Alberta Energy Regulator

Value Creation Inc.

Application to Amend *OSCA* and *EPEA* Approvals

10-056-21W4M

Costs Awards

July 31, 2018

Alberta Energy Regulator
Costs Order 2018-02: Value Creation Inc., Application to Amend *OSCA* and *EPEA* Approvals, 10-056-21W4M

July 31, 2018

Published by
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Introduction

Background

[1] On June 17, 2016, Value Creation Inc. (VCI) filed applications under the *Oil Sands Conservation Act* and the *Environmental Protection and Enhancement Act* to amend existing Alberta Energy Regulator (AER) approvals to construct a three-phase oil sands processing plant (bitumen upgrader) about 15 kilometres northeast of Fort Saskatchewan. The amendments proposed changes to VCI's processing-plant design in order to produce ultralow-sulphur diesel, hydrotreated naphtha, and premium synthetic crude.

[2] The AER issued a notice of hearing on September 26, 2017, asking for requests to participate in the hearing. George Percy and Barbara Percy (the Percys) filed a request and were granted full participation rights in the hearing (Proceeding 356).

[3] The AER held a public hearing of the applications in Sherwood Park, Alberta, beginning February 6, 2018, and ending on February 7, 2018. The Percys were the only participants in the hearing, other than the applicant, VCI.

[4] The AER issued its decision approving the applications on May 8, 2018, in *Decision 2018 ABAER 003: Value Creation Inc., Applications to Amend the Heartland Upgrader Project Approvals, Alberta's Industrial Heartland Area*.

George Percy and Barbara Percy Costs Claim

[5] On March 5, 2018, the Percys filed a costs claim. On March 20, 2018, VCI submitted comments on the claim. On April 3, 2018, the Percys filed a reply to VCI's comments. The AER considers the cost process to have closed on April 3, 2018.

[6] The Percys were represented in Proceeding 356 by Ms. D. Bishop, originally with Prowse Chowne LLP and currently with Bishop Law. Ms. E. Chipiuk of Prowse Chowne also provided legal services while the matter was at Prowse Chowne. The total amount claimed by the Percys was $52 862.47, broken down as follows:

- $43 099.00 in legal fees
- $5220.00 in expert fees
- $2026.22 in disbursements and expenses
- $2517.25 in goods and services tax (GST)

The AER's Authority to Award Costs

[7] 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 section 58(1)(c):

> 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.

[8] The Percys are persons who were permitted to participate in a hearing for which a notice of hearing was issued; therefore, they meet the definition of "participant" in section 58(1)(c) of the *Rules of Practice*. VCI argued that the Percys did not qualify as participants; however, given the definition in the *Rules of Practice*, that argument is untenable. The Percys are entitled to make a costs claim in relation to Proceeding 356.

[9] In exercising its discretion to make this order, the panel has considered the Percys' costs claim, VCI's comments on the Percys' costs claim, and the Percys' reply. The panel has also considered the conduct of the parties during the proceeding for the purpose of applying one of more of the "factors" listed in section 58.1 of the *Rules of Practice* (and in paragraph 11 below). Appendix 1 summarizes the costs claimed by the Percys and the amounts awarded by the AER.

[10] The AER has broad discretion in deciding whether and how to award costs. Section 64 of the *Rules of Practice* states the following:

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

[11] Section 58.1 of the *Rules of Practice* 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.

[12] When assessing costs, the AER is also guided by *Directive 031: REDA Energy Cost Claims* (*Directive 031*), and by AER *Bulletin 2014-07: Considerations for Awarding Energy Costs Claims and Changes to the AER's Process for Reviewing Energy Costs Claims.* The bulletin states 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.

[13] As contemplated in *Bulletin 2014-07,* participants and applicants are expected to make an effort to come to an agreement on costs claims. If 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.

VCI’s Submissions

[14] VCI submitted that the Percys’ costs claim should be disallowed or substantially discounted because the Percys created vexatious and unwarranted complications for what was a routine amendment application. VCI stated that its applications were intended to improve the economics of its project and minimize the environmental impact of an existing approved project.

[15] VCI stated that the Percys' goal in the proceeding was to enforce a commitment, allegedly made by VCI's predecessor, and have the AER force VCI to relocate the Percys at VCI's expense. VCI stated that the Percys filed meritless motions and applications and filed lengthy materials that were outside the scope of the proceeding and contrary to the AER's clear and repeated rulings.

[16] VCI stated that the objective of the AER's costs award regime is to encourage participants to advance legitimate points of view that contribute in a meaningful way to a hearing panel's deliberations, in a manner that is respectful of the hearing process. It is not to be used to indemnify participants or to fully relieve them of the financial burden of participating. VCI also stated that costs submitted by participants must be reasonable, necessary, and directly related to the hearing, and it specifically referred to AER *Costs Order 2016-003: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project; Costs Award – Alexander First Nation* and *Costs Order 2017-02: Shell Canada Limited; An Application for Two Pipeline Licences and an Application for a Pipeline Agreement, Ferrier Field; Costs Awards*. 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, as in the amount claimed must be proportionate to the matter to which it relates. This is assessed by considering the approval sought from the AER, the nature of the proceeding, and the nature of the costs claimant.

[17] VCI stated that the statutory regime only contemplates awards for costs incurred to prepare for and participate in a hearing. It followed, therefore, that in addition to all the other requirements that costs claimants must satisfy, the costs must also have been incurred after (and not before) a notice of hearing has been issued and after the claimant is given participation rights. VCI referred to paragraph 16 of AER *Costs Order 2016-001: Pembina Pipeline Corporation, Applications for Two Pipelines, Fox Creek to Namao Pipeline Expansion Project; Costs Awards*.

[18] VCI further stated that the AER costs award regime contemplates the minimization (or elimination, where possible) of time, effort, and other resources that the AER and the parties expend on contested costs awards. Consequently, parties are not only encouraged to handle costs claims in good faith but also to compromise on costs claims in order to reach agreement. VCI referred to AER *Bulletin 2014-07* and indicated that it had reached out to the Percys in good faith with a proposal to settle their costs claim; however, the Percys refused to engage with VCI to reach a compromise. This left VCI with no option but to file its submission contesting the Percys' costs claim.

Legal Fees

[19] VCI noted that the Percys claimed legal fees for two lawyers at two different law firms. VCI submitted that the Percys' claim for legal fees was not only excessive for a routine amendment application that was meant to make an approved project even better, it was also inconsistent with the AER costs award regime and did not meet the requirements of *Rules of Practice* rules 58(1) and 58.1.

Prowse Chowne Legal Fees

[20] With respect to the claim for legal fees of Prowse Chowne, VCI submitted that all of that part of the costs claim should be denied as the legal services were rendered from July 26, 2016, to June 19, 2017, prior to the notice of hearing being issued on September 26, 2017. VCI referred to AER *Costs Order 2016-001* paragraph 16, wherein the AER stated that "costs that precede a notice of hearing are not awarded."

[21] Alternatively, if the legal fees of Prowse Chowne are to be considered, VCI submitted that they are excessive and that the services performed were needlessly duplicated between two lawyers. VCI noted that the legal fees were billed by two lawyers, namely Ms. Bishop and Ms. Chipiuk, at an hourly rate of $320 each. The Alberta Law Society's lawyer directory indicates that Ms. Bishop qualified to practise law in 2006 and Ms. Chipiuk qualified to practise law in 2008. Both lawyers would have been 8–12 years at the bar in 2016 and 2017 when they billed their respective portions of the Prowse Chowne legal fees.

[22] VCI stated that *Directive 031* provides a sliding scale of fees for professionals under which a maximum allowable hourly rate of $320 is set for lawyers with 8–12 years at the bar. *Directive 031* goes on to clarify on page 17:

> The AER emphasizes that the maximum allowable hourly rates will not be awarded as a matter of course. Rather, the AER will assess each claim upon its individual merits.

[23] VCI noted that the AER stated the following in AER *Costs Order 2017-02*, paragraph 30:

> As stated in 5.2.1 of *Directive 031* the scale of costs provides a sliding scale for professionals on the basis that the professional's fees increase as he or she gains expertise. The AER emphasizes that the maximum allowable hourly rate are not awarded as a matter of course; rather, the AER assesses each claim on its individual merits and only approves the maximum fee when the participant has demonstrated that such a fee is warranted by the work performed.

[24] VCI referred to the test of reasonableness and proportionality applied in AER *Costs Order 2016-003* paragraph 45 and noted that Ms. Chipiuk was at the lowest point in the range of her years of experience but was billing at the maximum allowable hourly rate. VCI also noted that Ms. Chipiuk spent 6.5 hours drafting a statement of concern on July 27, 2016, and spent another 5 hours working on it the following day, after Ms. Bishop had spent 2 hours reviewing and correcting the same statement of concern. VCI stated that it did not see justification for such excesses and duplication of legal costs, either in the *Rules of Practice* or in the AER orders applying the *Rules of Practice*. Consequently, VCI submitted that the 24 hours the Percys claimed for Ms. Chipiuk's work should be reduced to 8 hours. VCI further submitted that Ms. Chipiuk's hourly rate should be set at $280.00 or less.

[25] With respect to Ms. Bishop, VCI noted that even though she is Ms. Chipiuk's senior by two years, the quality of work claimed in her name in the Prowse Chowne fees does not show any justification or proportionality for the Percys to claim the maximum allowable hourly rate for her work. VCI also

noted that the Percys are claiming 50 per cent of the hours Ms. Chipiuk spent doing the actual work as the time that Ms. Bishop presumably spent supervising Ms. Chipiuk's work.

[26] VCI submitted that a ratio of 2:1 between work done by one lawyer and the supervision of such work by another is excessive. Furthermore, such excess indicates either a lack of experience on Ms. Bishop's part or that Ms. Bishop was being unreasonable. VCI stated that in any event, the claim was disproportionate and it was unreasonable for the Percys to make such a cost claim.

[27] VCI submitted that any award for Ms. Bishop's work while at Prowse Chowne should be at the hourly rate of $280.

Bishop Law Legal Fees

[28] The Percys claimed $36 240.96 for work done for them by Ms. Bishop at Bishop Law (Bishop Law costs). VCI disputed the Percys' entitlement to be paid these costs for several reasons.

[29] VCI argued that portions of the Bishop Law costs were incurred prior to the Percys becoming participants in Proceeding 356. The notice of hearing was issued on September 26, 2017; however, the Percys claimed for three hours of work that Ms. Bishop did prior to the Percys becoming participants. VCI stated that this part of the claim should be denied in its entirety.

[30] VCI submitted that Bishop Law costs are based on the wrong scale of costs. Although Ms. Bishop was admitted to the Alberta bar in 2006, which sets her maximum allowable hourly rate at $320, the Percys claimed an hourly rate of $350 for more than 74 hours of work billed by Ms. Bishop. VCI submitted that the Percys have not demonstrated that this was earned, or that it is reasonable, justifiable, or proportionate under *Directive 031*. VCI noted that the sliding scale of costs set out in *Directive 031* is clear and not ambiguous whatsoever. It is therefore an act of bad faith (inconsistent with *Bulletin 2014-07*) for the Percys to claim costs on the wrong scale without any justification or explanation.

[31] VCI stated that Ms. Bishop's conduct in Proceeding 356 and the poor procedural choices that she made led to the expenditure of unnecessary time, effort, costs, and other resources by both the AER and the parties. VCI argued that Ms. Bishop filed unnecessary motions in Proceeding 356 and several applications in other forums, and she either failed to appreciate the hearing panel's clear and repeated rulings on the limits to its jurisdiction or simply chose to ignore such limits, thereby complicating a rather simple amendment application. VCI noted the hearing panel had to take the unusual step of striking out some of the Percys' written submission. VCI submitted that the hours awarded should be reduced to 36 hours or less.

[32] VCI stated that the Percys claimed 17.5 hours as the time their counsel needed to prepare their submission plus over 9 hours to figure out the jurisdiction of the AER in a routine amendment application. VCI submitted that no recognizable experience or expertise is borne out by such use of time

by counsel. VCI further submitted that any costs awarded to the Percys on account of the work Ms. Bishop did should be based on an hourly rate of $280 or less.

[33] VCI stated that it was not clear that all of the Bishop Law costs were "directly and necessarily related" to the proceeding and that the AER costs award regime is meant to address only the costs that arise as a result of participation in an AER hearing. VCI submitted that the Percys' claim for legal fees included dates that related to the following other proceedings brought by the Percys:

- Notice of motion for AER reconsideration No: 1903669 filed November 30, 2017, with related AER letters dated December 7 and 8, 2017, with decision issued on January 29, 2018
- Court of Appeal file number 1803-008 AC "George and Barbara Percy v. VCI and AER" filed on January 5, 2018, and heard on January 31, 2018
- The amount of $2275.00 billed on January 30, 2018, with the description "Review Alberta Energy Regulator jurisdiction, Review REDA/OSCA, Research of law." The timing of this entry is the day before the Court of Appeal matter, and without further specifics it lends itself to the conclusion that such research was not entirely related to Proceeding 356
- The amount of $1050.00 for "Research of law, regarding jurisdiction of Alberta Energy Regulator," the date of which corresponds with the date of the filing of a stay application with the Court of Appeal

[34] VCI stated that if part of the Bishop Law costs relates to preparation for another proceeding, then it is within that proceeding that any cost applications should be made. For example, the *Alberta Rules of Court*, section 14.88(1) says, "Unless otherwise ordered, the successful party in an appeal or an application is entitled to a costs award against the unsuccessful party." VCI submitted that it is impossible for VCI to know what part of the work for which Bishop Law costs are claimed actually relate to Proceeding 356. VCI stated that the Percys should be required to provide more details of the Bishop Law costs. Alternatively, VCI submits that the AER should disallow such costs or have these costs audited.

Appraisal Costs

[35] VCI stated its view is that for a basic appraisal report, the appraisers for Gettel Appraisals Ltd. took a significant amount of time to prepare the valuation loss analysis of the Percys' property (the Report). VCI noted that the Report combined the existing VCI project that was being amended with the amendment application, and as a result the Percys' experts could not differentiate between the impacts of the amendment application and the cumulative effects of other existing and planned projects in the area. The Report focused almost entirely on the Percys' stated goal of wanting to be relocated by VCI and consequently offered very little to help the hearing panel understand the issues before it.

[36] VCI submitted that the 18 hours claimed by expert Brett Coley should be reduced to 8 hours, and the hourly rate of $230 claimed for him should be reduced to $160 or less. VCI also submitted that Brian

Gettel's hourly rate should be reduced from $270 to $230 or less, and that the four hours claimed for him should be reduced to two hours.

The Percys' Submissions

[37] The Percys argued that this matter was not routine for them; rather, it was of utmost importance as was made clear in their emotional presentation of their evidence of their 15-year history with VCI. The Percys stated that *Directive 031* exists for participants who may be directly and adversely affected by an application and are given a forum to express their opinion and concerns. In Alberta, the Legislative Assembly has included the costs award regime in the AER's enabling legislation. Such an approach is supported by the common law and by the Supreme Court of Canada's decision in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, which stands for the premise that no landowner should be out of pocket simply because they own land that is in the way of development.

[38] With respect to *Costs Order 2016-001*, referenced by VCI, the Percys argued that the order is not relevant to their costs submissions because that AER decision denied the costs of an expert report that was commissioned for a dual purpose, and the expert witness in that case did not appear at the hearing. That order did, however, award costs for the preparation of the statement of concern (SOC) and for submissions related to standing prepared before a hearing notice was issued.

[39] The Percys said that they were perplexed by VCI's submissions regarding the proposal to settle because the proposal was made by VCI on a "without prejudice" basis. The Percys submitted that while VCI interpreted the Percys' refusal of the offer as "bad faith," VCI's email to the Percys specifically stated that a response any later than 48 hours after receiving the offer would be treated as a refusal. Not only did VCI not request a counter offer, it suggested that a counter offer should not be provided. The Percys said that they did not accept VCI's offer because it did not reflect a fair recovery of costs.

[40] The Percys also stated that whereas *Directive 031A* (the predecessor to *Directive 031*) did mention that costs are generally not awarded before a notice of hearing is issued unless there are specific circumstances that would lead to such an award, the current *Directive 031* is silent on when eligible costs can be incurred.

[41] The Percys also said that the current *Directive 031* seems to acknowledge that landowners such as the Percys will have already incurred significant costs to prepare their SOC and to respond to submissions requested by the AER in order to decide whether to hold a hearing. In this case, the AER accepted the submissions in the SOC as meeting the requirements of the statement of intent to participate, which would have had to be completed in any event after it was decided that a hearing would be held. This work was therefore relevant and necessary to the proceeding.

Legal Fees

[42] In her submissions on behalf of the Percys, Ms. Bishop stated that for all time entries prior to July 2017,[1] her time was billed at $320/hr, which is permitted under the rate in the scale of costs for lawyers having up to 12 years of experience. She also stated that in July 2017 she had been practising in the relevant area of law for over 12 years, having been called to the bar on January 24, 2006. After July 2017, Ms. Bishop had 12 years of experience, and this was reflected in the use of the $350/hr rate.

[43] Ms. Bishop stated that the rates claimed by the Percys are reasonable. She also stated that in order to assist the AER, she calculated the difference between the $350/hr rate and the $320/hr rate for the period between July 2017 and January 24, 2018, and the difference would amount to a $1167 reduction in the legal costs awarded, and to $58.35 less in GST.

Appraisal Costs

[44] The Percys stated that Brian Gettel has held his Accredited Appraiser Canadian Institute (AACI) accreditation for 37 years. He has appeared as an expert witness more than 300 times before courts and tribunals in Alberta and British Columbia. Mr. Gettel has been involved in appraising land in Alberta's Industrial Heartland since the 1980s and was retained to assist in buyouts completed by the voluntary purchase plan when it was in existence. No appraiser has more relevant experience than Mr. Gettel. He was retained by the Percys early in the process and used a more junior appraiser to help him complete the Report in order to produce it on a budget that was cost effective for the Percys. The Percys and their counsel also worked together to ensure that Mr. Gettel's time was not wasted and that he attended the hearing just long enough to give his evidence. The invoice that was submitted by Gettel Appraisals for an expert report and his appearance was for $5648.22. Counsel for the Percys stated that there has never been an invoice submitted for an appearance at a proceeding such as this that was more reasonable than Mr. Gettel's. She also noted that Mr. Coley did not claim the maximum tariff allowed for his 11 years of experience.

AER Decision

Legal Fees and Disbursements

[45] The following are the issues in dispute in this costs proceeding that are related to legal fees:

- Claims for legal fees incurred before the notice of hearing was issued
- The rate to be awarded for counsel fees, having regard for the scale of costs in *Directive 031*
- Whether any parts of the legal fees relate to court applications or other proceedings

[1] The submission actually refers to July 2018, but the AER believes that this is in error and that the intended reference is to July 2017.

- Whether to reduce the award on account of the Percys or their counsel contravening the panel's express directions that the panel would not consider, and the Percys were not to file, evidence for the purpose of establishing that *Decision 2005-079: BA Energy Inc., Application to Construct and Operate an Upgrader, Strathcona County, Fort Saskatchewan* required VCI to relocate the Percys.

[46] *Directive 031* states the following:

> All claims for legal fees must be supported by a copy of the lawyer's statement of account, which must include sufficient detail to demonstrate that all items billed were necessary and related to the application or proceeding. The AER considers a lawyer's hourly rate to include all overhead expenses, such as secretarial work.

[47] As identified by VCI, the AER generally does not award costs for legal fees or other work done before a notice of hearing is issued, or otherwise before it is clear the matter is going to hearing. This reflects section 58.1(k) of the *Rules of Practice*, which states that the regulator must consider

> 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;

[48] The logic is that to be eligible for an award, costs must be necessarily and reasonably incurred for the direct purposes of a hearing, and if there is no certainty of a hearing (i.e., no notice of hearing), that test cannot be met.

[49] The Percys' reply submission argues that this is no longer the AER's practice and that in *Costs Order 2016-001*, the AER awarded costs for preparing statements of concern and for submissions related to standing made before a hearing notice was issued. The panel considered that order and noted that it only addresses fees for expert witnesses because the other costs issues in that proceeding were settled or dealt with in a separate order. *Costs Order 2016-001*actually confirms that the AER's practice is to not award costs incurred before a notice of hearing was issued. It states the following:

> [16] The panel has considered the claim made for costs related to Shaske and has also considered the submissions of the parties. The panel notes that, as a general rule, costs that precede a notice of hearing are not awarded. In this case, the costs claimed precede not only the notice but also the applications. In such a case, the party claiming such costs would have to provide a compelling reason why they ought to be awarded. Grassroots, however, has provided no justification for why the panel ought to award costs that were incurred. In addition, since the "Preliminary Analysis" was neither filed as evidence nor addressed during the hearing process, it neither contributed to the hearing nor contributed to a better understanding of the issues before the AER. Therefore, no costs are awarded for the Shaske claim.

[50] Another AER cost principle is that costs to participate in nonbinding alternative dispute resolution (ADR) are not awarded. This part of the directive was addressed in *Costs Order 2016-001*:

> [24] The panel also notes that there is no indication of whether the time claimed for the June–October timeframe is related to Mr. Doll's preparation for the hearing or to ADR, which was ongoing at that time. As outlined in section 6.4 of Directive 031, "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. In all other cases, costs for ADR are to be dealt with in the context of the negotiations themselves and not through the AER's costs recovery process.

Prowse Chowne Legal Fees

[51] The Prowse Chowne legal account has entries beginning on July 26, 2016, and ending on June 19, 2017. In comparison, the Proceeding 356 timeline is as follows:

- The *Oil Sands Conservation Act* application was filed June 16, 2016.
- The notice of application was issued June 28, 2016.
- The Percys' statement of concern was filed July 28, 2016.
- The hearing panel was assigned in April 2017.
- In an email dated August 17, 2017, the hearing panel (through the AER's senior hearing advisor) asked Ms. Bishop for a response to a VCI letter.
- The first notice of hearing was issued on September 26, 2017.

[52] All of the Prowse Chowne charges predate the issuance of the first notice of hearing. The question that arises is whether the panel is prepared in this instance to award costs incurred before the first notice is issued, and if so what persuades the panel that such an award relates to work that was directly and necessarily incurred for the purposes of the hearing?

[53] *Directive 031* puts the onus on the costs applicant to demonstrate that legal fees were necessarily incurred and directly related to the hearing. Most of the Prowse Chowne entries are vague descriptions of the services provided. A number of entries relate to meetings and discussions with VCI, which tends to indicate that the work related to settlement discussions, not to hearing preparation. An entry on April 13, 2017, said, "Email correspondence with client re: AER notice," which the panel believes likely relates to the letter issued by the AER's chief hearing commissioner that said that the AER has decided to hold a hearing of VCI's applications but that ADR is available from the AER's hearing commissioners. Immediately following that are several entries (starting April 19) referencing AER hearing commissioner Barbara McNeil, who was assigned to conduct ADR. The panel concludes that these entries relate to an attempt to engage ADR. Given that, the fees incurred for that work cannot be awarded in a costs order.

[54] Given the lack of detail in the Prowse Chowne account and the dates the fees were incurred, it is difficult to see how any of the legal fees claimed meet the test of "directly and necessarily related to matters contained in the notice of hearing on an application." What appears more likely to the panel is that the Percys engaged Prowse Chowne shortly before the time expired to file a statement of concern in response to the notice of applications. The early time entries relate to getting a retainer agreement signed and getting the statement of concern filed. Many of the subsequent time entries relate to meetings and discussions with VCI representatives, and later with the AER's ADR hearing commissioner. There is no

other detail in these entries, and the most reasonable conclusion is that the legal fees incurred after the statement of concern was filed relate to settlement discussions and to both informal and attempted formal ADR. Nothing in the emails meets the test of directly and necessarily relating to matters in the hearing, and in any case all of these charges predate the first notice of hearing; the last entry in the Prowse Chowne account, dated June 19, 2017, is "review email from Value Creation Inc. and reply." The panel has therefore decided not to award any of the costs claimed by the Percys in relation to the Prowse Chowne account for legal fees and disbursements.

Bishop Law Legal Fees

[55] The first of the Bishop Law legal fees is a time entry on August 30, 2017: "Draft letter to the AER regarding response to VCI letter regarding scope of hearing." The "response" is to an August 17, 2017, email from the AER's senior hearing advisor, Dean Campbell, in which he said, "the hearing panel requests that you provide any response you may have about the contents of the [VCI] letter by August 31, 2017." At that time it was clear to the panel and the parties that the Percys were likely to be participants in a hearing of the VCI applications. The panel therefore considers that the entirety of the legal services provided by Bishop Law may have been directly and necessarily incurred for purposes related to the hearing, despite the possibility that the first notice of hearing may not have been issued by the time some of the services were rendered.

[56] VCI noted that three hours of legal fees are claimed for January 18, 2018, for "research of law, regarding jurisdiction of AER," and again on January 30 more time is claimed to "Review AER jurisdiction, Review REDA/OSCA, Research of law." VCI attributes that as being work done for the permission-to-appeal application that was heard by the Court of Appeal of Alberta on January 31, 2018. While VCI's suggestion is not unreasonable, the Percys also advanced a jurisdiction argument in Proceeding 356, specifically in relation to the AER's authority to order VCI to relocate the Percys or to defer a decision on VCI's applications until relocation has occurred. The panel is not prepared to disqualify part of the costs claimed for the reasons given by VCI, particularly because the entry on January 30 also said, "draft opening statement, argument, final argument," and because all of those parts of the Percys' hearing presentation included an argument on jurisdiction.

[57] The claim for legal fees incurred by Bishop Law is for 93.7 hours of work by Ms. Bishop. The panel has considered VCI's argument that the hours claimed are excessive and unreasonable. In the panel's opinion and experience, the hours claimed are not unreasonable and are in proportion to the amount of work required for a single lawyer to effectively represent the Percys in this proceeding. The panel will therefore consider awarding all of the time claimed for Ms. Bishop in the Bishop Law statement of account.

[58] On the question of the rate to be awarded for Ms. Bishop's services[2] while at Bishop Law, the scale of costs in *Directive 031* states the following:

> **Legal Fees**
>
> Articling students $140/hour
>
> 1–4 years at the bar $240/hour
>
> 5–7 years at the bar $280/hour
>
> 8–12 years at the bar $320/hour
>
> More than 12 years at the bar $350/hour

[59] Ms. Bishop was called to the Alberta bar on January 24, 2006. That means the applicable maximum rate for her under the scale is $320/hour, up to and including January 23, 2018. After that the maximum is $350/hour. In *Costs Order 2014-001: Grizzly Resources Ltd. and Sinopec Daylight Energy Ltd., Applications for Well, Pipeline, and Facility Licences and a Regulatory Appeal of a Pipeline Licence, Pembina Field; Costs Awards*, the panel accepted that Ms. Bishop (then with eight years at the bar) should be awarded fees of $280/hour, which was the top rate in the part of the scale from which she was one year removed. In this case, during the proceeding (i.e., on January 24, 2018, two weeks before the oral hearing started) she moved from one part of the scale to the next; however, in the Bishop Law account she billed entirely at the top rate of the scale she moved into. The panel is aware that Ms. Bishop practises extensively in regulatory matters, and within that area she does so almost exclusively for landowners and other participants. The panel has decided to apply the rate of $320/hour to the entire award of counsel fees for Bishop Law, which is the rate at the top of the part of the scale Ms. Bishop was in when the proceeding started.

[60] The panel considers that the following provisions of section 58.1 of the *Rules of Practice* apply directly to the Percys' participation in Proceeding 356:

> (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;
>
> (o) whether any step or stage in the proceedings was
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution;

[61] The Percys twice directly and deliberately contravened the panel's express ruling on the scope of the proceeding. The first instance was by including information and other material in the Percy's written submission, filed in October 2017, that was outside the scoping directions previously set by the panel. The second instance was by including in the Percys' oral evidence and argument the same information

[2] Having decided that none of the Prowse Chowne legal fees are eligible for a costs award, the panel does not need to consider the rate to be applied to fees claimed for Ms. Chipiuk's services.

and arguments the panel had struck from the Percy's written submission. The panel has no way to know, and does not need to know, whether Ms. Bishop or the Percys themselves made the decision to deliberately contravene the panel's instructions. The fact is that it was done, and it is conduct that cannot be accepted or condoned by the panel.

[62] When a hearing panel issues directions to parties, it expects the parties to abide by them. A party may disagree with the directions; however, that does not mean that it is entitled to disregard them. In this case, the decision to ignore the panel's scoping decision was irresponsible and improper, and it resulted in the Percys' written submission and oral evidence in the hearing unnecessarily lengthening the proceeding and confounding the evidence. As a consequence, the panel has decided to reduce by 20 per cent the amount of legal fees that it would otherwise have awarded.

[63] The panel awards legal fees in relation to Bishop Law's statement of account in the amount of $23 987.20, calculated as 80 per cent of 93.7 hours at $320/hour, plus GST of $1199.36. The panel awards Bishop Law disbursements claimed in the amount of $1719.82, plus GST of $85.99. The panel also awards the $40 meals allowance claimed by Ms. Bishop.

Experts' Fees and Expenses

[64] The panel has considered VCI's comments on the fees charged by Gettel Appraisals Ltd. The panel believes that the work was responsibly allocated between Mr. Coley and Mr. Gettel and that the fees charged are within what the scale of costs permits and are reasonable in the circumstances. The panel is prepared to grant all of the costs claimed for the work of Gettel Appraisals Ltd., except the disbursement claim for 153 km of travel. *Directive 031* permits experts to claim travel costs of $0.0505/km; however, the travel must be for a witness to travel 50 km or more to or from the hearing location in order to participate in the hearing. Only Mr. Gettel participated in the hearing, and there is no indication in Gettel Appraisals Ltd.'s invoice that the travel claim related to Mr. Gettel's attendance. It appears to the panel that the travel more likely related to Mr. Coley's work to prepare the report filed by the Percys. That travel is not eligible for a cost award.

[65] The panel awards the expert fees claimed for Gettel Appraisals Ltd. in the amount of $5220, plus GST of $261. The panel awards the disbursements claimed for title or document searches and for printing and binding in the amount of $82, plus GST of $4.10. The panel also awards the $20 meals allowance claimed by Mr. Gettel.

Participants' Honoraria and Expenses

[64] VCI did not raise an issue with the Percys' claim for attendance honoraria and expenses. For that, the panel awards the amount of $680, calculated as a participant honorarium of $300 and a meals allowance of $40 for each of the Percys.

Order

[66] The AER hereby orders that Value Creation Inc. pay costs in the amount of $31 749.02 and GST in the amount $1550.45, for a total of $33 299.47. This amount must be paid within 30 days of issuance of this order to

Bishop Law
446 Estate Drive
Sherwood Park, Alberta
T8B 1L8

Dated in Calgary, Alberta, on July 31, 2018.

Alberta Energy Regulator

<original signed by>

C. Chiasson
Presiding Hearing Commissioner

<original signed by>

R.C. McManus
Hearing Commissioner

<original signed by>

L.J. Ternes
Hearing Commissioner

Appendix 1 Summary of Costs Claimed and Awarded

	Total fees/ honoraria claimed	Total expenses claimed	Total GST claimed	Total amount claimed	Total fees/ honoraria awarded	Total expenses awarded	Total GST awarded	Total amount awarded
Prowse Chowne LLP	$10 304.00	$147.14	$522.55	$10 973.69	$0.00	$0.00	$0.00	$0.00
Bishop Law	$32 795.00	$1719.82	$1725.74	$36 240.56	$23 987.20	$1759.82	$1285.35	$27 032.37
Gettel Appraisals	$5 220.00	$159.26	$268.96	$5 648.22	$5 220.00	$102.00	$265.10	$5 587.10
George Percy	$300.00	-	-	$300.00	$300.00	$40.00	$0.00	$340.00
Barbara Percy	$300.00	-	-	$300.00	$300.00	$40.00	$0.00	$340.00
Total	$48 919.00	$2026.22	$2517.25	$53 462.47	$29 807.20	$1941.82	$1550.45	$33 299.47