

# **Shell Canada Limited**

## **An Application for Two Pipeline Licences and an Application for a Pipeline Agreement Ferrier Field**

### **Costs Awards**

**May 2, 2017**

**Alberta Energy Regulator**

Costs Order 2017-02: Shell Canada Limited; An Application for Two Pipeline Licences and an Application for a Pipeline Agreement, Ferrier Field

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**Shell Canada Limited  
An Application for Two Pipeline  
Licences and an Application for a  
Pipeline Agreement  
Applications 1823846 & PLA 150215**

**Costs Order 2017-02  
Costs Application 1874326**

## **Introduction**

### **Background**

[1] Shell Canada Limited filed application 1823846 under the *Pipeline Act* for approval to construct and operate two pipelines: a main pipeline and a spare pipeline. Shell also filed application PLA 150215 for a pipeline agreement under the *Public Lands Act*. These two applications relate to the Rocky 7 pipeline project. The project would be located about 27 km southeast of the O'Chiese First Nation Reserve Lands (I.R. 203).

[2] The main 6.99 km pipeline would be constructed from an existing well to an existing compressor station. It would transport natural gas with a hydrogen sulphide (H<sub>2</sub>S) content of 0 per cent. The pipeline application also included a request for the approval of a spare 0.43 km pipeline for the purpose of prebuilding infrastructure under Prentice Creek and a nearby unnamed creek. Shell submitted the PLA application for a pipeline agreement that would grant access to a permanent 10 metre wide right-of-way in most instances and, during construction, an additional 5 metre wide temporary workspace in some locations. The right-of-way would be located in an area with existing oil and gas development and other industrial disturbances. It would parallel existing linear features (i.e., a road, a powerline, and existing pipelines) for most of its length.

[3] On February 6 and February 24, 2015, the AER issued a public notice of application for the PLA application and the pipeline application, respectively. In response to the notices, the O'Chiese filed statements of concern.

[4] On February 24, 2016, the AER issued a notice of hearing, and on February 25, 2016, it issued an amended notice of hearing. On April 17, 2016, the AER advised that it would permit the O'Chiese to participate in the hearing.

[5] The AER held a public hearing of the applications in Calgary, Alberta, on September 13, 14, and 15, 2016, and November 9, 2016, before panel members R.C. McManus (presiding), B.T. McManus, and B.M. McNeil.

[6] The AER issued its decision approving the applications on February 1, 2017, in *Decision 2017 ABAER 002: Shell Canada Limited, An Application for Two Pipeline Licences and an Application for a Pipeline Agreement, Ferrier Field*.

### Costs Claims

[7] The O'Chiese filed the claim for costs on December 8, 2016, and the necessary documentation with further particulars for the professional fees of DLA Piper LLP on December 22, 2016. On January 18, 2017, Shell filed a submission with comments on the costs claim, and the O'Chiese filed a reply to those comments on February 1, 2017. The AER considers the costs claim to have closed on February 1, 2017.

[8] In exercising its discretion to make this order, the panel has considered the O'Chiese costs submissions, Shell's response, and the O'Chiese reply. Appendix 1 summarizes the O'Chiese costs claimed and awarded.

### The AER's Authority to Award Costs

[9] In determining who is eligible to submit a claim for costs, the AER is guided by the *Alberta Energy Regulator Rules of Practice (Rules of Practice)*, particularly sections 58(1)(c) and 62:

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.

[10] *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 tiled 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.

[11] When assessing costs, the AER is guided by Division 2 of Part 5 of the *Rules of Practice, Directive 031: REDA Energy Cost Claims*, and *AER Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER's Process for Reviewing Energy Costs Claims*. The bulletin advises that costs submissions are to address the factors from the *Rules of Practice* that appear relevant to the particular costs claim.

[12] As contemplated by *Bulletin 2014-07*, 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 the costs claim is expected to specifically identify and provide submissions relating to each of the disputed costs. It is not apparent to the panel that the O'Chiese and Shell made any attempts to agree on costs as contemplated by *Bulletin 2014-07*. However, Shell's response to the O'Chiese costs claim included submissions relating to the disputed costs to support its position that the vast majority of costs ought to be denied or significantly reduced in a manner that is consistent with the *Rules of Practice* and *Directive 031*.

### **Costs Claim of the O'Chiese First Nation**

[13] The O'Chiese meet the definition of participant in section 58(1)(c) of the *Rules of Practice*.

[14] On June 30, 2016, the O'Chiese filed an application for advance funds in the amount of \$572 648.09. On July 26, 2016, the AER awarded O'Chiese \$25 000.00 in advance funding for its participation in the hearing. In its decision the AER advised that:

This advance of funds in no way guarantees that the AER will make a final cost order in the amount of this advance of funds or amounts beyond the advance award. OCFN assumes the risk that if the AER is not satisfied that the amounts claimed by OCFN in its cost claim meet the requirements set out in the Rules and Directive 031, **OCFN may be required to re-pay all or a specified portion of the advance payment made by Shell pursuant to this award of advance of funds.**

The Panel reminds OCFN that the final costs recoverable in relation to any proceeding are weighed against the factors listed in section 58.1. This means that amongst other considerations, the AER will be assessing whether any costs claimed by OCFN in this proceeding are reasonable and necessary relative to the subject matter, scope, complexity and length of this matter.

[15] The final O'Chiese costs claim is considerable. The total amount claimed is \$629 861.24: \$468 997.00 in legal fees, \$105 500.00 in expert fees, \$17 500.00 in honoraria, and \$37 864.24 in disbursements and expenses.

### Costs Factors and Principles

[16] Costs applications are awarded based on the factors set out in *Directive 31* and must be reasonable and necessary in regards to the subject matter, scope and complexity of the application, and length of the hearing.

[17] Shell notes that in addition to the factors listed in section 58.1 of the *Rules of Practice*, its response takes into consideration guidance from other AER costs orders—in particular, *Costs Order 2016-003*, which states the following:

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. (para. 18)

[18] Shell notes that *Costs Order 2016-003* also referenced AER *Costs Order 2014-005*:

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. (para. 22)

[19] Shell submits that the costs claim is not supported by the factors set out in section 58.1 of the *Rules of Practice*, is not consistent with the principles outlined in *Costs Order 2016-003* or other costs awards of the AER referenced in its submission, has failed to provide sufficient information to earn an award of the quantum requested, has failed to establish that the costs are justifiable, and fails to justify them. Shell states that the O'Chiese have not satisfied their onus of meeting the requirements of the *Rules of Practice* and *Directive 031*, and that a vast majority of the costs claimed by O'Chiese should be denied or significantly discounted.

[20] The O'Chiese reply that the costs claim does not cover all the costs incurred in this proceeding. The O'Chiese state that the costs claim is supported by the factors outlined in the *Rules of Practice* and *Directive 031*, contains sufficient supporting information, and is justified given the exceptional circumstances of this case.

[21] The O'Chiese point out that a submission in response to a costs claim is not the proper venue to reargue the application or present new arguments about the merits of a witness or participant's evidence, as they claim Shell has done.

[22] The O'Chiese argue that Shell has provided irrelevant and unjustified criticism with respect to the competence, conduct, and charges of the counsel representing the O'Chiese. The O'Chiese also state that Shell inaccurately characterizes the evidence, expertise, integrity, and sources of data of the Calliou Group and attempts to diminish the significance of the evidence of Mr. Walter Hildebrandt.

[23] The O'Chiese state that the majority of the arguments in Shell's submission are irrelevant to the costs claim.

[24] The O'Chiese submit that it is a nation of approximately 1300 people who have been isolated from the impacts of Western civilization and, as a result, maintained their historical, traditional, cultural, spiritual, and ceremonial practices, and continue to exercise their traditional and treaty rights on the lands. They say they do not have the resources of a corporation like Shell. They had to retain outside legal counsel and specialized and trained professionals to assist in the review and analysis of Shell's application.

## DLA Piper Costs

### Legal Fees

[25] Shell submits that legal fees and disbursements in the amount of \$473 697.98, as claimed by the O'Chiese, are inappropriate and unreasonable in a proceeding of this nature. Shell submits that a 90% reduction in DLA Piper invoices is warranted. Shell believes that legal fees not exceeding \$47 369.80 are sufficient for the O'Chiese to reasonably and effectively participate in this proceeding.

[26] The O'Chiese respond that at the rate of \$350 per hour as set out in *Directive 031*, this amount would equate to approximately 135 hours, an absurdly low sum given the complexity of the proceeding, the required procedural steps in the hearing, and the exceptional circumstances (e.g., need for translation services) with which DLA Piper had to contend with.

[27] Shell suggests that several actions initiated by the O'Chiese or its counsel were unnecessary or unreasonable in the circumstances and lengthened or complicated the proceeding. Shell submits that the O'Chiese focused on out-of-scope issues throughout the proceeding, such as the Aboriginal Consultation Office (ACO) process and compensation. In Shell's view, this focus does not indicate that the O'Chiese's participation in the prehearing meeting to discuss the scope of the hearing issues was reasonable and resulted in efficiencies.

[28] The O'Chiese submit that participation in a discussion with Shell and the hearing panel about the scope of issues to be addressed in the hearing was necessary to clearly establish the issues that were within the scope of the proceeding and the AER's jurisdiction. The O'Chiese further contend that they did not continually focus on issues that were out of scope. The O'Chiese state that references to the ACO were directed at the ACO's findings of potential impact, which was directly in issue in the hearing, and that the O'Chiese made it clear in its evidence that it was not seeking compensation.

[29] Shell also submits that the O'Chiese's motion for further and better information request responses and its request for advance funding (for which the hearing panel only awarded a small portion of the overall advance funding request) were unreasonable and unnecessary in the circumstances. Shell argues that the O'Chiese's insistence on attending the AER's prehearing site visit on September 9, 2016, was similarly unreasonable and unnecessary. Shell believes that the conduct, motions, and requests of the O'Chiese resulted in unnecessary process steps and submissions and in turn resulted in the O'Chiese incurring additional unreasonable and unnecessary legal costs.

[30] With respect to the advance funding request, the O'Chiese argues that it is not a multinational corporation and, as such, advance funding is very important. The O'Chiese also stated that the hearing panel agreed that it was appropriate to award an advance of funds. With respect to the hearing panel's site visit, the O'Chiese argue that it relates to the principles of natural justice in that the O'Chiese were entitled to know the evidence the tribunal was relying on and that such a request is reasonable and justified. The O'Chiese also noted that the hearing panel granted this request and that external O'Chiese legal counsel did not attend the site visit on September 9, 2016.

[31] The O'Chiese points to the willingness of its counsel and the Calliou Group to continue their evidence into the evening on September 15, 2016, resulting in the hearing concluding a day early. Shell submits it is typical of AER hearings to continue into the evening and it should not be attributed as justification for the costs claimed, and that this is outweighed by the fact that the O'Chiese's counsel spent almost the entire day on September 15 in direct examination of the Calliou Group witness panel.

[32] Shell suggests that an award for costs should be for only one lawyer's attendance at the hearing, citing the following guidance provided in *Costs Order 2016-003*:

As noted in previous costs decisions (e.g., *Energy Costs 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. (para. 52)

[33] Shell submits that no exceptional circumstances exist that support an award of costs for attendance of more than one lawyer and that only Mr. Jull can be reasonably said to have contributed to the hearing. Accordingly, any award of costs for the attendance of DLA Piper should be in respect of his attendance only and that a discount should be applied to the costs claimed. Shell submits that the costs for the \$1400 and \$11 515 claimed in respect of Mr. Yaworski's and Ms. Nagina's attendance, respectively,

should be reduced in their entirety. Shell notes that Mr. Yaworski charged at the highest end of the scale of costs in *Directive 031* and only attended a portion of one day as a member of the gallery, not actively involved in the hearing. It states that this is indicative of the O'Chiese and DLA's approach in preparing the exorbitant costs claim.

[34] The O'Chiese state that hearing preparation and presentation was complex and that legal counsel were necessary to ensure that O'Chiese member witnesses were prepared, briefed, and ready to give evidence. O'Chiese also points out that Shell had two external legal counsel and two internal legal counsel to assist in the proceeding, notwithstanding that Shell's submission was less onerous.

[35] With respect to Mr. Yaworski's attendance, the O'Chiese state that he has a longstanding relationship with the O'Chiese, the chief, and council and is a trusted advisor. It was necessary to involve Mr. Yaworski so that he could brief and update chief and council on this hearing. Mr. Yaworski was also noted to be a practicing lawyer since 1979.

[36] Shells submits that the DLA Piper invoices include insufficient detail so as to be able to adequately assess whether all the items billed for are necessary and related to the proceeding as set out in section 6.2.1 of *Directive 031*. Therefore, in light of the limited or redacted information, Shell submits that the AER should exercise its discretion in applying a global reduction to the total amount claimed by DLA Piper.

[37] The O'Chiese state that the invoices and documentation provided by it contain sufficient particulars to support the amounts included in the costs claim. Only time entries that do not relate to this proceeding and confidential information are redacted.

[38] Shell points out that DLA Piper did not effectively assign lawyers with the appropriate level of experience to matters relating to the proceeding. There are numerous charges relating to interoffice conferences between Mr. Jull, Mr. Yaworski, and Ms. Nagina, which result in unreasonable billing by three partners all claiming at the maximum rate allowed under *Directive 031*. Shell submits that DLA Piper did not realize efficiencies where it reasonably ought to have and that an award of costs with respect to such charges would be inconsistent with *Directive 031* and the principles set out in previous costs awards and would serve to encourage parties to unreasonably incur legal costs at significant expense to project proponents. Shell requests that the AER rely on previous reductions made to costs claims in dramatically reducing any costs award.

[39] The O'Chiese respond that this was an exceptional case and that the preparation of evidence involved the synthesizing of the historical and traditional evidence of approximately 1300 O'Chiese members, many of whom required the services of a translator. Furthermore, there is no evidence that the O'Chiese unreasonably incurred costs in this proceeding.

Mr. Jull

[40] The O'Chiese have claimed \$158 095 with respect to Mr. Jull's legal fees. Shell submits that there are no reasons why Mr. Jull should charge at the highest rate. It points out that section 6.2 of *Directive 031* states "the maximum allowable hourly rates are not awarded as a matter of course." Shell respectfully submits that all of this was not representative of the level of experience and efficiency indicated in the costs claimed for his services.

[41] The O'Chiese submit that Mr. Jull has been practicing law for almost 44 years and is an experienced hearing and trial counsel. His billable rate should be no less than the maximum rate allowed for lawyers with more than 12 years' experience.

[42] Shell is of the view that Mr. Jull did not manage his time well, which resulted in more time at the hearing than necessary (i.e., late return from breaks with no explanation). Shell also submits that Mr. Jull did not effectively organize his witnesses and their evidence, citing how on day 1 he stated that he was "just" informed that the O'Chiese would be seating three separate witness panels. On day 3 he submitted evidence prepared by the Calliou Group that he had "just" been provided with. Shell submitted that this does not indicate behavior that warrants an award of the maximum scale of costs.

[43] The O'Chiese respond that it confirmed on August 16, 2016, that the O'Chiese would be calling as witnesses fifteen O'Chiese members, Mr. Hildebrandt, and three witnesses from the Calliou Group. In subsequent correspondence, and as confirmed by an AER letter to the parties dated August 26, 2016, the O'Chiese also advised that they would be calling more than one panel of O'Chiese members as witnesses. Furthermore, the O'Chiese argued that the nature of its evidence (historical, traditional, spiritual, cultural, and ceremonial matters and the O'Chiese value system) was such that it could not be read into the record from a prepared statement and presented additional challenges (e.g., translation).

[44] The O'Chiese submit that the new evidence provided by Calliou Group on day 3 was in response to Mr. Kasstan's evidence on day 1 when Shell called the Calliou Group's conclusions into question. The Calliou Group's evidence was provided in the written submissions on August 6, 2016, and received no objection from Shell in its written reply on August 30, 2016. Shell chose not to raise the objection about the absence of tabular results until the hearing. The O'Chiese submit that it shows insincerity on the part of Shell to question the timing of the provision of the data at this point.

[45] Shell submits that Mr. Jull's cross-examination of the Shell witness panel, and his direct examination of the three O'Chiese witness panels, largely confirmed information that was already on the record, lengthening the hearing. Several times he posed leading questions to the witness panels, which led to Shell's objection.

[46] The O'Chiese argues that cross-examination of Shell's witnesses proved the lack of engagement on the part of Shell to understand the value of the subject lands to the First Nation, as well as the lack of review of alternate routes or actions that would eliminate or minimize the impact of the proposed project.

[47] The O'Chiese noted that Mr. Jull's cross-examination showed that, contrary to previous assertions, the O'Chiese's access to some of the lands would be affected during construction work, including reclamation over the winter and summer, not only a nine-week construction period. Also, during cross-examination, Shell admitted that following construction it would not be prepared to grant full access to the O'Chiese. Shell also admitted that, if necessary, the right-of-way would be cleared of vegetation. The cross-examination by Mr. Jull pointed out the impacts to the O'Chiese that had been ignored by Shell and the inadequate mitigation measures being proposed by Shell.

[48] Cross-examination of Mr. Kaasten showed he lacked the foundational knowledge to make his findings with respect to the O'Chiese.

[49] With respect to the direct examination of the three O'Chiese witness panels, the O'Chiese argue that this evidence is directly relevant to the issue of the impact of the proposed pipeline on the O'Chiese. The O'Chiese dispute that Mr. Jull posed leading questions to the witnesses as the panel did not take issue with his questions. The O'Chiese submit that this is disingenuous on the part of Shell since its evidence was read into the record from prepared notes.

Mr. Yaworski

[50] Shell submits that it would be a significant departure from the provisions of *Directive 031*, the *Rules of Practice*, and the AER's previous costs awards to award even a portion of the \$111 370 claimed for Mr. Yaworski. Based on the record of the proceeding, Mr. Yaworski made no contribution and provided no services necessary to the O'Chiese's participation in the proceeding. Mr. Yaworski did not register an official appearance at the hearing or sign any substantive correspondence or submissions filed on the record. Shell submits that no costs should be awarded for Mr. Yaworski.

[51] The O'Chiese argue that Mr. Yaworski is a longstanding solicitor and counsel for the O'Chiese and has a relationship of trust with the O'Chiese chief and council, which necessitated his attendance at the hearing. He was active in reviewing the submissions, identifying and briefing witnesses, and formulating strategy. His relationship of trust with the O'Chiese was invaluable in ensuring that the services performed and evidence that was presented complied with the O'Chiese value system and respected their historical, traditional, spiritual, cultural, and ceremonial values.

Ms. Nagina

[52] The O'Chiese claimed \$196 000 in legal fees for Ms. Nagina. Shell submits that the nearly 530 hours claimed is excessive and unreasonable. Shell notes that costs have been claimed for Ms. Nagina's attendance at the prehearing meeting, the evidentiary portion of the hearing, and closing arguments on November 9, 2016. Shell again pointed out *Costs Order 2016-003*, which said that only in exceptional circumstances will costs be awarded for more than one counsel's attendance at a hearing.

[53] The O'Chiese submit that representation by more than one counsel was necessary as this was an exceptional case, as evidenced by the fact that Shell had more than one counsel involved in the hearing and had the assistance of two in-house counsel.

[54] Furthermore, O'Chiese submits that Ms. Nagina's involvement was required to provide reasonable, effective, and necessary counsel for the O'Chiese. Ms. Nagina participated actively in the proceeding by drafting correspondence; analyzing, reviewing, and discussing the extensive materials of Shell; interviewing and briefing witnesses; and preparing for and attending the hearing.

[55] Shell notes that Ms. Nagina and Mr. Jull have both billed 9 hours on May 13, 2016, for attending a site visit, as well as 19.9 hours between July 20 and 21, 2016, for travelling and attending at witness interviews. Shell submits that this is duplicative and not cost efficient. Shell points out that in *Costs Order 2014-006*, the AER reduced the legal fees significantly, pointing out that a law firm's usage of up to three lawyers for hearing preparation and attendance was unnecessarily duplicative:

The panel notes that [lead counsel] had two junior counsel helping him. While the panel questions the need for three counsel, it appreciates there is some value in having junior counsel help on files where this reduces the time required by senior counsel. As [lead counsel] said, the use of junior counsel can create efficiencies by allowing work to be done at a lower rate of pay. However, the panel questions whether such efficiencies occurred in this case. (para. 48)

[56] The O'Chiese dispute the allegation that the site visit and witness interviews do not reflect time management or efficiency. Mr. Jull and Ms. Nagina interviewed potential witnesses from a community of over 1300 people, often requiring a translator, and distilled that evidence into one day of oral evidence. This required multiple meetings, including travel to and from the O'Chiese community. On each of the site visits, counsel billed their travel time at a 50% discount as required by *Directive 31*.

[57] Shell submits that DLA Piper did not make appropriate use of junior counsel and failed to realize efficiencies by allowing work to be done at a lower rate of pay given that the majority of the charges relate to the time of three partners. Shell submits that a 50% reduction should be a starting point to bring the claim for the services of DLA Piper in line with what is reasonable and necessary, and that an even further reduction ought to be applied to bring the costs claim in line with what is reasonable and necessary given the nature of the proceeding.

[58] The O'Chiese argue that this was not a standard case with standard issues and that a 50% reduction is unreasonable; the rates set out in *Directive 031* already represent a substantially discounted rate. They believe the exceptional circumstances warranted the involvement of Mr. Jull, Mr. Yaworski, and Ms. Nagina.

Mr. Ward and Mr. Smith

[59] The costs claim for the fees of Mr. Ward are in the amount of \$3052. Shell notes that there is no explanation in the costs claim why Mr. Ward's costs should be awarded at the maximum amount allowed by *Directive 031* and that there is insufficient detail to allow for an assessment of the charges. Shell requests that these costs be discounted significantly, if not entirely.

[60] The O'Chiese argue that Mr. Ward provided legal research and assistance in preparing for the hearing and that this was an appropriate use of a junior lawyer.

[61] The O'Chiese have claimed \$480 in fees for Mr. Smith. Shell indicates that this claim is another example of the O'Chiese's inefficient and unreasonable handling of this matter. The O'Chiese argue that Mr. Smith provided legal research and assistance in preparing for the hearing and that this was an appropriate use of a junior lawyer.

[62] Shell indicates that in *Costs Order 2014-005*, the AER assessed a claim for legal fees of \$347 367. With respect to the hearing preparation time claimed by two lawyers for one participant, the AER commented as follows:

These hours [claimed] equal 73.8 full eight-hour days of only hearing preparation. In other words, 2½ months of eight-hour days were devoted to preparation for this hearing. The AER finds this number of preparation hours to be extremely excessive given that the hearing entailed a total of four full days, in which [participant] counsel cross-examined [the proponent's] panel for one full day and where its experts and three of the eleven community members led direct evidence for another full day. As discussed above, the panel does not consider this hearing to be sufficiently exceptional or complex to require two or more counsel at all times on behalf of [the participant] throughout the proceeding. (para. 129)

[63] As a comparison, DLA Piper billed approximately 1283.9 hours for preparation for a four-day hearing. This is the equivalent of 160.49 full eight-hour days or five months. In *Costs Order 2014-005*, the AER discounted the preparation time of counsel for an indigenous hearing participant by 70%, which lends further support to a substantial reduction in the fees claimed by DLA Piper. Shell further submits that the O'Chiese have not attempted to justify the services of four lawyers, an articling student, and its own general counsel.

Views of the Panel

[64] In exercising its discretion, the panel awards O'Chiese costs claimed for DLA Piper legal fees in the amount of \$134 111.00.

[65] The panel considered factors as set out in *Directive 31* and specifically the complexity of the matter, the reasonableness of the costs claimed, and the use of multiple counsel. For the following reasons, the panel finds that the project and hearing were not particularly complex, that the legal fees claimed were not reasonable, and that the use of multiple counsel was not justified.

### Complexity of the Applied-For Project and Hearing

[66] The panel does not find sufficient evidence to support the O’Chiese’s assertion that this was an exceptional case and that the preparation of evidence involved the synthesizing of the historical and traditional evidence of approximately 1300 O’Chiese members. This evidence appeared to the panel to be prepared principally by the O’Chiese’s expert consultants the Calliou Group and Mr. Hildebrandt. Furthermore, DLA Piper’s statements appear to indicate only two trips to the O’Chiese community on July 20–21 and September 1, 2016, for meetings with witnesses and interviews with elders for a total of 52.9 hours. The panel considered the complexity of Shell’s application. In the panel’s view, the involvement of a First Nation and consideration of impacts to its undisputed rights may make a matter more complex than some other files. However, this particular matter is no more complex than many other matters the AER has considered involving impacts to treaty and aboriginal rights (e.g., *Costs Order 2016-003* and *2014-005*). The panel notes that the length and footprint of the project was small in contrast to other recent pipeline hearings such as the Grand Rapids and Pembina pipelines. It notes that the project was sited in an area with existing development and that it paralleled a road, a power line, and existing pipelines for much of its length. It notes that the O’Chiese’s aboriginal and treaty rights as well as how these lands were being used to practice these rights was largely uncontested by the parties. As the pipeline will transport sweet gas, public safety concerns were not a significant issue. It also notes that the O’Chiese did not file technical studies or present expert evidence contesting Shell’s assessment of environmental effects or the need for the project. As a result the panel finds that this matter was not overly complex and that the level of research and preparations required to represent the O’Chiese in the hearing would not be expected to be greater than other recent AER pipeline hearings.

### Reasonableness of DLA Piper Legal Fees

[67] The panel finds that the hours claimed by DLA Piper for preparation in this matter were not reasonable.

[68] The panel notes that a guiding principle in exercising its discretion is that costs be reasonable. They must be reasonable in the sense that they were directly necessary for the costs applicant to appropriately participate in the subject proceeding. This often means that the costs applicant will not be fully indemnified by a costs order. It also means that the costs awarded must reflect a sense of proportionality. The amounts claimed must be proportionate to the matter they relate to. This is assessed by considering the approval sought from the AER, the nature of the proceeding, and the nature of the costs claimant.

[69] The approvals sought by Shell were not particularly complex from a technical oil and gas perspective. That is not to say the matter was not important to both Shell and the O’Chiese. Nonetheless, the panel does not find that this matter was exceptionally complex such that costs related to it should vary inordinately from those claimed or awarded in other similar proceedings. Further, it does not see anything exceptional in this hearing that would justify altering its assessment approach for this costs award.

[70] As noted, the O'Chiese claim DLA Piper legal fees of \$468 997, or 1353.7 hours of legal work. This is the equivalent of 169 eight-hour work days. The majority of fees are for three senior lawyers who together have almost 100 years of experience. \$24 430 of the fees claimed relate to attendance at the hearing. Overall, this is an extraordinary amount of time for participation in any proceeding and particularly for a four-day hearing relating to two small diameter pipelines that will transport natural gas containing no hydrogen sulphide in an area where there is extensive existing development.

[71] In its decision on the O'Chiese's application for advance funds, the panel stated that "...the information provided does not adequately explain why over 800 hours of legal counsel services are required for the hearing of an application for approval of a 7 kilometre pipeline..." Subsequent information provided in the O'Chiese's current application for costs does not adequately demonstrate to the panel that the now 1283.9 claimed hours of preparation time were reasonably necessary.

#### Use of Multiple Lawyers

[72] The panel finds that the use of three senior lawyers billing at the AER's maximum rate in this matter is not efficient, necessary, or justified.

[73] Experienced, capable practitioners such as those retained by the O'Chiese are expected to demonstrate a high level of expertise and efficiency. The panel recognizes that while the AER grants costs for more than one counsel only in exceptional circumstances (e.g., *Costs Order 2016-003* and *2008-011*), a second counsel may be warranted where the principal counsel requires support in fulfilling their functions in a proceeding of this type. Because of the number of witnesses O'Chiese presented and the additional work that created, the panel considers that the use of a second counsel was appropriate. However, the panel finds that it should come from a junior lawyer and not a lawyer with decades of experience.

[74] With regard to preparing for the hearing, the panel finds the hours claimed for any one of the senior lawyers to be excessive. The average of the amounts claimed by them for preparation is 420 hours. This reflects 52.5 eight-hour days of preparation each for three senior lawyers billing at the AER's maximum allowable rate. The panel finds that more than 1200 hours of preparation, as claimed by DLA Piper, appears to be inefficient and unjustified in the circumstances. The claim for these hours lacks any sense of proportion to the proceeding. This is particularly the case given it was largely uncontested that the O'Chiese had the treaty and aboriginal rights it asserted and that O'Chiese members currently use the area to practice those rights.

#### Costs Award for DLA Piper Legal Fees

[75] The panel accepts Shell's argument that DLA Piper did not proceed efficiently, especially regarding the use of three senior counsel, and that awarding costs for inefficiencies is inconsistent with

*Directive 031* and the principles set out in previous costs awards. As noted above, it is reasonable to allow fees for one senior lawyer and one junior lawyer.

[76] Given the nature and complexity of this matter, the experience of counsel involved, and the costs awards made in other AER proceedings involving assessment of impacts to aboriginal and treaty rights (e.g., *Costs Order 2016-003*, *2014-002*, and *2014-005*), the panel is prepared to award 170 hours for one senior lawyer (at \$350/hr) and 230 hours for a junior lawyer (at \$240/hr) for preparation time. The panel therefore awards a total of \$114 700 for O'Chiese legal fees for hearing preparation. The panel awards the claimed 32.9 hours for one senior lawyer (at \$350/hr) and also awards 32.9 hours for one junior lawyer (at \$240/hr) for hearing participation. The panel awards a total of \$19 411 for O'Chiese legal fees for hearing participation.

[77] In exercising its discretion, the panel awards O'Chiese a total of \$134 111 for legal fees.

#### Disbursements

[78] In exercising its discretion, the panel awards O'Chiese costs claimed for DLA Piper disbursements in the amount of \$3858.87.

[79] Shell submits that the claim for \$1000.25 in charges for photocopying, long distance telephone, mileage, courier, and legal research charges are inappropriate and excessive and beyond the scope of *Directive 031*. Section 6.2.1 of *Directive 031* provides that "the AER considers a lawyer's hourly rate to include all overhead expenses, such as secretarial work." Shell's view is that the listed expenses fall within overhead expenses and should be included in the hourly rate of the DLA Piper lawyers, and that a properly staffed legal team would have incurred less costs. Shell requests that the AER disallow a significant portion of the amount claimed for these expenses. It notes that *Directive 031* does not provide for the reimbursement of legal research charges.

[80] Shell points out that the claims for \$290.74 for accommodation and \$334.39 for car rental and fuel were incurred July 18 to 21, 2016, which is well outside the hearing phase of this proceeding and, according to *Directive 031*, are therefore not recoverable.

[81] Shell respectfully submits that it should not bear the cost of DLA Piper's unreasonable disbursements, particularly those outside the scope of *Directive 031*.

[82] The O'Chiese disagree that the disbursements should be considered as excessive and beyond the scope of *Directive 031*. They point out the following as justification:

Photocopying – The proceeding was document intensive and electronic submissions do not negate the fact that copies were required to be made. The photocopying charges claimed are reasonable and appropriate.

Long Distance – The O'Chiese reserve is located near Rocky Mountain House so the \$109.47 charge for long distance is reasonable and appropriate for the February to November timeframe.

Courier – Was necessary when sending materials that were too large to be provided electronically. The courier charges from February to November are reasonable and appropriate.

Mileage – It was more efficient for counsel to travel to the O’Chiese community for witness interviews than for members to travel to Calgary. The mileage charges are reasonable and appropriate.

Legal Research – On a few occasions the QuickLaw database was used. Legal research charges are reasonable and appropriate.

[83] The O’Chiese submit that photocopying, long distance, and mileage are included in form E4 (a part of *Directive 031*), which shows that these disbursements are not automatically included as overhead.

[84] The claims for \$290.74 for accommodation, \$199.98 for mileage, and \$334.39 for car rental and fuel were necessary expenses when travelling to the O’Chiese community. There were no disbursements included for the site attendance on May 13, 2016.

[85] The panel is prepared to award the disbursements claimed for transcripts, photocopying, long distance telephone, and courier charges.

[86] The panel is not prepared to award \$290.74 for accommodation, \$199.98 for mileage, and \$334.39 for car rental and fuel as these costs were incurred in July of 2016, outside the hearing phase of this proceeding.

[87] In consideration of the above, the panel awards \$3858.87 for DLA Piper disbursements.

## Calliou Group

### Professional Fees

[88] The Calliou Group’s statements of account include professional fees for Ms. Campbell, Ms. McGarvey, and Mr. DeCarteret, for a total of \$81 750. Shell acknowledges that the consultants provided evidence at the hearing and prepared several reports. Shell submits that the costs should be reduced by at least two-thirds. Shell considers a reasonable award would include the costs associated with one of the three reports and the attendance of one member of the Calliou Group to speak to that report at the hearing.

[89] Shell submits that the statements of account do not provide appropriate or sufficient information to assess the costs as related to the proceeding. Shell submits that the preparation of three reports is unreasonable and not necessary and considers none of the reports to have provided a conclusion with respect to the potential impacts of the project on the O’Chiese’s traditional rights. Shell argued that the Calliou Group undertook an unnecessary and unreasonable amount of work, a significant portion of which was of minimal assistance to the AER. A significant portion of the reports, particularly the Lands Taken Up Report, related to matters that were outside the scope of the subject applications and were not necessary or relevant.

[90] Shell submitted that the evidence of the Calliou Group was flawed, had gaps in logic, was not transparent, and was incomplete as evidenced by the preparation of a sampling of data related to the Calliou *Identification of Impacts Shell Canada Limited Rocky 7 Pipelines* report that was presented as new evidence on day 3.

[91] Shell submits that the attendance of three members was unreasonable since their testimony was duplicative with no clear delineation of responsibility. The amounts claimed in respect of the Calliou Group's attendance at the hearing should be reduced to reflect an amount sufficient for the attendance of only one member at the hearing.

[92] The O'Chiese submit that the Calliou Group reports are relevant to the issues in the proceeding. They further state that it was necessary to have three Calliou Group members attend the hearing as they were presenting joint reports prepared by the three witnesses. Having different specialized training and extensive knowledge, based on three years of interactions with the O'Chiese, it was necessary for all to be there to provide their expert opinions and research findings to the hearing panel. The O'Chiese submit that the Calliou Group contributed meaningfully to the hearing panel understanding of the issues, evidenced by the hearing panel chair thanking them for their "willingness to provide fulsome answers and be cooperative."

[93] The O'Chiese note that the fees of the Calliou Group only include the cost of the August 2016 report entitled, "Identification of Impacts Shell Canada Limited Rocky 7 Pipelines," even though the other two reports prepared by the Calliou Group also contained information relevant to the issue of impact of the proposed pipeline on the O'Chiese. Shell submits that a significant portion of time entries in the Calliou Group invoices refer vaguely to application materials and performing administrative tasks such as scheduling and attending meetings. It would appear from the time entries that the Calliou Group provides consulting or administrative services to the O'Chiese on a number of matters beyond the subject proceeding. Given this insufficient level of detail, the reasonableness of many charges cannot be assessed, and the AER should exercise its discretion to apply a global reduction to the total amounts claimed by the Calliou Group.

[94] Shell further submits that the following items in the Calliou Group invoice do not relate to the proceeding or are specifically excluded by *Directive 031* and ought not to be awarded:

"Project manage Shell files including project tracking, review application filing, strategic planning and file management";

"Meeting with Alberta Energy Regulator (AER) regarding Alternative Dispute Resolution (ADR) process on Rocky 7 February 5"; and

"Request and review Pembina Hearing records with regards to Rocky 7."

[95] The O’Chiese respond that the Calliou Group invoices are sufficiently detailed for the hearing panel’s review as they identify the work done, the date, and a description of the work and contain sufficient particulars to support the claimed amount. The entries relate to the proposed Rocky 7 Pipeline as identified in the time entries.

[96] Shell submits that the hours claimed for Ms. Campbell’s services do not correspond with the hours actually billed in the statement of account. The O’Chiese respond that there was a mathematical error and that Ms. Campbell’s costs should be reduced by \$775 (5 hours × \$155/hr) as pointed out by Shell.

#### Disbursements

[97] Shell submits that the charge of \$7000 on August 15, 2016, for “Report Graphic Layout Services – Stephen Rainforth” is both excessive and unreasonable. The Calliou Group has not provided an explanation for such a charge and Shell submits that there is no basis for design and production of reference materials in *Directive 031* and should not be awarded. The O’Chiese respond that the disbursements are reasonable and should be awarded.

#### Views of the Panel

[98] In exercising its discretion, the panel awards \$74 147.50 in professional fees and \$2000.00 in disbursements for the Calliou Group.

[99] In the panel’s view, the Calliou Group’s evidence made a contribution to the panel’s understanding of the issues, in particular the potential impacts of the applications on the O’Chiese. The panel finds that the statements of account provided enough detail to determine whether the items billed were necessary and related to the application. However, a number of entries were found to be beyond the scope of this hearing and in relation to items that are specifically excluded by *Directive 031*.

[100] The O’Chiese claimed a total of \$81 750 for the Calliou Group professional fees and \$7000 for disbursements. In making this award, the panel had regard for the mathematical error identified by the parties and the items that were beyond the scope of this hearing or specifically excluded by *Directive 031*. As set out in *Directive 031*, no award for costs was made in relation to time entries associated with participation in the AER’s alternative dispute resolution process.

[101] The panel also denied costs for hours incurred by Tracy Campbell and Kevin deCarteret before the notice of hearing was issued on February 24, 2016. It is not the practice of the AER to award such costs, and the panel is not persuaded that the circumstances warranted an exercise of discretion to modify this practice. The panel was also not prepared to award costs for attendance of the Calliou Group at the hearing beyond the day that representatives provided testimony and the day prior (two days). Accordingly, the panel awards \$74 147.50 in professional fees for the Calliou Group.

[102] With respect to the \$7000 disbursement claimed by O'Chiese in relation to the Calliou Group's use of a graphic layout services, the panel finds the explanation for the disbursement to be inadequate, particularly given the size of the amount claimed. While the panel recognizes that some graphic layout services were required, without more explanation, a disbursement of this size cannot be characterized as reasonable or justified. Accordingly, the panel is prepared to award the O'Chiese costs in relation to the Calliou Group's graphic layout services, but for a reduced amount of \$2000.

#### Mr. Hildebrandt

[103] The O'Chiese have requested \$11 000 and \$1343 for disbursements for Mr. Hildebrandt's consulting services and hearing attendance. Shell submits that no amount should be awarded for his costs since, in Shell's view, the evidence was of no value given that it did not relate to issues properly within the scope of the subject proceeding and that the O'Chiese was a better source for that information. Shell submits that his testimony lacked focus and credibility and was irrelevant, as proven by the fact that no one from Shell, AER counsel, or the panel had questions for him.

[104] Shell submits that Mr. Hildebrandt's statement of account does not comply with section 5.1 of *Directive 031*, which indicates that a professional's statement of account must include a detailed list of services performed, the hourly rate, and amount of time spent carrying out each component of work. Shell deduces that he charged \$1 per word for the paper he prepared regarding the O'Chiese and Treaty 6. Further he claimed costs for attending the hearing September 11–15, 2016, even though the hearing only took place September 13–15, and he only gave evidence on September 14. The O'Chiese have claimed costs for Mr. Hildebrandt's attendance at final argument, but no invoice is provided with respect to those costs. Shell submits that there is no basis for awarding costs for Mr. Hildebrandt's attendance outside of the day of his testimony. Any award for costs should not be made based on the maximum rate in the scale of costs due to the limited value and irrelevant testimony.

[105] The O'Chiese argue that before determining the impact of the proposed pipeline on the rights of the O'Chiese, it was critical to understand the existing constitutionally protected aboriginal and treaty rights that may be impacted. Mr. Hildebrandt contributed to a better understanding of the history and origin of these rights. He is an accomplished and credible historian, and his evidence was his opinion on the rights of the O'Chiese, was grounded in his actual experience and historic research, and was needed to refute the generic knowledge of First Nations culture presented by Shell.

[106] The O'Chiese submit that Mr. Hildebrandt prepared his report and presented his evidence in good faith and as such his costs should be awarded.

#### Views of the Panel

[107] In exercising its discretion, the panel awards \$2800 for report preparation fees, \$1000 for attendance at the hearing, and \$713 for disbursements for Mr. Hildebrandt.

[108] The panel found Mr. Hildebrandt's evidence to be of limited value. It provided some information related to the history of the O'Chiese and its culture. However, much of the evidence was general in nature and did not address specific issues related to Shell's applications. Further, the inadequacies in Mr. Hildebrandt's statement of account for his prehearing work and attendance at the hearing necessitate a reduction in the claim for his fees and disbursements. *Directive 031* is clear that an expert's account must include a detailed list of what services were performed, the hourly rate, and the amount of time spent carrying out each component of the work.

[109] Accordingly, the panel awards 50% of the \$5600 cost claimed for Mr. Hildebrandt's preparation of his report and \$1000 in fees for one day's attendance at the hearing for a total of \$3800. The panel also awards \$330 (\$165/night) for accommodation (two days), \$80 for meals (two days), and \$303 for mileage for Mr. Hildebrandt's disbursements. This reduction from the amount claimed reflects the limited assistance of his evidence and the failure to adequately support the claim for his fees and disbursements.

#### Ms. Venne

[110] The O'Chiese have claimed costs in the amount of \$12 750, plus disbursements of \$1343, for Ms. Venne. Shell submits that no costs should be awarded for Ms. Venne given that she made no apparent contribution to the evidence filed by the O'Chiese, did not make a formal appearance at the hearing, and was neither necessary to the O'Chiese participation in the subject proceeding or the AER's consideration of the subject application. Shell points out that in *Costs Order 2016-003*, the AER emphasized that costs must be earned and justified, which Shell points out the O'Chiese have failed to do with respect to Ms. Venne's costs.

[111] The O'Chiese submit that Ms. Venne has expertise in cultural importance and presentation of evidence of First Nations. She was essential in preparing the O'Chiese Elders and assisted in bridging the gap between the legal and regulatory proceedings of the Western system and the value system of the O'Chiese.

#### Views of the Panel

[112] Despite the role of Ms. Venne as described by the O'Chiese, it is not apparent to the panel that Ms. Venne made a substantial contribution to the hearing. Ms. Venne made no formal appearance at the hearing and her statement of account contains insufficient detail to demonstrate to the panel that the items billed are reasonable and necessary. As set out in *Costs Order 2016-003*, costs awards are discretionary and must be justified. The panel also notes that no information was provided regarding Ms. Venne's qualifications. The panel agrees with Shell that the O'Chiese failed to justify Ms. Venne's costs in this matter. Accordingly, the panel denies the costs claim with respect to Ms. Venne in its entirety.

## The O'Chiese's Costs

[113] The O'Chiese have claimed \$40 997.26 in honorarium and disbursements. Shell submits that an award with respect to hearing attendance should be limited to the \$100 per half-day honorarium, as specified in *Directive 031*. Further, Shell submits that a portion of the \$23 477.26 claimed by the O'Chiese for disbursements and expenses is outside the scope of *Directive 031* and should be reduced accordingly. Shell points to the following excerpts from *Directive 031*:

- Appearing at an AER hearing may include giving evidence, being cross-examined, assisting counsel and consultants, and presenting closing arguments. Participants who participate in a hearing in this manner can claim an honorarium of \$100 for each half day of attendance at a hearing...For large participant groups, the AER generally awards attendance honoraria to no more than six individuals but may consider additional attendance honoraria in exceptional circumstances. (section 6.1.3)
- The maximum allowable claim for accommodation is \$140 per day. Receipts must accompany all claims for accommodation. Claims for accommodation are restricted to the hearing phase of a proceeding. (appendix D, section 2.2)

[114] Shell submits that any AER award should not exceed \$100 per half-day for the O'Chiese members who participated in the proceeding. With respect to the more than \$23 000 claimed in disbursements, Shell submits that because many of the O'Chiese members stayed in the hotel for an extra night (September 11, 2016) outside the hearing period, the AER should award no more than \$21 676.62 for disbursements, including \$14 069.76 for accommodation.

[115] Shell points out that the costs claim is seeking attendance honoraria for 25 individuals during the evidentiary portion and an additional 10 individuals for the closing arguments on November 9, 2016. This exceeds the number of individuals for which an award will be given as per *Directive 031*. No explanation has been provided to indicate any exceptional circumstances warranting attendance of 25 individuals. Shell submits that any costs awarded for attendance honoraria should be reduced as the AER deems appropriate.

[116] The O'Chiese submit that it was important for the members to participate in the hearing as the issues go to the core of the O'Chiese's constitutionally protected aboriginal and treaty rights and the protection and preservation of the O'Chiese's way of life. These exceptional circumstances warrant the award of costs as claimed.

[117] At a minimum, the O'Chiese submit that participant honoraria should be awarded for the following individuals:

- The thirteen O'Chiese members who provided oral evidence, including Ms. Ironbrow
- Mr. Nanooch, who conducted opening prayer with Ms. Ironbrow

- Mr. Scott, who affirmed the witnesses in accordance with O’Chiese customs
- Six of the twelve O’Chiese members (including councillors, band manager, and monitor), who attended the first three days of the hearing
- Six of the ten O’Chiese members (including Chief Whitford and Mr. Scott), who attended the hearing on day 4

[118] The attendance of the O’Chiese members demonstrates the importance of these issues to them, and payment of honoraria is customary. The O’Chiese point out that holding the hearing in Calgary rather than Rocky Mountain House or on the O’Chiese Reserve was much more cost efficient. These cost efficiencies were counterbalanced by the need to have the O’Chiese members in Calgary.

#### Views of the Panel

[119] In exercising its discretion, the panel awards a total of \$6000.00 in honoraria and \$13 471.86 in disbursements for attendance at the hearing for O’Chiese witnesses and Mr. Nanooch.

[120] *Directive 031* states that a \$100 attendance honorarium is available for each half-day that a participant appears at a hearing, which may include giving evidence, being cross-examined, assisting counsel and consultants, and presenting closing arguments. The AER generally awards attendance honoraria to no more than six individuals but may consider additional attendance honoraria in exceptional circumstances. 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.

[121] The panel considers it appropriate to award honoraria to 13 O’Chiese witnesses that attended the hearing on both the opening day and the day on which they gave evidence. The panel awards \$100 in attendance honoraria for each witness for those four half-days. The panel awards three days for personal disbursements that are reasonable and directly and necessarily incurred to participate in the hearing as it was held in Calgary (\$165/night accommodation, \$40/day for meals). The panel believes that the submissions of these witnesses made a substantial contribution to the hearing and contributed to a better understanding of the issues, namely the potential impact of the applications on the O’Chiese.

[122] The panel also awards two half-day honoraria and disbursements each for Chief Darren Whitford, Phyllis Whitford, and Joanne Gladeau for the third day of the hearing because of their role in supporting counsel as a translator and community leaders. An additional half-day is awarded to Chief Whitford for his attendance at final argument.

[123] The panel is also prepared to award \$100 for one half-day on which Mr. Nanooch participated in the hearing by conducting the opening prayer. In addition to attendance honoraria, the panel is prepared to award Mr. Nanooch personal disbursements that are reasonable and directly and necessarily incurred to participate in a hearing. This includes accommodation for three nights.

[124] The O’Chiese costs application included a \$4126.86 claim for mileage and \$120 for parking without any supporting receipts or documentation. Without benefit of these details, the panel estimated the mileage to be approximately 500 km roundtrip from O’Chiese I.R. 203 to the AER’s hearing room. In exercising its discretion it awards mileage for one round trip for each of the 13 witnesses and for Mr. Nanooch. It awards a second roundtrip for Chief Darren Whitford to attend final argument. It also awards \$120 for parking as claimed by the O’Chiese. The panel therefore awards a total of \$3907.50 for mileage and parking for the O’Chiese costs application.

[125] Mr. Andrew Scott is an employee of the O’Chiese First Nation; the AER does not award costs for services provided by a participant’s personnel in the normal course of their duties.

[126] The costs awarded have been outlined in the below table.

	<b>Honoraria</b>	<b>Accommodation</b>	<b>Meals</b>
Sammy Beaverbones	\$400	\$495	\$120
Rosie Bremner	\$400	\$495	\$120
Sara Daychief	\$400	\$495	\$120
Joanne Gladeau	\$600	\$660	\$160
Eva Ironbrow	\$400	\$495	\$120
Andrew Nanooch	\$100	\$495	\$120
Alice Strawberry	\$400	\$495	\$120
George Strawberry	\$400	\$495	\$120
Steven Strawberry	\$400	\$495	\$120
Travis Strawberry	\$400	\$495	\$120
Charlie Whitford	\$400	\$495	\$120
Chief Darren Whitford	\$700	\$660	\$160
Phyllis Whitford	\$600	\$660	\$160
Leslie Yellowface	\$400	\$495	\$120
	<b>\$6 000</b>	<b>\$7 425</b>	<b>\$1 800</b>

[127] With respect to attendance honoraria for the remaining O’Chiese members who attended the hearing but were not part of the community witness panels or otherwise participating in the hearing, the panel recognizes that an award of attendance honoraria for these individuals is beyond what is contemplated in *Directive 031* barring exceptional circumstances. In this case, the O’Chiese have not demonstrated that the attendance of these individuals at the hearing included participation as contemplated in *Directive 031* (e.g., giving evidence, bring cross-examined, assisting counsel and consultants, and presenting closing argument), and the panel is not satisfied that exceptional circumstances exist that would warrant the award of attendance honorarium to these O’Chiese members.

## Advance of Funds

[128] In awarding the O'Chiese \$25 000 in advance funds, the AER's letter decision of July 26, 2016, stated as follows:

The AER is not prescribing how OCFN chooses to allocate the advance of funds. However, this advance of funds is subject to a redetermination in a final award of costs. Following the hearing, the AER will require OCFN to provide a full accounting of how the advanced funds were spent by way of a cost application that complies with Directive 031 (cost application). The cost application must be supported by invoices and detailed descriptions of services rendered on OCFN's behalf and all information required by Directive 031 for costs applications submitted under the AER's cost process. This information must be submitted thirty (30) days following the close of the hearing, unless otherwise directed by the Panel.

[129] Shell submits that the O'Chiese have not provided any explanation or accounting of how the funds were spent and believes that it is not sufficient to only deduct the amount from the total costs claimed. There is no way of determining whether use of these funds was reasonable or necessary to the subject proceeding. Shell submits that the \$25 000 advance funds should be subtracted from the overall amount awarded to O'Chiese.

[130] The O'Chiese respond that the advance funds are earmarked for use towards payment to the Calliou Group for the *Identification of Impacts Shell Canada Limited Rocky 7 Pipelines* report and the costs incurred for the preparation of the O'Chiese members' evidence.

[131] In its decision approving the advance funding request, the panel stated that "the third report to be prepared by Calliou and the preparation of community members' testimony are costs that will be reasonably and necessarily incurred for the purposes of the hearing. For that reason, the panel considers that an advance of \$25,000.00 is appropriate."

[132] It appears to the panel that the O'Chiese used the advance funds for the purposes outlined above, as evidenced by the statements of account of the Calliou Group and DLA Piper. Accordingly, the panel finds that it is appropriate to subtract the \$25 000 advance funds award from the overall amount awarded to the O'Chiese.

## Order

[133] The AER hereby orders that Shell Canada Limited pay costs to the O'Chiese First Nation in the amount of \$212 762.87. This amount must be paid within 30 days of issuance of this order to

DLA Piper LLP  
Suite 1000, Livingston Place West  
250 2<sup>nd</sup> Street SW  
Calgary, AB T2P 0C1

[134] 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 May 2, 2017.

## **Alberta Energy Regulator**

*<original signed by>*

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

*<original signed by>*

B.T. McManus, Q.C.  
Hearing Commissioner

*<original signed by>*

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

## Appendix 1 Summary of Costs Claimed and Awarded

	<b>Total Fees / Honoraria Claimed</b>	<b>Total Expenses Claimed</b>	<b>Total Amount Claimed</b>	<b>Total Fees / Honoraria Awarded</b>	<b>Total Expenses Awarded</b>	<b>Total Amount Awarded</b>
DLA Piper LLP	\$468 997.00	\$4 700.98	\$473 697.98	\$134 111.00	\$3 858.87	\$137 969.87
Calliou Group	\$81 750.00	\$7 000.00	\$88 750.00	\$74 147.50	\$2 000.00	\$76 147.50
Walter Hildebrandt	\$11 000.00	\$1 343.00	\$12 343.00	\$3 800.00	\$713.00	\$4 513.00
Sharon Venne	\$12 750.00	\$1 343.00	\$14 093.00	\$0.00	\$0.00	\$0.00
The O'Chiese First Nation	\$17 500.00	\$23 477.26	\$40 977.26	\$6 000.00	\$13 132.50	\$19 132.50
<b>Advance Funding</b>			<b>-\$25 000.00</b>			<b>-\$25 000.00</b>
<b>Totals</b>	<b>\$591 997.00</b>	<b>\$37 864.24</b>	<b>\$604 861.24</b>	<b>\$218 058.50</b>	<b>\$19 704.37</b>	<b>\$212 762.87</b>