervention made a substantial contribution to the hearing or provided a better understanding of the issues that were before the Panel.

[341] As stated above, the Panel agrees with Shell that a substantial part of the MNA et al.'s submission and evidence was directed to general concerns about Métis section 35 rights, the absence of a government Métis consultation policy, and establishing that MNA et al. had rights in accordance with the *Powley* decision, and that this evidence did not materially help the Panel's assessment. The statement of account provided by MNA et al.'s legal counsel does not have (nor does it need to have) sufficient detail for the Panel to conduct a line-by-line analysis of the particular aspects of the intervention for which the itemized legal services were incurred. The Panel has therefore decided that it is appropriate to award 60 per cent of the costs claimed by MNA for legal fees for preparation and attendance at the hearing (evidence and argument). The Panel therefore awards MNA et al. $38 097.60 for legal fees for preparation and attendance at the hearing. This award is intended to reflect the parts of the intervention that were directed to matters arising before the Panel and contributed to a better understanding of the issues without unnecessarily lengthening the proceeding.

[342] MNA et al.'s claim for legal fees included 25 hours for their counsel to travel to and from the Fort McMurray parts of the hearing. The Panel has reviewed this part of the claim and is

[32] Equal to $61 740 - $840 - $3500 + $6096 = $63 496.

satisfied that the travel was for hearing purposes. The Panel awards $3500 for this part of the claim.[33]

[343] MNA et al. also claimed $6683.79 for disbursements incurred by their legal counsel. The Panel has reviewed this part of the claim and has decided that not all of the amounts claimed are eligible for an award under the scale of costs or were supported by a receipt as required under *Directive 031*.

[344] Parking charges of $146.18 were claimed, but one charge of $2.38 was for parking in the City of Calgary on October 19, 2012. That charge was not incurred to attend the hearing and is not awarded. In addition, two Fort McMurray airport parking charges dated November 16, 2012, were claimed, but only one receipt for $22.86 was provided. The other parking of $49.52, for which Bishop Law's statement of account indicated there was no receipt, is not awarded. The Panel will therefore award $94.28 of the $146.18 claimed for parking by MNA et al.'s counsel.

[345] MNA et al. claimed meals for their counsel in the amount of $455, and "meals with clients hearing preparation" in the amount of $224.81. *Directive 031* is clear that a hearing participant (which includes counsel) can claim a meal per diem for each day that he or she is attending the hearing. In Bishop Law's statement of account, Ms. Bishop claimed a $40 meal per diem for eight[34] of the days that the hearing was sitting. The Panel will award a meal per diem for each of those eight days, plus four more days that represent one additional day for each week the hearing was sitting in Fort McMurray and Ms. Bishop was attending, for a total per diem meal award of $480. All other amounts claimed for Ms. Bishop for either meals or meals with clients are not awarded.

[346] The amount of $52.46 claimed for gasoline that Ms. Bishop purchased for Mr. Fortna's car is not recoverable under the scale of costs. As the Panel has stated previously in this cost order, *Directive 031* allows a hearing participant to recover mileage charges if a personal vehicle is used to travel between urban centres to a hearing. While it may be resourceful for a hearing participant to use a private vehicle during the hearing (whether her own vehicle or one borrowed from another), a cost panel cannot award fuel charges because it has no ability to confirm that the fuel that was purchased was entirely consumed while the vehicle was being used for purposes directly related to the hearing. This part of the cost claim is not awarded.

[347] MNA et al. claimed mileage charges of $156.55 for vehicle travel between Ms. Bishop's home in Fort Saskatchewan and the Edmonton International Airport. The claim indicates that each trip is 62 kilometres (one way). This part of the claim is in accordance with *Directive 031*, and the Panel awards the amount as claimed.

[348] The Panel is satisfied that the costs for copies of the *Mark of the Métis* atlas were necessarily incurred for the MNA et al.'s intervention because copies of the book had to be provided to the Panel and Shell in order for MNA et al.'s witnesses to be able to speak to the book's contents in their evidence.[35] The Panel therefore awards $625 as claimed. As this cost

[33] Travel was claimed for October 30, November 2, November 11, November 14, and November 16. Travel is awarded at one-half counsel's normal rate, in this case 25 hours @ $140 = $3500.
[34] Bishop Law's account actually includes a meal per diem claim for each of twelve days, including October 21 and 22, and November 11 and 12; however, the hearing was not in session on any of those four days.
[35] This is not to imply that such evidence was of assistance to the Panel: that is expressly addressed in the cost order.

order will record that MNA et al. has obtained copies of the *Mark of the Métis* atlas, the Panel expects that the groups and individuals that constitute MNA et al. will be able to provide copies of the book in any future proceedings in which they address the book in their evidence, without the need to seek reimbursement of the costs to obtain additional copies of the book.

[349] MNA et al. claimed $1120 for accommodation for their counsel, based on the scale of costs limit of $140 per night, but provided receipts that indicate that actual Fort McMurray costs paid by their counsel total $2122.69. For the reasons previously given in this cost decision, the Panel would normally award the actual costs of Fort McMurray accommodation that were incurred by MNA et al.'s counsel in the amount of $2122.69. But it appears that MNA et al. may have already received $1275.12 from CEAA participant funding to reimburse the difference between the accommodation claim they filed in this cost proceeding and their counsel's actual hearing accommodation costs. Assuming that the shortfall has been paid by CEAA funding, the Panel awards $1120 claimed by MNA et al. for their counsel's accommodation.

[350] The Panel has decided that the disbursement amounts claimed by MNA et al. for their legal counsel that are not addressed above are in accordance with *Directive 031* and are supported by receipts (where necessary), and the Panel awards the following amounts as claimed:

- airfare of $1638.82
- Greyhound bus fare of $48.43
- costs for transcripts of $409.50
- courier and delivery charges of $37.23
- teleconferencing charges of $397.81
- Bishop Law photocopying at the scale of costs rate of $.10/page, in the amount of $1000
- Staples Canada Inc. and hotel printing charges of $167.46
- Staples Canada Inc. office supplies in the amount of $204.54

[351] The total amount awarded to MNA et al. for disbursement costs claimed for their legal counsel is $6379.62.

Expert Witnesses

[352] MNA et al. claimed $33 600 for professional fees for Peter Fortna, comprising $5550 for preparation fees and $28 050 for attendance fees during the hearing. Mr. Fortna's expertise is as a historian, and that establishes the scope of matters for which he was qualified to give expert evidence in the hearing. The Panel noted that much of Mr. Fortna's evidence related to the history of the Métis families in the region and to the Aboriginal rights they asserted. For the reasons stated above, the Panel has found that such evidence provided only limited assistance to the Panel and that information about current land use by Métis people in the Project LSA and RSA would have been more useful. Mr. Fortna did offer some evidence relating to Project impacts; however, the subject matter was outside his area of expertise, and his conclusions were largely based on assumed expectations of MNA members and not on a technical assessment of the Project itself. Mr. Fortna's focus on historical matters and his rudimentary knowledge of the details of the Project itself limited the value of his evidence.

[353] MNA et al. claimed professional fees for 37 hours of preparation by Mr. Fortna. The Panel reviewed the invoice provided by Willow Springs Strategic Solutions and determined that 30 hours were invoiced for Mr. Fortna reviewing material submitted in the proceeding. The other preparation attendances were for strategy meetings with counsel or for preparing oral hearing submissions, both tasks that are outside Mr. Fortna's expertise and that are considered to be counsel's responsibility. The Panel will therefore only consider awarding 30 hours of preparation time for Mr. Fortna's services.

[354] The 187 hours claimed by MNA et al. for Mr. Fortna's hearing attendance stands out from the claims made by other participants for their expert witnesses. He gave evidence on one day of the hearing, although the Panel acknowledges that he may have assisted the MNA et al.'s counsel on the days that she questioned Shell's witnesses. MNA et al. provided extensive cost submissions on the "dual role" performed by Mr. Fortna and described the other hearing-related functions he assumed, such as organizing the intervention, monitoring the hearing, coordinating witness attendance, and preparing witnesses. The Panel accepts that Mr. Fortna may have performed those other functions; however, none of those aspects of the intervention fall within his expertise. The Panel has decided that none of those attendances by Mr. Fortna attracts an award of costs that is based on the fee he charges for professional or expert services. In addition, none of the fees claimed for Mr. Fortna's presentations about the hearing or debriefing with clients were related to the hearing in a way that merits an award of costs. The Panel will not consider an award that reimburses Mr. Fortna's fees for those services.

[355] The Panel has decided to award MNA et al. professional fees for the services provided by Mr. Fortna based on 30 hours of hearing preparation and 16 hours of hearing attendance. The attendance part of the fees represents one day during which Mr. Fortna gave evidence and two partial days when he may have helped counsel with her questioning of Shell's witnesses and Shell's rebuttal panel witnesses. The award for professional fees is calculated based on the claimed rate of $150/hour and will be further reduced by 40 per cent to reflect that the focus of Mr. Fortna's expertise and evidence was the history of the Métis people in the region, which was a subject that provided limited assistance to the Panel.

[356] Although the Panel has decided not to award the full attendance fees claimed for Mr. Fortna, it will award MNA et al. an organizing honorarium of $500, the maximum amount provided in *Directive 031*, in recognition of his efforts helping counsel to form the group and to manage the group throughout the hearing.

[357] MNA et al. claimed disbursements for Mr. Fortna's participation in the hearing in the amount of $2056.90, comprising $755 for meals and $1301.90 for mileage. Mr. Fortna is entitled to a $40 meal per diem for each day that he actively participated in the hearing by either giving evidence or assisting MNA et al.'s counsel in her questioning of Shell witnesses, plus one additional day for each of those attendances in recognition of the limited travel options to and from Fort McMurray (as previously described in this cost order). The Panel therefore awards a total meal per diem of $240, representing two days' per diem for each of the three different days that Mr. Fortna actively participated in the hearing. The Panel will also award $765.58 for mileage for Mr. Fortna's travel from Calgary to Fort McMurray on October 22 and for his travel from Fort McMurray to Calgary on November 15, 2012. Mr. Fortna's return trip from Calgary to Lac La Biche was not for hearing purposes, and the Panel will not award the mileage costs claimed for that travel.

[358] MNA et al. claimed professional fees for Tereasa Maillie in the amount of $960 and for Jonathan Anuik of $26 469.95. The fees were for their respective reports "Historical Archives on the Métis Experience in Northeastern Alberta" and "Historical Métis Communities in Region One of the Métis Nation of Alberta, 1881–1916." Neither expert was presented in the hearing to address her or his report; however, Shell said that it did not have questions for these experts, and it did not require that they attend.

[359] Ms. Maillie's report is dated April, 2009. Its introductory paragraph states the following:

> The goal of this project was to obtain documents and information on the history of the Métis in Northeastern Alberta, particularly in the Ft. McMurray region with special focus on traplines, applications for permission to trap, and legislative documents on Métis trapping. Details on a proposed Métis settlement in the 1950s and the Métis Settlement act were also collected. As well, the project covered documents and information on the development of the Athabasca Oil Sands region. The James M. Parker files at the University of Alberta Archives served as the main source of information.

[360] The services provided by Ms. Maillie were described in her invoice to MNA as "review of material and preparation for the ... Submission to the Joint Panel Review." The invoice also stated that most of her report was written previously for a different project and that original research was not done. The Panel finds that Ms. Maillie's report was not created or provided for any aspect of the Project application or the Panel's review. The only Project-related service that Ms. Maillie appears to have provided was a review of MNA et al.'s hearing submission, which did not include any original work by her. Responsibility for the contents of the hearing submission rests primarily with counsel and the authors of the submission. The Panel has decided that the services provided by Ms. Maillie were not necessarily incurred for the purposes of the hearing, and it will not award MNA et al. any amount for Ms. Maillie's services.

[361] The focus of Dr. Anuik's report is appropriately described in its title, as it documents the presence of Métis in the Wood Buffalo region and surrounding territory from the late nineteenth century to the early part of the twentieth century. Like Ms. Maillie's report, it was not created or provided for any aspect of the Project application or the Panel's review. The report was commissioned by MNA through a research grant agreement with the University of Alberta, dated March 12, 2012, under which the university provided two invoices to the MNA in amounts that total $26 469.95. MNA et al. claimed the very same amount in its cost claim in this proceeding. If the Panel awarded this part of the cost claim, the net result borders on astonishing: Shell would be required to pay the entire amount that MNA paid the university for work that was not related in any way to the Project. The Panel has decided that the services provided by Dr. Anuik were not necessarily incurred for the purposes of the hearing and it will not award MNA et al. any amount for his services.

[362] The parties indicated that Shell had made a payment or payments of $27 544.29 towards MNA et al.'s hearing costs. It is not clear to the Panel whether the costs claimed by MNA et al. include those payments or exclude those payments. As a result, the Panel makes its award to MNA et al. without consideration of the amounts paid by Shell, and it trusts that the parties can agree on what part of the cost award remains to be paid. If such an agreement cannot be reached, either of the parties may ask the Panel to consider the matter.

Table 5. Summary of MNA et al. Costs Award

Legal fees claimed	Legal fees awarded	Reduction	Disbursements and expenses claimed	Disbursements and expenses awarded	Reduction
$67 836.00	$41 597.60	$26 238.40	$6683.79	$6379.62	$304.17

Experts	Fees claimed	Fees awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
P. Fortna	$33 600.00	$4640.00	$28 960.00	$2056.90	$1005.58	$1051.32
Teresa Maillie	$960.00	$0.00	$960.00	N/A	N/A	N/A
Jonathan Anuik	$26 469.95	$0.00	$26 469.05	N/A	N/A	N/A

Order

[363] The AER hereby orders that Shell Canada Energy pay costs to Athabasca Chipewyan First Nation in the amount of $442 831.60 and GST in the amount $21 570.33 for a total of $464 401.93. ACFN received an award of advance funding from Shell in the amount of $202 505.00. This payment is hereby subtracted from the award amount of $464 401.93, for a final total amount awarded of **$261 896.93**. This amount must be paid within 30 days of issuance of this order to Woodward & Co. Lawyers LLP as the submitter of the claim at

Woodward & Co. Lawyers LLP
844 Courtney Street, 2nd Floor
Victoria BC V8W 1C4

[364] The AER hereby orders that Shell Canada Energy pay costs to the Oil Sands Environmental Coalition in the amount of $131 273.03 and GST in the amount $6563.65 for a total of **$137 836.68**. This amount must be paid within 30 days of issuance of this order to Ecojustice as the submitter of the claim at

Ecojustice
Suite 900 – 1000 5th Avenue SW
Calgary AB T2P 4V1

[365] The AER hereby orders that Shell Canada Energy pay costs to Fort McMurray First Nation No. 468 in the amount of **$37 048.79**. This amount must be paid within 30 days of issuance of this order to MacPherson Leslie & Tyerman LLP as the submitter of the claim at

MacPherson Leslie & Tyerman LLP
1500 – 410 22nd Street East
Saskatoon SK S7K 5T6

[366] The AER hereby orders that Shell Canada Energy pay costs to Non-Status Fort McMurray/Fort McKay First Nation and Clearwater River Band No. 175, et al, in the amount of $29 896.00 and GST in the amount $1494.80 for a total of **$31 390.80**. This amount must be paid within 30 days of issuance of this order to Anna Johnston as the submitter of the claim at

Anna Johnston
301 – 1549 Barclay Street
Vancouver BC V6G 1J8

[367] The AER hereby orders that Shell Canada Energy pay costs to Métis Nation of Alberta Region 1, et al, in the amount of $53 622.80 and GST in the amount $2681.14 for a total of **$56 303.94**. This amount must be paid within 30 days of issuance of this order to Bishop Law as the submitter of the claim at

Bishop Law
1450 Standard Life Centre
10405 Jasper Avenue
Edmonton AB T5J 3N4

[368] Dated in Calgary, Alberta, on April 1, 2014.

ALBERTA ENERGY REGULATOR

<original signed by>

A. H. Bolton, P.Geo.
Hearing Commissioner

<original signed by>

L. J. Cooke
Hearing Commissioner

Shell Canada Ltd.
Application for Jackpine Mine Expansion
Cost Application No. 1754488

	Total Fees/Honoraria Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees/Honoraria Awarded	Total Expenses Awarded	Total GST Awarded	Total Amount Awarded
ATHABASCA CHIPEWYAN FIRST NATION								
Woodward & Co. Lawyers LLP	$225,754.75	$28,173.73	$12,696.42	$266,624.90	$225,754.75	$26,384.88	$12,606.98	$264,746.61
IRC (includes honoraria for L. King and D. Somers)	$31,929.00	$4,608.69	$1,701.88	$38,239.57	$4,700.00	$2,558.27	$127.91	$7,386.18
Nicole Nicholls	$3,625.00	$1,736.37	$268.07	$5,629.44	$3,625.00	$562.00	$28.10	$4,215.10
Allan Adam, Translator	$2,875.00	$2,729.89	$280.24	$5,885.13	$2,437.50	$2,729.89	$258.37	$5,425.76
Firelight Group	$28,485.00	$6,297.76	$1,739.14	$36,521.90	$24,720.00	$5,505.08	$1,511.25	$31,736.33
MSES	$88,291.25	$7,381.34	$4,783.63	$100,456.22	$67,700.00	$6,886.39	$3,729.32	$78,315.71
Paul Jones	$2,450.00	$1,993.50	$222.18	$4,665.68	$1,225.00	$1,910.59	$156.78	$3,292.37
Martin Carver	$39,375.00	$2,574.14	$2,097.46	$44,046.60	$23,975.00	$2,404.14	$1,318.96	$27,698.10
Bruce Maclean	$3,607.50	$1,501.96	$255.47	$5,364.93	$3,607.50	$1,381.96	$249.47	$5,238.93
Pat Larcombe	$14,690.00	$2,745.78	$871.79	$18,307.57	$14,170.00	$1,990.78	$808.04	$16,968.82
Patricia McCormack	$8,550.00	$1,610.11	$508.01	$10,668.12	$8,550.00	$1,570.11	$506.01	$10,626.12
Community Witnesses	$8,200.00	$8,418.33	$420.92	$17,039.25	$3,100.00	$5,382.76	$269.14	$8,751.90
10% Administration Fee				$55,344.93				$0.00
Sub-total	$457,832.50	$69,771.60	$25,845.21	$608,794.24				$464,401.93
Advance Funding provided by Shell				*$202,505.00*				*$202,505.00*
Total amount claimed				$406,289.24				$261,896.93
OIL SANDS ENVIRONMENTAL COALITION								
Karin E. Buss -Ackroyd, LLP	$10,010.00	$233.70	$512.19	$10,755.89		$208.70	$10.44	$219.14
Karin Buss Professional Corporation	$51,170.00	$908.60	$2,603.93	$54,682.53	$61,180.00	$908.60	$3,104.43	$65,193.03
Melissa Gorrie -Ecojustice	$0.00	$5,757.89	$307.01	$6,064.90	$0.00	$5,757.89	$287.89	$6,045.78
Dr. Glenn C. Miller, expert	$8,000.00	$2,684.32	$68.21	$10,752.53	$8,000.00	$2,684.32	$534.22	$11,218.54
Carolyn Campbell, expert	$10,640.00	$874.63	$595.65	$12,110.28	$10,640.00	$874.63	$575.73	$12,090.36
Dr. Schindler, expert	$0.00	$813.43	$25.13	$838.56	$0.00	$813.43	$40.67	$854.10
Simon Dyer, expert	$15,795.00	$2,395.72	$904.26	$19,094.98	$15,795.00	$2,395.72	$909.54	$19,100.26
Marc Huot, expert	$19,480.00	$701.47	$1,009.21	$21,190.68	$19,480.00	$701.47	$1,009.07	$21,190.54
Jennifer Grant, expert	$17,440.00	$1,333.27	$938.70	$19,711.97	$500.00	$1,333.27	$91.66	$1,924.93
Sub-total	$132,535.00	$15,703.03	$6,964.29	$155,202.32				$137,836.68

Shell Canada Ltd.
Application for Jackpine Mine Expansion
Cost Application No. 1754488

	Total Fees/Honoraria Claimed	Total Expenses Claimed	Total GST Claimed	Total Amount Claimed	Total Fees/Honoraria Awarded	Total Expenses Awarded	Total GST Awarded	Total Amount Awarded
FORT MCMURRAY FIRST NATION #468								
MacPherson Leslie & Tyerman LLP	$33,228.00	$3,820.79	$0.00	$37,048.79	$33,228.00	$3,820.79	$0.00	$37,048.79
Nina Modeland	$731.25	$0.00	$36.56	$767.81	$0.00	$0.00	$0.00	$0.00
Petr Komers	$1,330.00	$0.00	$66.50	$1,396.50	$0.00	$0.00	$0.00	$0.00
Sub-total	$35,289.25	$3,820.79	$103.06	$39,213.10				$37,048.79
NON-STATUS/CLEARWATER								
Anna Johnston, In Law and Equity	$37,482.00	$6,154.00	$4,497.84	$48,133.84	$23,742.00	$6,154.00	$1,494.80	$31,390.80
Sub-total	$37,482.00	$6,154.00	$4,497.84	$48,133.84				$31,390.80
METIS NATION OF ALBERTA REGION 1								
Bishop Law	$67,836.00	$6,683.79	$3,726.44	$78,246.23	$41,597.60	$6,379.62	$2,398.86	$50,376.08
Peter Fortna, Expert (Willow Springs Strategic Solutions)	$33,600.00	$2,056.90	$1,782.84	$37,439.74	$4,640.00	$1,005.58	$282.28	$5,927.86
Tereasa Maillie, Expert	$960.00	$0.00	$48.00	$1,008.00	$0.00	$0.00	$0.00	$0.00
Jonathan Anuik, Expert	$26,469.95	$0.00	$0.00	$26,469.95	$0.00	$0.00	$0.00	$0.00
Sub-total	$128,865.95	$8,740.69	$5,557.28	$143,163.92				$56,303.94
TOTAL				$792,002.42				$524,477.14