Alberta Energy Regulator

Pembina Pipeline Corporation

Applications for Two Pipelines Fox Creek to Namao Pipeline Expansion Project

Costs Award – Alexander First Nation

October 5, 2016

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Costs Order 2016-003: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project

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Pembina Pipeline Corporation
Fox Creek to Namao Pipeline Expansion Project **Costs Order 2016-003**
Applications No. 1806873 et al. **Application No. 1853048**

1 Introduction

1.1 Background

[1] Pembina Pipeline Corporation (Pembina) filed Application No. 1806873 under the *Pipeline Act* for approval to construct and operate two pipelines. Pembina proposed to construct a 609.6 millimetre (24-inch) diameter pipeline and a 406.4 millimetre (16-inch) diameter pipeline that would run parallel to each other in a common ditch for about 268 kilometres. The pipelines are designed to transport high-vapour-pressure liquid hydrocarbons, low-vapour-pressure liquid hydrocarbons, and crude oil from Pembina's Fox Creek pump station at Legal Subdivision (LSD) 8, Section 36, Township 62, Range 20, West of the 5th Meridian, to its Namao Junction pump station at LSD 04-35-054-24W4M. The hydrogen sulphide concentration of the hydrocarbons would be zero moles per kilomole. The pipelines would cross both White and Green Areas of the province.

[2] Pembina also filed Applications No. PLA141460, PLA141465, PLA141468 to PLA141473, PLA141475 to PLA141480, and PLA141487 under the *Public Lands Act* for 15 pipeline agreements in the Green Area. The agreements would grant access to a permanent right-of-way with a width of 35 metres (m) and, during construction, an additional 10 m wide temporary workspace.

[3] Finally, Pembina filed *EPEA* Application No. 001-00356633 under the *Environmental Protection and Enhancement Act* for approval of a conservation and reclamation plan, which includes construction and post-construction reclamation of the portion of the project that is located within the White Area.

[4] Seventeen statements of concern (including one from Alexander First Nation) were filed in response to the notice of application issued by the Alberta Energy Regulator (AER). Eleven of the statement-of-concern filers were advised that they were eligible to participate in the hearing under section 34(3) of the *Responsible Energy Development Act* (*REDA*). Eleven requests to participate were filed and all eleven were granted. The following ultimately participated in the hearing: Grassroots Alberta Landowners Association (Grassroots), representing 38 landowners; D. Nielsen; Alexander First Nation (Alexander); Driftpile First Nation (Driftpile); and Gunn Métis Local 55.

[5] The AER issued an initial notice of hearing on April 17, 2015. A prehearing meeting was held in Spruce Grove on May 14, 2015. The AER held a 14-day public hearing of the applications in Edmonton, Alberta, beginning on October 26, 2015, and ending on December 18, 2015, before panel members R. C. McManus (presiding), C. A. Low, and B. M. McNeil.

[6] Alexander sought and was granted an interim stay of proceeding against the AER on March 16, 2016. The stay prevented the AER from issuing a decision on Pembina's applications; however, the stay was lifted on April 21, 2016. The AER issued *Decision 2016 ABAER 004: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project* the same day, approving Pembina's applications with conditions.

1.2 Costs Claims

[7] Grassroots, Mr. Nielsen, Alexander, and Driftpile submitted costs claims. Before the costs claims were considered, Pembina reached settlements on the claims filed by Mr. Nielsen and Driftpile. Pembina also reached a partial costs settlement with Grassroots. A decision on the unsettled portion of the Grassroots costs claim was issued on July 29, 2016 (AER *Costs Order 2016-001*). This costs decision will address Alexander's costs claim, which is the only remaining costs claim from this proceeding.

[8] Alexander filed a costs claim on February 29, 2016, in the amount of $432 300.00. It was not in compliance with AER *Directive 031: REDA Energy Cost Claims*, and Alexander was asked to provide statements of account as required supporting its claim for costs for legal fees and costs for experts and consultants.

[9] There has been a significant amount of correspondence relating to Alexander's costs claim commencing in March when Pembina made submissions to the AER regarding deficiencies in Alexander's claim. Subsequent correspondence included correspondence from the AER to Alexander regarding deficiencies in its claim; correspondence from Alexander to the AER disputing the requirement to provide lawyers' statements of account; correspondence from Alexander to the AER requesting direction from the AER on how to make and substantiate its costs claim; submission of heavily redacted statements of account in support of legal fees claimed; and follow up of a telephone conversation between the AER and Alexander setting out the requirements for a costs claim and pointing out further deficiencies in Alexander's claim. Finally, in correspondence dated June 17, 2016, the AER set a June 23, 2016, deadline for Alexander to complete its claim.

[10] On June 23, 2016, Alexander provided further submissions to the AER and documentation in respect of its claim for costs. In those submissions, Alexander said that taking into account its submissions of February 29, 2016, March 14, 2016, and June 10, 2016, as well as the June 23rd submissions, its costs claim was complete. The claim submitted by Alexander on June 23, 2016, included $351 702.00 in legal fees, $87 616.00 in expert fees, $200.00 in honoraria, and $4749.66 in disbursements for a total of $444 267.66.

[11] Pembina responded to Alexander's claim for costs on July 7, 2016. Alexander filed a reply to Pembina's response on July 21, 2016. The AER considers the Alexander costs process to have closed on July 21, 2016.

2 The AER’s Authority to Award Costs

[12] The AER’s authority to award costs arises from *REDA* section 61(r) giving it the authority to make rules governing the awarding of costs. The key sections of the *Alberta Energy Regulator Rules of Practice* (*Rules of Practice*) governing the award of costs in this matter are 58.1, 62, and 64.

[13] Sections 58(1)(c) and 62 of the *Rules of Practice* provide 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.

[14] *Rules of Practice* section 58.1 sets out the following considerations for awarding costs:

> 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 or 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.

[15] When assessing costs, the AER is also guided by *Directive 031*, and AER *Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER's Process for Reviewing Energy Costs Claims*. *Bulletin 2014-017* advises that costs submissions are to address the factors from the *Rules of Practice* that appear relevant to the particular costs claim. The bulletin also advises that the AER will only review the aspects of a costs claim that are specifically in dispute and may grant the rest of the claim without further review.

[16] While Alexander indicated that it was attempting to agree on costs with Pembina as contemplated by *Bulletin 2014-07,* the parties were unable to come to terms. Indeed, Pembina's primary response to Alexander's costs claim is that it should be denied in its entirety: that Alexander is not entitled to costs because its participation "does not merit a costs award." Pembina's alternative submissions provide "some examples" of costs it says are not recoverable by Alexander if a costs award is to be made, leaving it to the AER to determine which other costs are or are not recoverable.

[17] Parties and applicants are expected to make an effort to come to terms on costs claims. Where they are not able to do so, *Bulletin 2014-07* makes it clear that the party opposing a costs claim is expected to specifically identify and provide submissions relating to each of the disputed costs.

[18] Alexander took over three and one half months to complete the filing of its costs claim. It still lacks appropriate supporting documentation for aspects of the claim. In its submission of July 21, 2016, Alexander asks that the AER advise it if further documentation or submissions are required. Costs awards are discretionary. Costs must be earned. They must be justifiable and they must be justified. The applicant for costs bears the onus of meeting the requirements set out in the *Rules of Practice* and the directives. If they do not, the AER is well within its jurisdiction to deny the costs application.

[19] Because this is only the third costs application to be filed for a proceeding conducted wholly under the *REDA* regime, the panel will fully consider the claim and the individual elements with a view to providing guidance to parties for current and future proceedings.

[20] *Directive 031* was revised under *REDA*. No purpose for costs awards is specified in the revised directive. An award of costs remains entirely discretionary (*Rules of Practice* section 64). Costs are not an entitlement: they must be earned (*Rules of Practice* sections 58.1(j) and (l)).

[21] In *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, the Court of Appeal expressed that hearings under the *Energy Resources Conservation Act* were not intended to be adversarial in nature. The same is true under *REDA*. As a result, as noted in *Kelly*, costs awards do not depend on the success or failure of a party on an issue. Costs awards are not based on the extent to which a participant succeeds in convincing a panel to accept its views or reject the views of others on an issue. Costs awards are intended to compensate for costs actually incurred for participation that contributed in a meaningful way to a panel’s deliberations.

[22] As noted in AER *Costs Order 2014-005*, a costs award is not intended to fully indemnify a participant or to fully relieve it of the financial burden of participation. Costs awards are a means of encouraging participants to advance legitimate points of view in a manner that is responsible and respectful of the hearing process.

[23] Pembina argues that *Rules of Practice* section 58.1(a) is, in effect, a threshold factor and that the applicant for costs bears the onus of showing why it should not bear its own costs.

[24] Nothing in the *Rules of Practice* indicates that *Rules of Practice* section 58.1(a) is a threshold test or that an applicant for costs bears the onus of showing why it should not bear its own costs. *Rules of Practice* section 58.1 is clear that the AER is to rely on at least one of the factors set out in the *Rules of Practice* in considering a costs claim. Claims may be made for an advance of funds prior to a hearing and for interim costs. *Rules of Practice* section 58.1(a) is most relevant to such claims. The panel finds that Pembina’s threshold factor submission has no merit in the context of this costs claim.

3 Costs Claimed

[25] Alexander's February 29th claim for costs was filed in time but was largely unsubstantiated and incomplete. The June 23, 2016, correspondence from Alexander enclosed revised costs claim forms. When compared with the forms filed in February, the revisions were significant. By its own admission, Alexander's original claim filed in February was based on estimates, "rounded approximate hours," and "approximation based on a basic recollection." Approximations and estimates are not acceptable. Hearing participants who apply for costs must appropriately account for costs claimed.

[26] Even with all of Alexander's various submissions and filings related to its claim for costs, there remain elements of the claim that are not verified or proved as required. The claim is considerable. It is for a total of $444 267.66 with most of the claim being for legal fees and costs of $356 451.66.

[27] Pembina's primary argument regarding Alexander's costs claim is that it should be denied in its entirety because Alexander's participation does not merit a costs award. Pembina says Alexander did not make a substantive contribution to the hearing. In support, Pembina describes various issues and the panel's findings to make the case that the panel did not accept or agree with Alexander's arguments. However, as made clear in *Kelly*, asking whether a participant was successful on an issue is not relevant to the question of whether the panel should exercise its discretion to award costs.

[28] In exercising our discretion to make this order, the panel reviewed Alexander's costs submissions, Pembina's response dated July 7, 2016, and Alexander's reply dated July 21, 2016. We have addressed the costs claimed in the order in which the items appear in the revised Alexander costs claim forms filed on June 23, 2016, with headings or subheadings where necessary to address the specific claims that were identified in Pembina's reply. Any claim for costs by Alexander that is not specifically addressed in these reasons was found to be unsubstantiated, and is therefore not awarded. Appendix A summarizes the Alexander costs claimed, denied, and awarded.

3.1 AIRC Costs

[29] Alexander claims $32 616.00 in costs for Alexander Industry Relations Corporation (AIRC).

[30] Alexander provided none of the required documentation in support of this claim: according to Alexander in its letter dated June 10, 2016, it is Alexander's "standard practice to delegate its Crown consultation and regulatory matters with industry to AIRC." According to Alexander's counsel, that delegation was not supported by a contract or other documentation setting out the specific terms of a retainer related to the Pembina applications.

[31] In the first Alexander costs claim filing in February 2016, it claimed $45 000 in respect of AIRC for 1000 hours of work by four individuals: Ken Arcand, Collette Arcand, Ryan Arcand and RJ Arcand. 250 hours of work was claimed for each at a rate of $45/hour. In its updated claim filed on June 23, 2016, Alexander revised the claim for AIRC to 724.8 hours for Ms. Arcand at a rate of $45/hour for a total of

$32 616. Alexander said that for the purpose of advancing its costs claim, it generated an "approximate time" that was claimed for Ms. Arcand's work on this matter from time sheets. No invoices/ bills or proof of payment have been provided.

[32] Pembina argues that the claim for AIRC costs ought to be struck in its entirety because it is not substantiated as required by *Directive 031*. As noted by Pembina, *Directive 031* requires that claims made for a consultant's account must include a "detailed list of what services were performed, their hourly rate, as well as the amount of time spent carrying out each component of work."

[33] Pembina also submits that AIRC work for which costs are claimed is not properly characterized as work of a consultant for the purposes of a costs claim because it is work that a participant would undertake prior to a proceeding as a matter of course. From the estimates of Ms. Arcand's time, Pembina gives gathering evidence, instructing counsel, and communicating with Pembina and the AER as examples. Pembina correctly points out that the AER does not generally award costs for services provided by a participant's personnel in the normal course of their duties. This principle has been applied expressly in circumstances where First Nations have claimed costs for employees of First Nation industry relations corporations such as AIRC.

[34] Finally, Pembina submits that AIRC costs are not recoverable because there is no evidence to show that Alexander actually incurred those costs.

[35] Alexander acknowledges it is not able to provide a contract or statements of account to substantiate and support the claim for costs for AIRC.

[36] The panel agrees with Pembina's characterization of the work described in relation to the claim for AIRC costs. It is properly characterized as work and activity that a participant would normally carry out in preparation for a hearing. In accordance with past practice of the AER and its predecessor, it is not compensable (see, for example, AER *Costs Orders 2014-002* and *2014-003*). The choice to carry out the work through an entity such as AIRC does not make it compensable work of a consultant for the purpose of costs awards. This remains the case even where the individuals in question are employees of a First Nation industry relations corporation such as AIRC.

[37] In addition and in any event, the panel finds the claim for AIRC is not substantiated as required in *Directive 031*. Without a contract, invoices, or records of payment from Alexander to AIRC and without an adequate and reliable record of the specific tasks performed and by whom, the panel finds that the costs claimed for AIRC are not compensable and denies Alexander's claim for $32 616 for AIRC in its entirety.

3.2 Collette Arcand

[38] Alexander claims $200 per diem for Ms. Arcand's attendance as a witness at the hearing.

[39] Although Ms. Arcand said on several occasions during her testimony that she had not been authorized to speak on behalf of Alexander or to give evidence relating to impacts of the proposed pipelines on Alexander's aboriginal rights, Pembina did not oppose this claim, although it did refer to Ms. Arcand's appearance as a witness.

[40] The panel approves the claim of $200 per diem for Ms. Arcand's appearance at the hearing.

3.3 Atkins Consulting Canada Ltd.

[41] Alexander claims $55 000 in costs for Atkins Consulting Canada Ltd. (Atkins). Alexander retained Atkins to complete a quantitative risk assessment of the project to provide evidence on the issue of public safety—in particular, the safety of people living or working in the area of the Alexander reserve within the emergency planning zone for the project.

[42] Pembina objects to this claim. It argues that the Atkins report did not contribute in a meaningful way to the panel's understanding of the issues. In support of its submission Pembina says that the panel preferred the evidence of its expert and accepted the conclusion of Pembina's expert.

[43] Atkins was retained very late in the hearing process and had only a short time to prepare its report. While the findings of the Atkins report were not accepted by the panel, it did enable the panel to focus on and assess the issue of risk to an extent that it might not have done without the Atkins report. When determining whether to exercise the discretion to award costs of an expert, the question is not whether a panel accepted that expert's evidence or preferred that evidence over other evidence. In accordance with *Rules of Practice* section 58.1(l) the question this panel asked is whether the evidence contributed to the panel's understanding of an issue.

[44] The Atkins report did provide a focus for a discussion about the issue of risk and enabled the panel to more fully assess the issue of risk: in that way, Atkins did substantially contribute to the panel's understanding of the issue. As a result, the panel approves the claim of $55 000.00 for Atkins.

3.4 O'Driscoll & Company, Barristers and Solicitors

[45] Alexander claims $351 702.00 in fees (legal fees) and $4,749.66 in disbursements and expenses (legal expenses). The claim is based on the maximum rates set out in *Directive 031*. *Directive 031* specifically states that the maximum allowable hourly rates will not be awarded as a matter of course. Each claim is assessed on its individual merits and the rate must be reasonable, justifiable, and warranted by the work performed.

3.4.1 Alison O'Driscoll

[46] Of the legal fees claimed, $6966.00 relate to work done by Alison O'Driscoll. Alison O'Driscoll is not a lawyer but works as an assistant at the firm. Pembina points out that *Directive 031* clearly states that legal fees are deemed to include office overhead, including secretarial costs. Pembina submits that the only documentation provided in support of this portion of the legal fees shows that Alison O'Driscoll did work as a legal assistant that did not require the expertise of a paralegal.

[47] Alexander disputes Pembina's characterization of Alison O'Driscoll's work. It says that at least some of the services she provided were those of a paralegal and were therefore compensable.

[48] *Directive 031* states that, while the AER will not consider fees for secretarial work, in certain situations it may be appropriate for a paralegal to work on the application. The AER will consider such claims for paralegal fees only if it can be demonstrated that the work performed required the expertise of a paralegal and could not have been performed by a legal assistant. According to the Alberta Association of Paralegals, "Legal assistants assist in the administration of the law practice while paralegals assist on the legal side. Legal assistants receive instruction from both the lawyer and paralegal. Usually legal assistants do not bill their time to clients while the paralegal does." The panel reviewed the portions of the O'Driscoll & Company statements of account that had not been redacted, specifically the entries for Alison O'Driscoll, to determine what services were provided that could be classified as assistance on the legal side of the law practice.

[49] The panel finds that 22 hours out of the 154.8 hours of Alison O'Driscoll's time may be characterized as paralegal services. In arriving at our determination we eliminated time for matters such as downloading and cataloguing transcripts, phone calls, making deliveries, proof-reading, reviewing drafts, cross-referencing, service of documents, verifying listings and addresses, preparing and formatting letters, and basic searches. We included time for such matters as preparing information requests and research. In many instances, time was recorded during which many tasks were carried out by Alison O'Driscoll with no indication of how much of the time was allocated to each task. For example, there are 3.3 hours recorded on September 24 where the description of tasks includes "research and preparation of NQCL, confirm appropriate recipients and office addresses." The former is something a paralegal might do and be compensated for accordingly; the latter is something an assistant would do and so is not compensable other than through the legal fee element of costs. Where time was recorded for multiple tasks, the panel divided the time approximately between the various tasks listed.

[50] The panel finds that only 22 hours of the time claimed for work by Alison O'Driscoll is compensable as work of a paralegal. That means 132.8 hours of Alison O'Driscoll's time is not compensable. As a result, the legal fees portion of Alexander's claim for costs is reduced by $5976.00.

3.4.2 Rita Aggarwala

[51] Of the legal fees claimed, $136 832.00 relate to work done by Rita Aggarwala. Ms. Aggarwala is a lawyer listed as having eight years' experience. Pembina disputes the 30.25 hours of Ms. Aggarwala's time claimed for "attendance" at the hearing by phone as second counsel. Pembina argues that not only was Ms. Aggarwala not present at the hearing but that time would be duplicative of time claimed for Caroline O'Driscoll's attendance at the hearing. Pembina also submits that the general practice of the AER is not to award costs for the attendance of more than one counsel at a hearing.

[52] As noted in previous costs decisions (e.g., *Energy Cost Order 2008-011*), it is only in exceptional circumstances that the AER will award costs for attendance at the hearing by more than one lawyer. This is true whether the attendance is in person or by phone or electronic means. The panel has before it no evidence that would lead to the conclusion that attendance by Ms. Aggarwala provided any benefit in terms of efficiency or otherwise advancing the proceeding. There is no evidence before us to show that those costs are anything but duplicative of those charged by Caroline O'Driscoll for attendance. Therefore, the panel declines to award costs for Ms. Aggarwala's attendance at the hearing. As a result, the legal fees portion of the costs claim is further reduced by an amount of $9680.00 (30.25 hours × $320/hour).

3.4.3 Alternative Dispute Resolution

[53] Pembina argues that the legal fees claimed include 11.6 hours relating to alternative dispute resolution (ADR). Pembina disputes these fees on the grounds that *Directive 031* provides that ADR costs are not to be dealt with in the costs claim process.

[54] The panel notes that what *Directive 031* says is: "With the exception of binding dispute resolution by a hearing commissioner, the AER does not award compensation for participation in the AER's alternative dispute resolution (ADR) program." Alexander's reply to Pembina's objection to this portion of the legal fees is that Alexander attended ADR at the direction of the AER.

[55] The *REDA* framework clearly demonstrates that the AER encourages parties to use best efforts to engage with each other to resolve differences when possible. In the usual case where ADR by hearing commissioner is conducted between a corporate applicant and a hearing participant, the applicant may provide some form of compensation or support to the participant. In the panel's view, a party that has been directed to participate in ADR by hearing commissioner and does so, and who is not an AER-regulated entity, should not bear the full cost unless there is a compelling reason to do so.

[56] The ADR attended by Alexander and Pembina was not binding ADR, but it was directed by the AER in response to the written request Pembina made on October 1, 2015. The ADR session with Pembina and Alexander was conducted by AER hearing commissioners who were not members of the panel, and it took place before the start of the oral part of the hearing and after October 5, 2015, which

was the date of the letter from the chief hearing commissioner to Pembina and Alexander setting out the request that each send authorized representatives to an ADR session.

[57] The only relevant entry in the O'Driscoll & Company statements of account that the panel has been able to identify is for 7.4 hours recorded on October 5, 2015 for Caroline O'Driscoll, relating to ADR and 2.8 hours recorded for Alison O'Driscoll. The time for Alison O'Driscoll has already been addressed. The unredacted information shows the time recorded by Caroline O'Driscoll for a variety of tasks, including "Draft Response re: Alternative Dispute Resolution (ADR) Request." There is no record of time to attend the ADR or to provide advice to Alexander relating to the ADR. The panel finds that 7.4 hours to draft a response to Pembina's request for directed ADR by hearing commissioner is not reasonable. More importantly, there is no record of time to attend or otherwise participate in the ADR. The panel therefore will not exercise its discretion to award costs claimed for ADR because it is not substantiated. As a result, the claim for legal fees is reduced by $2368 (7.4 hours × $320/hour).

3.4.4 Claim for Alexander Submissions to the Aboriginal Consultation Office

[58] The legal fees claimed by Alexander include 136.15 hours of time ($43 568) recorded in the statements of account as being in relation to counsel for Alexander making submissions to and having discussions with the Aboriginal Consultation Office (ACO).

[59] Pembina argues that this claim is for submissions that were outside of the AER process and so are not compensable. Alternatively, it says the amount claimed is unreasonable and should be reduced, although it does not say by how much.

[60] Alexander says its claim for costs for submissions to the ACO is justified because it relates to potential adverse effects on aboriginal participants and a gap Alexander says exists between the ACO and AER processes.

[61] AER *Decision 2016 ABAER 004* describes the distinct differences between and purposes of the AER and ACO processes. In accordance with the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities* between the AER and the Government of Alberta, the AER provides certain information and notices to the ACO prior to and in the course of hearings. But the reverse is not true. The ACO does not provide to the AER information it gathers in the course of carrying out its functions; it does advise the AER of its conclusion about the adequacy of Crown consultation, and prior to or at the close of the evidentiary portion of the hearing, it provides the AER with a letter of advice regarding potential adverse impacts on aboriginal rights and recommended mitigation measures.

[62] Alexander's submissions to the ACO did not help the AER develop its understanding of the issues within its jurisdiction. That is because, as discussed in AER *Decision 2016 ABAER 004* in paragraphs 464 through 476, Alexander chose not to provide evidence to the AER about potential impacts on its treaty rights or traditional use rights. Furthermore, Alexander's submissions to the ACO were made

wholly outside of the hearing. As a result, the panel will not award Alexander costs for submissions to or other correspondence with the ACO.

[63] We note that the panel did specifically ask the parties to address the relevant ACO letters of advice in their final arguments. The ACO's advice was set out in letters dated and received by the AER on December 11, 2015. Alexander did address this issue in final argument but only to say that the AER could not issue a decision until consultation was complete. The panel had repeatedly reminded Ms. O'Driscoll that under section 21 of *REDA* it did not have the jurisdiction to assess the adequacy of Crown consultation. Her submissions in final argument in relation to the ACO advice regarding Alexander did not help the panel understand the issues within its jurisdiction, and they may or may not have been related to Alexander's submissions to the ACO.

[64] An important purpose for the *Rules of Practice* relating to costs awards is to ensure that parties who contribute substantially to the understanding of an issue in a hearing are compensated appropriately. Alexander had more than ample opportunity to provide evidence and submissions in the course of the hearing on the potential adverse effects of the project on its aboriginal rights. It declined the opportunity to present traditional knowledge evidence. It did not provide a traditional-use study that was funded by Pembina, and its one witness was not authorized to give evidence on the point.

[65] Whatever submissions Alexander may have made to the ACO on aboriginal rights in the context of Crown consultation and accommodation did not help the panel assess the potential for impact caused by Pembina's proposed project on Alexander's aboriginal rights. While the panel relied on the ACO report provided after the close of the evidentiary portion of the hearing in determining what conditions might be necessary to mitigate potential negative impacts identified by the ACO on Alexander's aboriginal rights, the panel was not able to carry out any substantial assessment of its own because of the lack of evidence on the issue in the hearing. The panel will not exercise its discretion to award Alexander the costs claimed to make submissions to the ACO. As a result, the Alexander costs claim is further reduced by $43 568.

3.4.5 Notice of Questions of Constitutional Law

[66] A significant portion of the legal fees claimed by Alexander relate to the notice of questions of constitutional law (NQCL) and subsequent related motions.

[67] Pembina argues that legal fees for Alexander's counsel relating to the NQCL and subsequent motions should be denied because they were not reasonable or directly or necessarily related to the proceeding. Pembina also argues that the NQCL and related motions unnecessarily lengthened the proceeding and caused Pembina's counsel to spend considerable time preparing for and responding to them. With respect to the latter point, Pembina submits that it should not have to pay its own legal costs and those of Alexander for motions Pembina says were not reasonable.

[68] The AER or its predecessor, the Energy Resources Conservation Board (ERCB), has awarded costs claimed for preparation and presentation of NQCLs in the past; for example, see AER *Costs Order 2014-005* and ERCB *Costs Order 2008-05*. It has also denied such costs; for example, see ERCB *Costs Orders 2011-02* and *2008-15*. It has also denied costs for subsequent motions related to an NQCL that a panel dismissed; for example, AER *Costs Order 2014-005*.

[69] It is the view of this panel that if the only relief sought in the NQCL is clearly beyond the jurisdiction of the AER, as was the case here, then no costs ought to be awarded because in such a case the NQCL can in no way advance the proceeding or, to use the language of *Rules of Practice* sections 58.1(j) and (k), it cannot make a substantial contribution to the hearing, and costs relating to it cannot be directly and necessarily related to matters contained in the notice of hearing. The relief sought by Alexander in its NQCL was for the AER to establish a joint federal-provincial review panel and to direct the Crown to engage with Alexander in "good faith" and in a manner consistent with the honour of the Crown with a view to reporting to the joint review panel once appropriate consultation had been concluded. Matters that are directly and necessarily related to matters contained in a notice of hearing must mean matters within the AER's jurisdiction. The relief sought by Alexander in its NQCL was wholly outside of the AER's jurisdiction. As a result, the panel will not award Alexander any costs relating to the NQCL.

3.4.5.1 NQCL Related Motions

[70] The panel issued its ruling on the NQCL on October 22, 2015, in which it found that it did not have the jurisdiction to answer any of the five questions raised. In spite of this fact, Ms. O'Driscoll brought a series of motions over the course of the first days of the hearing relating to the NQCL and our decision. Briefly, these included the following:

1) A motion that the panel make a declaration that the proposed project was beyond the sole jurisdiction of the AER and the hearing could not proceed under the AER's exclusive jurisdiction
2) A motion that the hearing be adjourned so that Alexander could seek a determination of the jurisdictional question from the courts
3) A motion for the panel to provide its consent for Alexander's legal counsel to contact the associate chief justice of the Alberta Court of Queen's Bench to request that a judge be appointed to address the jurisdictional question as soon as possible
4) A motion that the panel award full costs, including solicitor/client costs to Alexander and all other participants who continued to participate in the hearing while the jurisdictional question remained unanswered

[71] In one of the motions made on October 28, 2015, Ms. O'Driscoll asked the panel for permission to contact the Chief Justice of the Alberta Court of Queen's Bench to attempt to secure an expedited

hearing of an appeal of the panel's decision on the NQCL. As part of that motion, Ms. O'Driscoll asked that if other parties to the proceeding would not voluntarily give their permission for her to contact the Chief Justice, the panel direct them to do so—a motion with no basis in law that served only to delay further the course of the hearing.

[72] Those motions delayed the course of the hearing and undoubtedly caused inconvenience and unnecessary expense to Pembina and the other parties who were present and ready to proceed with the hearing of Pembina's applications, in some cases with significant numbers of witnesses.

[73] Pembina notes that the costs claimed by Alexander arising from the NQCL and related motions are significant. Pembina calculated the hours spent to be 183.3 hours for the NQCL and 53.3 hours for the motions.

[74] In light of the foregoing, the panel finds that Alexander is not entitled to any costs related to the NQCL or the related motions filed in the first several days of the hearing. As a result, the costs claim is further reduced by $75 712 (236.6 hours × $320/hour).

3.4.6 Balance of Legal Fees Claimed

[75] The balance of costs claimed under the heading of legal fees is $213 408.00.

[76] Pembina points out that the hours claimed for costs purposes by Alexander's legal counsel greatly exceed those of any of the other participants. Pembina's comment is based on the total claim for 1232.1 hours. With the deductions made by the panel to this point, the 666.9 hours claimed is still the greatest number of hours claimed, exceeding even that of Grassroots (550.1 hours) which represented 48 landowners along the proposed route and which presented evidence from representatives of the landowners and of expert witnesses at the hearing. Gunn Métis and Driftpile claimed 472.7 and 253 hours, respectively. Both presented evidence and both addressed relevant issues. In addition to addressing the question of potential impacts on aboriginal rights, Gunn Métis also addressed issues that were technical in nature.

[77] Alexander responded that the number and nature of the issues Pembina's application raised for Alexander directly correlate to the "volume of substantive and relevant submissions" made by Alexander in the proceeding.

[78] Alexander raised many issues. Of those it raised, the panel finds that the only issues supported by any evidence, whether provided directly by Alexander or elicited through cross-examination by Ms. O'Driscoll, were no more complicated than issues raised by the other participants, Gunn Métis in particular.

[79] *Rules of Practice* section 58.1 requires that we consider one or more of the factors set out in that rule when deciding whether and how to exercise our discretion to award costs. In this instance the panel considered the factors set out in *Rules of Practice* sections 58.1(l), (m), and (o).

[80] In our view, the conduct of Alexander's counsel in this proceeding demonstrated either a lack of experience, a lack of understanding of the AER's hearing process, or a failure to act responsibly in the proceeding. The panel finds that conduct must be taken into account in exercising our discretion to make a costs award.

[81] After seeking and obtaining leave to file the Atkins report well after the panel's deadline for filing expert evidence, and although she had at least eight days' notice, Ms. O'Driscoll failed to have the Atkins witnesses present at the hearing venue on time the morning they were scheduled to appear. Barring unforeseen circumstances, it is counsel's responsibility to ensure their witnesses understand what is expected of them and when. When the Atkins witnesses did arrive at the hearing venue, Ms. O'Driscoll left the hearing room and was gone for some time before AER counsel was finally asked by the panel to go and let her know she was expected to seat the witnesses expeditiously. As a result, the hearing was delayed and other parties who were present and ready to proceed when expected were inconvenienced.

[82] Further factors that must be taken into account include the sheer volume of irrelevant material or material relating to matters beyond the AER's jurisdiction filed by Alexander. The most significant of those submissions was an affidavit of Collette Arcand totaling some 3000 pages. The bulk of the appended material related to the adequacy of Crown consultation and was excluded from the record in the hearing on a motion brought by Pembina. Much of what remained was not relevant to the proceeding; for example, materials from National Energy Board hearings into applications for approval of the Alliance and Northern Gateway pipeline projects.

[83] Ms. O'Driscoll's conduct during the oral portion of the hearing was equally unhelpful and unreasonable in light of the fees claimed. For example, she was either not present or late arriving in the hearing room when expected on several occasions: see transcript page 2610, lines 14–17, and page 2949, line 19. Ms. O'Driscoll's cross-examination of Pembina served to unnecessarily lengthen the proceeding, was not directly and necessarily related to the proceeding, and did not reflect the level of experience for which legal fees are claimed. For example, much of Ms. O'Driscoll's cross-examination of Pembina witnesses was not cross but argument or evidence and often both. Much of it was simply argumentative. Often there was no discernable question. Specific examples are found at transcript page 702 lines 6–25 and page 704 lines 21 through page 706 line 14; page 747 line 24 through page 748 line 12; page 754 line 22 through page 756 line 12; page 773 lines 12-23; and pages 757 through 762. Often, Ms. O'Driscoll's questions were framed based on assumptions that were not accurate or facts that were not in evidence; for example, transcript page 812 line 8 through page 814 line 6 where the question assumed emergency planning zones exist for two pipelines not regulated by the AER. Much of Ms. O'Driscoll's final argument focused on issues for which Alexander had supplied no evidence or that were matters beyond

the jurisdiction of the panel—for example, submissions on whether or not an environmental assessment ought to have been conducted.

[84] At other times, Ms. O'Driscoll entered into exchanges with witnesses during her cross-examination on matters that were irrelevant; for example, asking whether Pembina had done research into the approval, which would have been a National Energy Board approval, of the Alliance pipeline (transcript page 774 lines 24–25 and page 775 lines 1–21).

[85] Ms. O'Driscoll's approach caused the panel chair to intervene on a number of occasions in an effort to keep the proceeding moving forward in a productive manner; for example, transcript page 782 lines 14–19.

[86] A further example of hearing time taken that was unhelpful and not commensurate with the fees claimed were motions unrelated to the NQCL with no basis in the *Rules of Practice* or reasonable practice in general. For example, Ms. O'Driscoll brought a motion in the afternoon of the third day of the hearing asking the panel to make an award of full costs to Alexander on a "solicitor and client" basis. That motion is another demonstration of a lack of experience with or understanding of AER process, or a disregard for the clear provisions in the *Rules of Practice* for costs claims. That motion resulted in yet another unwarranted delay in the hearing.

[87] As a final example of conduct the panel finds was not commensurate with the level of fees claimed, the panel notes that Ms. O'Driscoll asked the hearing panel for clarification on a number of occasions on matters that experienced counsel claiming costs at a tariff level of eight years' experience would be expected to know. For example, during the fourth day of the hearing and during her cross-examination of the Pembina witness panel, Ms. O'Driscoll took exception to the Pembina witnesses conferring before answering a question she had posed to one of them. *Rules of Practice* section 23(3) expressly provides that members of a witness panel may confer among themselves unless the AER directs otherwise. The AER had not directed otherwise. Indeed, the same issue had arisen the previous day with a different counsel, and the panel had been clear that unless it directed otherwise, members of a witness panel were free to confer before responding to a question. At transcript page 687 lines 4–12, Ms. O'Driscoll seeks clarification from this panel not of the *Rules of Practice*, but of her understanding, which was lacking. As a further example, the panel cites Ms. O'Driscoll's confusion or lack of understanding about the submission-evidence-argument components of AER hearings as evidenced by an exchange at transcript page 3014 that took place during Alexander's final argument.

[88] Taking into account the examples described above, together with other similar instances in the course of the proceeding, the panel finds that the remaining legal fees claimed by Alexander should be reduced by 40 per cent, bringing its claim into line with what the panel considers to be reasonable compensation for Alexander's participation in the hearing. As a result, Alexander's claim for legal fees will be further reduced by $85 363.20.

3.4.7 Disbursements

[89] The only disbursement claimed by Alexander that was disputed by Pembina was $200.68 for a flight from Calgary to Edmonton taken by Caroline O'Driscoll on May 14, 2015. Pembina submits that since the flight was taken outside of the hearing phase of the proceeding it is not compensable in a costs award.

[90] However, the flight in question was the same day as the prehearing meeting held in Spruce Grove. Caroline O'Driscoll attended on behalf of Alexander. It is the view of this panel that a prehearing set down by the panel is properly considered to be part of the hearing phase of a proceeding. As a result, we exercise our discretion to award the $200.68 claimed for the flight taken by Caroline O'Driscoll to attend the prehearing meeting.

4 Order

[91] The AER hereby orders that Pembina pay costs to Alexander in the total amount of $188 984.46. This amount must be paid within 30 days of issuance of this order to

O'Driscoll & Company
Suite 1607, 840 - 7 Avenue SW
Calgary, AB T2P 3G2

[92] Costs recipients should be aware that despite the above order, in accordance with *Bulletin 2014-07* the AER may, at its sole discretion, audit a costs claim for compliance with the *Rules of Practice* and *Directive 031* any time after it is filed, including after the AER has issued a costs award. Any noncompliance identified during such an audit may result in a decision by the AER to rescind all or part of the costs award. Recurring or persistent noncompliance with AER costs requirements may result in the AER auditing that party's costs applications more frequently.

Dated in Calgary, Alberta, on October 5, 2016.

Alberta Energy Regulator

<original signed by>

R. C. McManus, M.E.Des.
Presiding Hearing Commissioner

<original signed by>

C. A. Low, B.Sc., LL.B., LL.M.
Hearing Commissioner

<*original signed by*>

B. M. McNeil, B.Sc. (Ag.), C.Med.
Hearing Commissioner

Pembina Pipeline Corporation
Fox Creek to Namao
Cost Application No. 1853048

	Total Fees/ Honoraria Claimed	Total Expenses Claimed	Total Costs Claimed	Reduction of Fees/Honoraria	Total Fees/ Honoraria Awarded	Total Expenses Awarded	Total Amount Awarded
Caroline O'Driscoll	$207,904.00						
Rita Aggarwala	$136,832.00						
Alison O'Driscoll	$6,966.00			$5,976.00			
O'Driscoll & Company		$4,749.66				$4,749.66	
Hearing Attendance by R Aggarwala				$9,680.00			
ADR				$2,368.00			
Submissions to ACO				$43,568.00			
NQCL				$75,712.00			
Balance of legal costs				$85,363.20			
Totals for O'Driscoll & Company	**$351,702.00**	**$4,749.66**	**$356,451.66**	**$222,667.20**	**$129,034.80**	**$4,749.66**	**$133,784.46**
Atkins Consulting Canada Ltd.	$55,000.00	$0.00	$55,000.00	$0.00	$55,000.00	$0.00	$55,000.00
Alexander Industry Relations Corporation	$32,616.00	$0.00	$32,616.00	$32,616.00	$0.00	$0.00	$0.00
Collette Arcand (Participant)	$200.00	$0.00	$200.00	$0.00	$200.00	$0.00	$200.00
Totals	**$439,518.00**	**$4,749.66**	**$444,267.66**	**$255,283.20**	**$184,234.80**	**$4,749.66**	**$188,984.46**