



# Dover Operating Corp.

Application for a Bitumen Recovery Scheme  
Athabasca Oil Sands Area

Costs Awards  
August 5, 2014

## **ALBERTA ENERGY REGULATOR**

Costs Order 2014-005: Dover Operating Corp., Application for a Bitumen Recovery Scheme,  
Athabasca Oil Sands Area

August 5, 2014

Published by

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## **ALBERTA ENERGY REGULATOR**

**Calgary Alberta**

**DOVER OPERATING CORP.**

**Costs Order 2014-005**

**APPLICATION FOR A BITUMEN RECOVERY SCHEME**

**Application No. 1673682**

**ATHABASCA OIL SANDS AREA**

**Costs Application No. 1763928**

## **INTRODUCTION**

### **Background**

[1] Dover Operating Corp. (Dover) applied to the Energy Resources Conservation Board (ERCB/Board) for a bitumen recovery project scheme (the project) under section 10 of the *Oil Sands Conservation Act (OSCA)*. The project will produce bitumen from the upper member of the McMurray Formation. The project would be located about 95 kilometres (km) northwest of Fort McMurray in the Regional Municipality of Wood Buffalo (Wood Buffalo) and the Municipal District of Opportunity within Townships 92–96, Ranges 15–18, West of the Fourth Meridian (W4M). The initial development area includes Sections 1, 6, and 12 of Township 96-16W4M and Legal Subdivisions (LSDs) 1–4 of Section 13-96-17W4M. The Dover leases extend over 376.8 square kilometres (145.5 square miles; 37 684 hectares [ha]).

[2] The community of Fort McKay, including the Fort McKay First Nation and the Fort McKay Métis Community Association (Fort McKay), submitted an objection to the project.

[3] The ERCB held a public hearing in Fort McMurray, Alberta, beginning on April 23, 2013, and concluding on April 29, 2013, before panel members G. Eynon, P.Geo., FGC; R. C. McManus, M.E.Des.; and T. C. Engen. At the close of the hearing, Fort McKay was required to complete one undertaking. The undertakings were considered complete on May 9, 2013.

[4] On May 30, 2013, Dover changed its name to Brion Energy Corporation (Brion).

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 The *Energy Resources Conservation Act (ERCA)*, which established the ERCB, was repealed and the AER was created.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

[6] On August 6, 2013, the AER issued *Decision 2013 ABAER 014: Dover Operating Corp. Application for a Bitumen Recovery Scheme Athabasca Oil Sands Area*.

### **Costs Claim**

[7] On May 29, 2013, Fort McKay applied for an award of costs incurred in the proceeding in the amount of \$1 311 698.24. On July 4, 2013, Dover submitted comments to Fort McKay's costs claim. On August 2, 2013, Fort McKay submitted a response to Dover's comments. Based

on Brion's comments, Fort McKay submitted an errata reducing one of its counsel's travel time by 50 per cent. This resulted in a \$1512 reduction in claimed legal fees.

[8] The AER reviewed Fort McKay's application and noted that several costs were claimed outside of the proceeding's hearing phase and therefore were not compliant with the scale of costs. On August 14, 2013, the AER provided Fort McKay with the opportunity to resubmit its costs application in compliance with Directive 031: REDA Energy Cost Claims (Directive 031). Fort McKay resubmitted its application on August 30, 2013. The amended costs claimed by Fort McKay totalled \$1 260 345.37. Brion provided a response submission on September 12, 2013.

[9] The AER requested more information from Fort McKay, to which Fort McKay responded on October 4, 2013. On October 9, 2013, Brion replied that it had no further submissions on Fort McKay's costs application.

[10] The AER considers the close of the costs process to be October 10, 2013.

[11] On February 25, 2014, Fort McKay notified the AER that it was withdrawing its objection to the Dover project because it had reached an agreement with Brion regarding the project. The AER wrote to Fort McKay asking whether the withdrawal of the objection also meant that its costs application was withdrawn. Fort McKay responded that the costs application was not being withdrawn.

## **THE AER'S AUTHORITY TO AWARD COSTS**

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

58 (1)(c) "participant" means a person or a group or association of persons who have been permitted to participate in a hearing for which notice of hearing is issued or any other proceeding for which the Regulator has decided to conduct binding dispute resolution, but unless otherwise authorized by the Regulator, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

62(1) A participant may apply to the Regulator for an award of costs incurred in a proceeding by filing a costs claim in accordance with the Directive.

(2) A participant may claim costs only in accordance with the scale of costs.

(3) Unless otherwise directed by the Regulator, a participant shall

(a) file a claim for costs within 30 days after the hearing record is complete or as otherwise directed by the Regulator, and

(b) serve a copy of the claim on the other participants.

(4) After receipt of a claim for costs, the Regulator may direct a participant who filed the claim for costs to file additional information or documents with respect to the costs claimed.

(5) If a participant does not file the information or documents in the form and manner, and when directed to do so by the Regulator under subsection (4), the Regulator may dismiss the claim for costs.

[13] When determining whether to exercise its discretion to award costs, the AER is guided by division 2 of part 5 of the *Rules* and appendix D of *Directive 031*. Sections 58.1 and 64 of the *Rules* state the following:

- 58.1 The Regulator shall consider one or more of the following factors when making a decision in respect of an application by a participant for an advance of funds request, an interim award of costs or a final award of costs:
- (a) whether there is a compelling reason why the participant should not bear its own costs;
  - (b) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
  - (c) in the case of an advance of funds, whether the submission of the participant will contribute to the binding dispute resolution meeting or hearing;
  - (d) in the case of interim costs, whether the participant,
    - (i) has a clear proposal for the interim costs, and
    - (ii) has demonstrated a need for the interim costs;
  - (e) whether the participant has made an adequate attempt to use other funding sources;
  - (f) whether the participant has attempted to consolidate common issues or resources with other parties;
  - (g) in the case of final costs, whether an advance of funds or interim costs were awarded;
  - (h) whether the application for an advance of funds of for interim or final costs was filed with the appropriate information;
  - (i) whether the participant required financial resources to make an adequate submission;
  - (j) whether the submission of the participant made a substantial contribution to the binding resolution meeting, hearing or regulatory appeal;
  - (k) whether the costs were reasonable and directly and necessarily related to matters contained in the notice of hearing on an application or regulatory appeal and the preparation and presentation of the participant's submission;
  - (l) whether the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Regulator;
  - (m) the conduct of any participant that tended to shorten or to unnecessarily lengthen the proceeding;
  - (n) a participant's denial of or refusal to admit anything that should have been admitted;
  - (o) whether any step or stage in the proceedings was
    - (i) improper, vexatious or unnecessary, or
    - (ii) taken through negligence, mistake or excessive caution;
  - (p) whether the participant refused to attend a dispute resolution meeting when required by the Regulator to do so;

- (q) the participant's efforts, if any, to resolve issues associated with the proceeding directly with the applicant through a dispute resolution meeting or otherwise;
- (r) any other factor that the Regulator considers appropriate.

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

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

[15] The panel recognizes that Fort McKay made its claim and submissions in this costs proceeding relying on the legal authorities in force at the time, which was before *REDA* came into effect and the *ERCA* was repealed. The panel also notes that the legislation repealing the *ERCA* and enacting *REDA* did not provide for "grandfathering" or any other graduated transition of the AER's cost authority and rules. At the time the AER made the costs award decisions in this energy costs order, the only legal authority for doing so was under the *REDA* cost regime. The difference between the authority of the panel under the *ERCA* and under *REDA* is of note in this costs proceeding in two ways. First, under section 28 of the *ERCA*, the AER had authority to grant costs only to local interveners as defined in the *ERCA*. The fact that the concept of "local intervener" does not exist in *REDA* does not change Fort McKay's entitlement to costs, whether considered under the *ERCA* or under *REDA*.

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

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

[18] The panel wishes to note two other factors that it considered when it assessed the claims in this costs proceeding. In the decision *Kelly v. Alberta (Energy Resources Conservation Board)*,<sup>1</sup> the Court of Appeal of Alberta stated that AER hearings are not adversarial in nature

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<sup>1</sup> 2012 ABCA 19, at paragraph 31.

and therefore costs awards should not be based on the extent to which a participant's intervention succeeded in persuading the hearing panel's decision:

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

[19] Although the court said this in relation to the local intervener cost regime under the *ERCA*, it was that regime that was in force at the time of the hearing and when Fort McKay would have been making decisions about incurring or forgoing costs related to their participation in the hearing. With reference to section 58.1(a) of the *Rules*, the panel has decided that these circumstances are a compelling reason why Fort McKay should not bear its own costs.

[20] The panel notes that Brion did not challenge some of the items and amounts claimed by Fort McKay. If an item and the amount claimed for it meets the AER's requirements for an award, the panel has generally awarded the costs claimed (as reflected in the tables of costs awards attached to this decision) even though the item may not be specifically addressed in the "Views of the Panel" parts of this decision. One can consider that the panel found these amounts to be reasonable and directly and necessarily related to the proceeding.

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

## COSTS CLAIM OF FORT MCKAY

[22] Klimek Buss Bishop Law Group (Klimek Buss Bishop) filed a costs claim on behalf of Fort McKay on May 29, 2013. Fort McKay claimed legal fees of \$347 367.00, expert fees of \$704 425.00, honoraria of \$39 640.00, disbursements of \$158 371.09, and GST of \$61 895.15, for a total claim of \$1 311 698.24.

[23] On August 14, 2013, the AER wrote to Fort McKay's counsel noting that the costs application did not comply with the requirements of *Directive 031* because several costs were claimed outside of the proceeding's hearing phase. Similarly, the names of three community members, who had requested honorariums and food per diems, had not been provided in the application. The AER provided Fort McKay with the opportunity to resubmit the costs application in compliance with *Directive 031*.

[24] On August 30, 2013, Klimek Buss Bishop submitted an amendment to Fort McKay's costs claim. Fort McKay's counsel submitted that the amended costs claim excluded disbursements, such as travel, accommodations, and meals incurred by legal counsel and experts before the hearing. It also included the full names of the community members for which Fort McKay was claiming an honorarium. Fort McKay's revised costs claim was \$1 091 432.00 for fees and honoraria, \$109 394.74 for disbursements and expenses, and \$59 518.53 for GST, for a total claim of \$1 260 345.27.

[25] On September 24, 2013, the AER requested that Fort McKay further revise its claim and provide only the receipts that were applicable to its amended claim.

[26] On October 4, 2013, Fort McKay provided the information as requested by the AER. On October 10, 2013, Brion confirmed that it would not be providing further comments on Fort McKay's costs claim.

[27] The AER considers the costs claim process to have closed on October 10, 2013.

[28] On February 25, 2014, Fort McKay advised the AER that it was withdrawing its objection to the Dover project because it had reached an agreement with Brion. The AER inquired whether Fort McKay's withdrawal also meant that it was withdrawing its costs application. Fort McKay responded that it was not.

### **Views of Brion (formerly Dover)**

[29] Brion did not dispute that Fort McKay is a "participant" for the purposes of the *Rules*, and thereby entitled to certain participant costs; however, Brion did submit that costs claimed by Fort McKay were grossly excessive, inappropriate, and inconsistent with *Directive 031*.

[30] Brion raised several concerns about the reasonableness of some of Fort McKay's claims. It referred to the recent joint review panel hearings for Shell Canada's Jackpine Mine Expansion Project, where, Brion submitted, the Athabasca Chipewyan First Nation (ACFN) filed one of the largest costs claims ever filed for an ERCB hearing. ACFN's costs claim was based on the length of the Shell hearing (four weeks, including many evening sessions), extensive cross-examination by ACFN's legal counsel (over a period of six days), and the numerous experts and community witnesses that ACFN presented over three full hearing days (including evenings). Brion stated that ACFN's costs claim was less than half of what Fort McKay has claimed.

[31] Brion submitted that large parts of Fort McKay's intervention were focused on policy issues that were unrelated to the application: specifically, the development of the Lower Athabasca Regional Plan (LARP) and the need for expanded protected areas, regionally coordinated access management, and best management practices in Fort McKay's traditional territory, which Fort McKay's experts explicitly stated were unrelated to any project-specific mitigation Brion had proposed.

[32] Brion explained that the AER has previously held that "reasonable submissions do not include arguments about government policy or legislative changes, which are more properly

brought before the government at the appropriate provincial or federal level.”<sup>2</sup> Since most of Fort McKay's intervention focused on precisely these types of issues, Fort McKay's costs should be significantly reduced.

#### *Legal Fees and Disbursements*

[33] Brion was of the view that the legal fees claimed by Fort McKay were excessive and unreasonable given the nature of its intervention and the length of the hearing (including less than one full day of cross-examination by Fort McKay). The size of Fort McKay's hearing team, six lawyers from three different law firms,<sup>3</sup> was excessive and unnecessary.

[34] Brion identified that one of the lawyers retained by Fort McKay was Gavin Fitch of McLennan Ross LLP, who was retained solely to help with one day of hearing preparation before the hearing began. Brion said that roughly half of Mr. Fitch's time was spent reviewing evidence that had already been filed by Fort McKay. Brion was of the view that since both Ms. Buss and Ms. Lambert (not to mention the rest of their legal team) were already familiar with this evidence, hiring a third party simply to review evidence and conduct one day of hearing preparation was unnecessary and unreasonable. Brion also pointed out that Mr. Fitch claimed legal fees well above the maximum set out in *Directive 031*.

[35] It appeared to Brion that lawyers from both Ms. Buss's firm and Ms. Lambert's firm were responsible for reviewing the same information. Printing and administrative costs were also duplicated by the two firms. Furthermore, Fort McKay's legal team assumed responsibility for aspects of Fort McKay's submission that did not require any legal expertise. Brion submitted that Fort McKay incurred significant expenses for travel before the hearing began, expenses that are not recoverable under *Directive 031*. This included flights, hotels, meals (including meals well in excess of the maximums set out in *Directive 031*), car rentals, taxis, mileage, and parking.

[36] Brion pointed out that it was unreasonable for Ms. Razzaghi to claim both a flight and a Red Arrow bus ride from Edmonton to Fort McMurray on April 21, 2013. Brion also submitted that Ms. Razzaghi, as well as some experts and consultants hired by Fort McKay, claimed full fees for travel time. *Directive 031* is explicit that only half time should be claimed for travel.

#### *Experts' Fees and Expenses*

[37] Brion stated that the total costs claimed by each of Fort McKay's consultants was extremely high. It pointed out that many of the 29 individual consultants and 11 subconsultants retained by Fort McKay either never prepared evidence or prepared reports that were not used in Fort McKay's submission or cross-examination. These consultants included Peter Fortna, Doug Geller, Donald Functional & Applied Ecology Inc., Fiera Biological Consulting, and Derek Whitehouse-Strong. Brion contended that since these consultants and subconsultants made no contribution to the AER's understanding of the issues before it, the costs should not be recoverable.

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<sup>2</sup> Local intervener costs in relation to an application by Total E&P Canada Ltd. for an oil sands bitumen upgrader. ERCB *Energy Cost Order 2010-009: Total E&P Canada Ltd., Application for an Oil Sands Bitumen Upgrader, Strathcona County, Cost Awards*, 15 December 2010, at 22.

<sup>3</sup> The three firms were Klimek Buss Bishop, Witten Law LLP, and McLennan Ross LLP.

[38] Brion further submitted that almost all of Fort McKay's hearing team travelled to Calgary on April 15–16, 2013, for hearing preparation and incurred significant costs for airfare, hotel, meals, etc. Brion explained that Fort McKay claimed that this prehearing conference was cost-effective because none of the witnesses live in Fort McKay, and Calgary is a more central location. However, with the exception of some of the ALCES Group (ALCES) witnesses, all of Fort McKay's hearing team had to travel to Calgary. Brion argued that this was extremely expensive and unnecessary and that Fort McKay could have easily coordinated its intervention through other means, such as conference calls and videoconference (i.e., Skype, as several of the Integral and ALCES witnesses used to communicate), e-mails, and in-person sessions in Fort McMurray during the hearing. As a result, Brion submitted that all prehearing travel costs should be denied in accordance with *Directive 031*.

[39] Brion explained that Fort McKay occupied roughly one full day of the hearing (i.e., one third of the entire evidentiary part of the hearing) presenting summaries of its evidence to the AER. While Fort McKay's costs claim submission suggests that its presentations at the hearing were efficient because they avoided the need to present the full reports Fort McKay was relying on, those reports had already been filed in the proceeding and reviewed by all parties. Brion submitted that there was no need to present these reports again at the hearing through summaries or otherwise and that doing so resulted in considerable inefficiencies and delays at the hearing.

#### *Integral and ALCES*

[40] Brion said that Integral Ecology Group (Integral) and ALCES, who collectively prepared Fort McKay's expert reports on traditional land use, together claimed over 2000 hours of expert fees, totalling over \$400 000. Brion submitted that their costs claimed were excessive and unreasonable given that most of the work done by these witnesses was in support of a broader community-based project concerning cumulative effects on the Fort McKay community, a project that is unrelated to the Dover project.

[41] Brion pointed out that Dr. Brad Stelfox acknowledged in the hearing that the cumulative effects study began before contemplation of the Dover project and that the study did not simulate the Dover project effects specifically. Brion contended that perhaps in recognition of this fact, Fort McKay removed from their costs claim all costs associated with the ALCES cumulative effects study in ALCES's March 18 invoice. However, Brion explained that these costs were not removed from any of the other ALCES invoices or from the Integral invoices (which also make numerous references to the cumulative effects study). Brion submitted that the AER has consistently held that the costs associated with evidence about broad issues that are unrelated to the project being proposed are not eligible for reimbursement. As a result, Brion argued that all costs associated with the ALCES cumulative effects study are not related to the Dover project and should not be recovered from Brion.

[42] Brion also submitted that the cumulative effects study (and each of the expert reports that relied on it) made no contribution to the AER's understanding of the issues before it because it assessed cumulative effects under two different scenarios: a business-as-usual (BAU) scenario and a Fort McKay scenario, neither of which was realistic. Brion pointed out that Fort McKay failed to file the appendices to the ALCES model that were required to understand their underlying assumptions. Therefore, each of the reports that relied on the ALCES cumulative

effects model were of limited value to the AER in assessing the likely effects of the project, and thus the costs of these reports should be reduced considerably.

[43] Brion submitted that even if the Integral and ALCES studies were of value to the AER, the amount of costs that Integral and ALCES have claimed are extremely high and unreasonable. In part, this may be due to an overlap in functions between Integral and ALCES. Many of the Integral time entries are for review or coordination of work prepared by ALCES, as opposed to preparation of any work themselves.

[44] Another cause of the high costs claimed by Integral and ALCES appears to be unreasonable claims of hours billed. For example, Dr. Berryman claimed over 90 hours just to attend the hearing (she was in attendance at the hearing for less than three and a half days). This is roughly 50 per cent more than the hours claimed by Ms. Buss for attendance at the hearing and more than double Ms. Lambert's. Furthermore, Dr. Stelfox claimed 78 hours and Ms. Garibaldi claimed 71 hours to attend the hearing. All of the claims are unreasonable and should be reduced.

#### *Kwusen Research & Media Ltd. (Kwusen)*

[45] Brion submitted that the costs claimed by Kwusen to prepare Fort McKay's video submission are excessive and unreasonable. Kwusen, whose primary role appeared to be the preparation of a short video summary of Fort McKay's intervention, claimed over 1100 hours of expert fees totalling almost \$200 000. Brion argued that these amounts are unreasonable and were not necessary for Fort McKay's intervention.

[46] Brion pointed out that Kwusen claimed costs for 6 individuals and 11 subcontractors (including film production, film crew, music composition, film editing, animation, directing, sound mixing and mastering, subtitles, and graphic design), plus \$55 000 in disbursements, totalling about \$200,000. More than 350 hours were claimed for film editing alone. Brion submitted that these costs were particularly unreasonable given the fact that the video did not present any new evidence to the AER; rather, it summarized the ALCES cumulative effects study and showed interviews with several of the Fort McKay community witnesses, which mirrored the content of those witnesses' "will says" filed in the hearing. Brion stated that summarizing evidence in the video (evidence which had already been filed) was neither necessary nor reasonable for Fort McKay's intervention, and the costs of the video should be denied entirely.

[47] It was not clear to Brion why Towagh Behr's involvement in the preparation of Integral's traditional land use update report was necessary. From Brion's review of Mr. Behr's invoices, it was clear that his primary involvement in Fort McKay's intervention related to the video and not to preparation of any written reports. Similarly, Brion argued that Mr. Behr's attendance at the hearing (for which he claimed 63 hours, which was more than Ms. Buss claimed) was not necessary since the primary expert witness for Fort McKay traditional land use was Ms. Garibaldi. Therefore, Brion submitted that Mr. Behr's costs should be denied in their entirety or at least significantly reduced.

[48] Brion further submitted that Kwusen had claimed prehearing costs for travel to a variety of locations to film and produce their video, costs that are not recoverable under *Directive 031*. Brion also pointed out that Kwusen claimed administrative fees for processing invoices and

entering receipts. Brion submitted that these administrative fees should have been included in the expert fees that were charged.

*Gould Environmental*

[49] Brion noted that Lorne Gould was retained by Fort McKay to critique Brion's assessment of project impacts on wildlife. Brion submitted that Mr. Gould's report did not provide any new assessment of potential impacts of the Dover project, but rather criticized aspects of Brion's assessment. In addition, even though Mr. Gould claimed 268 hours for his work on behalf of Fort McKay, Mr. Gould was unaware of Brion's proposed off-site caribou habitat enhancement program, which was one of Brion's primary mitigation strategies for reducing or avoiding effects on wildlife.

[50] Brion submitted that in ERCB *Energy Cost Order 2010-009: Total E&P Canada Ltd., Application for an Oil Sands Bitumen Upgrader*, the AER outlined its expectations of experts at its hearing:

The Board expects experts at its hearings to have, amongst other things, a firm understanding of the issues, materials, and applicable regulations, at the very least, before they make definitive and alarmist statements at such proceedings. Where experts who do not have these basic and essential understandings and qualifications are put before the Board at hearings, the result is the tendering of evidence that is not of optimal value and assistance to the Board in reaching its decision on a particular application.<sup>4</sup>

[51] Brion suggested that since Mr. Gould's report was largely focused on the effectiveness of Brion's proposed mitigation for wildlife, his ignorance of one of Brion's primary mitigation strategies for wildlife significantly limited the value of his conclusions. In turn, Brion submitted that this should significantly reduce the amount of Mr. Gould's costs that are recovered under *Directive 031*.

*Richard Edgar*

[52] Brion submitted that Richard Edgar was retained by Fort McKay to prepare a report on resource recovery by the Dover project. Brion argues that Mr. Edgar performed no additional studies; rather, he reviewed Brion's evidence and other publicly available data to determine whether there were geological impediments to beginning development of the project from south to north. Despite claiming over 150 hours, at a cost of about \$45 000, Mr. Edgar's eight-page report ignored several key geological considerations for steam-assisted gravity drainage (SAGD) oil sands developments, such as porosity, bitumen saturation, SAGD reservoir quality, clay volume, horizontal and vertical permeability, burial depth to top of reservoir, and presence or absence of depleted gas accumulations. In Brion's view, the report provided no information that would help the AER in considering the Dover project and should be allowed no costs.

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<sup>4</sup> Local intervener costs in relation to an application by Total E&P Canada Ltd. for an oil sands bitumen upgrader. ERCB *Energy Cost Order ECO 2010-009*, 15 December 2010, at 21.

*Sedley Associates Inc.*

[53] Brion explained that John Sedley was retained by Fort McKay to prepare a report on the economic impacts associated with Fort McKay's proposed buffer zone. Mr. Sedley reviewed Brion's evidence on the economic benefits of the Dover project and then reduced those benefits by the percentage of the project's bitumen resource that would be sterilized as a result of Fort McKay's buffer zone. Brion submitted that Mr. Sedley provided no rationale for his simplistic calculations, and he acknowledged that any prediction of province-wide economic benefits into the future is highly uncertain. Brion stated that Mr. Sedley's five-page report provided little to no benefit to the AER in considering the Dover project and that the costs associated with the report should be reduced accordingly. Furthermore, Brion submitted that Mr. Sedley's hearing costs were excessive. For example, Mr. Sedley's hotel costs were double those of Mr. Edgar, and his expert fees increased from \$180/hr. to \$270/hr. during the hearing, without explanation. Brion argued that these excessive costs should not be recoverable.

*Dr. Patricia A. McCormack*

[54] Brion submitted that the expert report prepared by Dr. Patricia McCormack was entirely focused on the scope of Fort McKay's treaty rights and the history of the Fort McKay community. Brion stated that while the detailed report may be interesting in understanding the history of the Fort McKay community, it was irrelevant to the AER's assessment of the Dover project's potential impacts and whether the project was in the public interest. As a result, Brion argued that the costs of this report should be disallowed.

*Lagimodiere Finigan Inc.*

[55] Brion pointed out that Marie Lagimodiere claimed 175 hours, totalling over \$33 000, for preparing her update to the Fort McKay specific assessment study that was originally filed in the AER's Shell Jackpine Mine Expansion hearing. Brion submitted that the study was a report on the cumulative effects on the Fort McKay community and was not at all specific to the Dover project. Furthermore, as Ms. Lagimodiere was not made available at the hearing so that her evidence could be tested, her report could not be given any weight by the AER; therefore it cannot contribute to the regulator's understanding of the issues before it, so the costs for Ms. Lagimodiere should be denied in their entirety.

*Fort McKay's Fees, Honoraria, and Expenses*

[56] Brion submitted that Fort McKay has claimed expert fees for each of the three Sustainability Department witnesses who appeared at the hearing (Alvaro Pinto, Daniel Stuckless and Karla Buffalo) on the basis that these witnesses were experts in consultation. Brion argued these witnesses are not experts for the purposes of *Directive 031* since *Directive 031* allows local interveners to recover the costs of hiring external experts to support their intervention, but the only costs that the intervening parties themselves receive are daily honorariums for participating at the hearing and, in some cases, honorariums for coordinating their intervention. Fort McKay explained that the Sustainability Department is already funded by industry to facilitate reviews of proposed projects and to participate in regulatory reviews. The only additional costs that the Sustainability Department is eligible to claim under *Directive 031* are attendance honorariums (\$100 per half day) for each witness while that witness is giving evidence, being cross-examined,

or directly assisting counsel. Brion pointed out that this is consistent with how the AER has historically treated individuals who testify on behalf of aboriginal groups.<sup>5</sup>

[57] Dr. Pinto, Mr. Stuckless, and Ms. Buffalo each appeared for one and a half days (three half days) to give evidence and to be cross-examined. The other days in which Dr. Pinto, Mr. Stuckless, and Ms. Buffalo attended the hearing were to observe the proceedings. Brion submitted that this does not warrant attendance honorariums. Brion believed the appropriate amount of funding for each of the Sustainability Department witnesses is \$300. Furthermore, meal and hotel costs should also only be available for those witnesses for the days that they participated in the hearing (or that were necessarily related to that participation), not for the days that these witnesses attended the hearing as general observers.

[58] Fort McKay has claimed attendance honorariums for all 11 of its community witnesses. Brion submitted that *Directive 031* provides that attendance honorariums are generally available for a maximum of six witnesses. Brion is of the view that this is an appropriate number in the present circumstances since a variety of “will says” statements were filed in advance of the hearing, no new evidence was presented during the hearing, and only three community witnesses, including Councillor Raymond Powder and Fort McKay Métis president Ron Quintal, were subject to any cross-examination.

[59] Brion also stated that these honorariums should only be available for the days that the witnesses gave evidence or were subject to cross-examination, which was one half day for each witness. Meal and hotel costs should also only be available for those witnesses for the days in which they actually participated in the hearing (or costs that were necessarily related to that participation), not for the days in which these witnesses attended the hearing as general observers. Brion explained that Fort McKay has claimed attendance honorariums for three community members who were never called as witnesses and who participated entirely as observers. These individuals were not eligible for attendance honorariums or for any other costs under *Directive 031*.

[60] Fort McKay claimed several other miscellaneous items that Brion submitted were unnecessary and unreasonable. These included claims for alcohol, flights claimed at fares above basic economy fares (e.g., Air Canada Flex and Latitude), claims for rental of a meeting room and projector at MacDonald Island for two days after the conclusion of the evidentiary part of the hearing, claims for meals in excess of the daily maximum, including large food and beverage costs for the meeting room, and claims for submission materials couriered from Fort McKay’s legal counsel to several of Fort McKay’s consultants from Integral. Brion also submitted that Fort McKay has claimed for administrative services provided by 6799817 Canada Ltd. Brion argued that these tasks should be covered by the legal or expert fees and should not be claimed separately.

[61] In conclusion, Brion submitted that most of the costs claimed by Fort McKay should be denied or significantly reduced because the costs are not reasonable or necessary for Fort McKay’s participation in the hearing and did not contribute to a better understanding of the

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<sup>5</sup> For example, local intervener costs in relation to an application by Suncor Energy Inc. for the Steepbank Extension and Voyageur Upgrader. *EUB Energy Cost Order ECO 2007-001: Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area*, 21 February 2007, at 17.

issues before the regulator. Brion was of the view that an appropriate amount of costs for Fort McKay's intervention was \$300 000.

[62] After filing Fort McKay's amended costs claim, Brion submitted that the amended cost claim reduced Fort McKay's original costs claim by about \$50 000, or about 4 per cent of the original claim. It said that Fort McKay provided no explanation as to which disbursements were reduced or excluded, or how Fort McKay determined which costs to reduce. Therefore, Brion could not provide a detailed response to those amendments. Nevertheless, Fort McKay is still claiming over \$1.2 million, which, given the scope of the hearing, Brion continues to submit is grossly excessive, inappropriate, and inconsistent with *Directive 031*.

[63] In Brion's submission, the amended costs claim did not address the fundamental concerns raised in its earlier correspondence, namely (i) the fact that Fort McKay's participation in the hearing was largely related to policy matters, not specific concerns with the project; (ii) Fort McKay's unnecessarily large hearing team; (iii) Fort McKay's inefficient use of hearing time; (iv) the limited value that Fort McKay's expert reports were to the regulator in considering the project; and (v) the unnecessary expense associated with preparing a professional video summarizing Fort McKay's evidence. Fort McKay is also continuing to claim a variety of costs that are clearly in excess of the *Directive 031* guidelines, such as expert fees for Sustainability Department witnesses and hourly fees for Gavin Fitch in excess of the *Directive 031* limits. As a result, Brion continues to rely on its submissions dated July 4, 2013, which submit that an appropriate amount of costs for Fort McKay's intervention is \$300 000.

### **Views of Fort McKay**

[64] Fort McKay noted that Brion did not dispute that Fort McKay was entitled to participant funding but disagreed about the amount of costs that should be ordered. It was apparent to Fort McKay that Brion may have misunderstood several components of Fort McKay's costs claim.

[65] Fort McKay submitted that the information Brion provided about the Shell Jackpine Mine Expansion hearing and the costs claim filed by ACFN is irrelevant because the AER's decision on Fort McKay's costs claim must be made considering the facts and circumstances of this specific proceeding.

[66] Fort McKay pointed out that a significant difference between the ACFN/Shell hearing and this proceeding was the scope of work undertaken by Fort McKay. Fort McKay put forward solutions to the AER that would enable the AER to consider options and be informed of the conditions necessary for the Dover project to proceed in the public interest. This required not only rebuttal expert and community evidence to Brion's application, but also a new and original study, analysis, and evidence apart from Brion's EIA. Fort McKay explained that the work culminated in several reports that were intended to provide new information and an independent approach with respect to assessing the requirements of the exercise of Fort McKay's constitutional rights with oil sands developments.

[67] Fort McKay submitted that it also commissioned original historical research to enable the AER to understand the nature and scope of Fort McKay's treaty rights and other constitutional rights in relation to Fort McKay's Indian Reserves 174a and 174b. In contrast, ACFN did not commission original research and modelling but focused on the less costly exercise of critiquing Shell's EIA.

[68] With respect to Brion's claim that large parts of Fort McKay's intervention were focused on policy issues unrelated to the Dover project, Fort McKay said that this statement indicates that Dover not only misunderstood Fort McKay's evidence but also much of its own. Any policy-related discussions were raised by Brion and required responding evidence and argument on behalf of Fort McKay. Specifically, Fort McKay pointed out that it was Dover that relied on policy issues to advance its application, and one example is its reliance on the wolf-kill program for caribou recovery.

[69] Fort McKay explained that its evidence with respect to LARP was focused on providing the AER with a practical solution for preventing a loss of Fort McKay's traditional land use, which is a constitutional right, on and around Fort McKay's Moose Lake reserves. The proposal for a compromise was the 20 km setback of Dover's project from the reserves. Fort McKay submits that this requested relief fell within the AER's jurisdiction and required no legislative or government action. Furthermore, it states that a live issue at the hearing was the extent to which LARP and current mitigation practices (as proposed by Brion) would be effective. Fort McKay focused on providing evidence to rebut Brion's premise that the Dover project will have insignificant effects on Fort McKay's treaty and aboriginal rights, cultural heritage, and traditional land use. It disagreed with the assertion that the hearing evidence was largely about policy matters.

#### *Legal Fees and Disbursements*

[70] Fort McKay submitted that the number of lawyers and firms retained for its intervention is irrelevant to the amount of Fort McKay's costs claim; rather, the number of hours billed at the appropriate level of experience is what is relevant to the AER's costs decision. It added that its hearing team was proportional to the complexity of issues relevant to the hearing, including the adverse effects of the Dover project, which borders Fort McKay reserve land and takes up a significant portion of Fort McKay's traditional territory that remains available for the exercise of constitutionally protected rights. The size of the hearing team was also appropriate given that Fort McKay sought to address these adverse effects by providing original expert evidence to support a practical solution rather than by merely critiquing Dover's application.

[71] Fort McKay pointed out that although Brion raised an issue with Mr. Fitch's participation for the purpose of preparing the experts for cross-examination, Brion did not dispute that the task was a necessary part of hearing preparation. Fort McKay submitted that efficiencies were achieved by having 13 witnesses all briefed on the same day by all counsel present at the briefing, including Mr. Fitch. Mr. Fitch's invoice indicates his fees are \$450/hour, and therefore Fort McKay is relying on the regulator's discretion to grant fees greater than the scale of costs for complex cases. Fort McKay submits that Mr. Fitch's legal fees are appropriate given the complexity of the case, which involved 13 expert witnesses and original expert reports that were reasonably expected to be subject to extensive cross-examination.

[72] With respect to Brion's claim that Fort McKay's legal fees are excessive because of the limited hearing time devoted to cross-examination, Fort McKay submits that there is no requirement or principle that legal fees can only arise from cross-examination. In this instance, Fort McKay focused on prehearing preparation of its direct evidence and preparation of reports, materials, and witness statements, including the exchange of information requests with Brion in order to decrease hearing time. Fort McKay's approach was to provide the AER with helpful

information and solutions rather than focus on critiquing Brion's evidence, an approach that Fort McKay submits is a more useful and efficient use of resources.

[73] Fort McKay explained that the work completed at Witten and Klimek Buss Bishop was not duplicated work; rather, it was divided between counsel. Ms. Lambert was responsible for issues arising from the project's impacts on Fort McKay's traditional land use and the reports and the testimony of Dr. McCormack, Ms. Garibaldi, and Mr. Behr. Ms. Buss took responsibility for the remainder of the issues arising from the hearing, including the Moose Lake setback and the cumulative effects evidence. Both of these areas of work were necessary for the issues before the AER and did not materially overlap.

[74] Fort McKay submitted that its work preparing a chronology was necessary legal work because counsel was required to review the documents for relevancy for the issues at the hearing and also for the parts of those records relevant for the hearing submission. Additional document review for relevancy was required to help witnesses prepare their evidence and prepare for cross-examination. One objective of this preparation was to save time at the hearing by ensuring that materials were organized and easily accessible for the witnesses. Fort McKay submitted that all of the hours completed by Fort McKay's lawyers were necessary and that many of the hours were devoted to preparation for the hearing, which in turn reduced the hours of hearing time.

[75] Fort McKay submitted that *Directive 031* gives the AER discretion to award costs beyond the scale of costs in unique circumstances. Because of the location of the intervener and the Dover project, it was necessary for legal counsel to travel to and from Fort McMurray to meet with the clients and prepare their evidence prior to the hearing. This in turn shortened the hearing time, which saved costs. For instance, legal counsel travelled to Fort McKay to prepare the affidavit evidence of community witnesses, which ended up saving hearing time. Brion continuously fails to appreciate that adequate preparation is fundamental to an efficient and effective hearing process.

[76] Fort McKay agreed that Tarlan Razzaghi's travel time should be reduced by 50 per cent and has amended its costs claim by \$1512.

#### *Experts' Fees and Expenses*

[77] Fort McKay submitted that it was efficient in its participation at the hearing. It took one day to present 11-or-so expert witnesses, including the witnesses' cross-examination by Brion and Fort McKay's rebuttal evidence. This efficiency was a result of preparing extensive prefilled report and undertaking prehearing preparation.

[78] The 2000 hours claimed by its experts were divided among 12 experts and over four months, which equates to 40 hours a month per expert. Fort McKay said that this was reasonable given that Fort McKay was not simply putting forward a critique of Dover's application, it was also preparing original research to provide new information for the AER's decision.

[79] Fort McKay submitted that it was reasonable and cost effective to have an expert preparation meeting in Calgary. Travel costs were inevitable because the experts were from across Canada and the United States. Calgary was a more cost-effective location to travel to than Edmonton, Vancouver, Victoria, or Fort McMurray in terms of expert time and flight costs.

[80] According to Fort McKay, all experts contributed to Fort McKay's evidence. Mr. Fortna's and Dr. Whitehouse-Strong's research was incorporated into Dr. McCormack's report, and because of their relative expertise and the necessity of the work, this saved time and costs in expert fees.

[81] Fort McKay submitted that Donald Functional & Applied Technology contributed to Integral's expert reports. Specifically, Donald Functional & Applied Technology prepared a report on the delay of reclamation for in situ projects in the region for Integral to incorporate into its analysis and its resulting reports. Donald Functional & Applied Technology also provided up-to-date information to Integral on the current requirements of best practice and access management for existing projects to enable Integral to determine whether these requirements adequately addressed Fort McKay's interests. This was important foundational work for Integral's analysis in putting forward a solution to the conflicting interests engaged at the hearing.

[82] Fort McKay submitted that Fiera Biological Consulting provided aerial photographs to identify Fort McKay traditional land use sites on the Dover lease for the traditional land use assessment undertaken and to respond to Dover's request for information.

[83] Fort McKay pointed out that it would have been more costly to have these experts present their research at the hearing rather than be spoken to by lead authors. Fort McKay should not be penalized for conducting a thorough intervention while taking steps to eliminate hearing costs by consolidating experts.

[84] Fort McKay explained that any administrative fees claimed are based on hourly rates for secretarial work as permitted by the scale of costs for experts' fees.

#### *Integral and ALCES*

[85] Fort McKay submitted that the witnesses from Integral and ALCES have highly specialized and rare expertise in the areas in which they provided evidence. The ALCES modelling work for exhibits was very time and labour intensive because it was technically difficult.

[86] Fort McKay submitted that the cumulative effects study was necessary because Brion had claimed that the Dover project would not significantly affect Fort McKay's constitutional rights. ALCES's work was fundamental to Fort McKay's intervention because it concluded that the project's impacts were expected to be greater in the long term than the impacts predicted in Brion's EIA. It is irrelevant to this costs claim whether Fort McKay has undertaken cumulative effect studies for other purposes because the Integral and ALCES work done in this proceeding was necessary to address the issues before the AER. Furthermore, Fort McKay has only claimed its costs for the cumulative effects research done in preparation for filing its reports at the hearing. Work done for the hearing but before the notice of hearing was issued was also excluded from the costs claim in accordance with *Directive 031*. Fort McKay submitted that Dover is correct that cumulative effects research for other purposes were removed from the March 18, 2013, invoice intentionally as these were unrelated to the hearing, but it submitted that these were the only cumulative effects studies unrelated to the hearing.

[87] The business-as-usual model did include the LARP conservation areas as ALCES relied on the AER's identification of areas of extractable bitumen in the region, areas that for the most part do not overlap the LARP conservation areas as they are located on the periphery of the oil sands region. Furthermore, when ALCES modelled the Fort McKay scenario using LARP conservation areas that are relevant for Fort McKay's purposes, those areas showed no measurable difference on the preservation of Fort McKay's traditional rights on their own without the 20 km buffer.

[88] Fort McKay said that it was an oversight on ALCES's part to not include the appendices to its report, and there was an offer to correct this, to which both the AER and Dover declined for being unnecessary to the hearing. Fort McKay submitted that while Integral may have been required to review ALCES's work to prepare its own evidence, this was necessary for preparation of the Integral reports and was not duplicated work. Efforts were coordinated to engage all experts' expertise and were necessary in order to prepare reports that were co-authored.

[89] Fort McKay said that because Dr. Berryman and Ms. Garibaldi had to travel from British Columbia and the United States and the timing of their evidence was uncertain, they had to attend the hearing for the entire week of the hearing and presented their evidence later in the week. The time reported also includes their travel time that was from out of the country and out of the province.

*Kwusen Research & Media Ltd. (Kwusen)*

[90] The video prepared by Kwusen was important for Fort McKay's participation—particularly to ensure that its experiences, land, and values were understood and adequately presented. Without the video, the evidence of the history of Fort McKay's treaty rights, including its rights to the reserve and the impacts of development near the reserves would have had to be presented in oral testimony, which would have lengthened the hearing process and again incurred further costs not only for Fort McKay, but also for Brion and the AER.

[91] Furthermore, Fort McKay submitted that the video played a fundamental role in representing the cultural significance of the Moose Lake Reserves for the more than 700 Fort McKay members, who were all represented at the hearing and who were entitled to have a reasonable opportunity to be heard as to the project's effects on their constitutionally protected rights in the reserves. The Moose Lake video also provided efficiencies in representing these members.

[92] Fort McKay clarified that the total of \$200 000 for its Moose Lake refuge video included the cost of the video and all of Mr. Behr's time for co-authoring the traditional land use (TLU) update report and preparing for the hearing to present evidence. Mr. Behr was vital to the production of the video largely because he has over 12 years of experience conducting TLU research for aboriginal communities and has been working with Fort McKay for the past three years on TLU research.

[93] Kwusen staff had to travel to Fort McKay to prepare the TLU update report and the Moose Lake refuge video prior to the hearing; both involved interviewing community witnesses at the Moose Lake reserves and Fort McKay where the community is located.

[94] With respect to Kwusen's administrative fees, Fort McKay submitted that *Directive 031* entitles experts to recover of the cost of secretarial work at an hourly rate and that therefore these costs are eligible for recovery. Administrative hourly rates to do these tasks are less than the cost of expert time.

*Gould Environmental*

[95] Fort McKay submitted that the reference Brion relies on to claim that Mr. Gould is not aware of Dover's off-site caribou mitigation is taken out of context. Mr. Gould pointed out at the hearing that Dover had not provided any details of the alleged program for caribou habitat enhancement. The program is not knowable because it is a concept only. Fort McKay submitted it was confirmed by Brion's Mr. Bachynski in cross-examination in that it is a vague "intention," not a detailed mitigation plan that an expert like Mr. Gould could review in addition to what he did discuss with respect to Brion's reclamation. Any detail of the program provided was not included in Brion's EIA, but in its response to questions under cross-examination. Therefore, Brion's challenge to Mr. Gould's costs is unfounded.

*Richard Edgar*

[96] Mr. Edgar's report was to demonstrate that most of the oil sands resource on Brion's lease is outside of Fort McKay's proposed 20 km setback and that the depth to pay is equally good in the southern portion as it is in the north. Mr. Edgar did not ignore relevant geological considerations but rather was determining the issue of potentially recoverable bitumen based on Brion's definition of net pay and therefore put less weight on the factors Brion mentions in its submission. Furthermore, Brion and Mr. Edgar used similar calculations in deriving their conclusions about bitumen available in Fort McKay's proposed 20 km setback.

*Sedley Associates Inc.*

[97] The purpose of Mr. Sedley's calculations was to demonstrate the insignificance of the 20 km Fort McKay setback within Alberta's economy, and this rationale was apparent from his report and his evidence at the hearing. Mr. Sedley provided his expert opinion that Brion's promised economic benefits are also uncertain and should be relied on with caution.

[98] Mr. Sedley has over 30 years of experience and therefore both the hourly rates claimed, one to prepare his report and the other to attend the hearing, fall within the scale of costs. It is common for experts to charge a higher hourly rate for attending a hearing than for writing and preparing a report because of the different skills and requirements involved.

[99] Fort McKay submitted that Mr. Sedley's hotel costs were at a lower nightly rate than Mr. Edgar's. If Brion is raising issue with the length of Mr. Sedley's stay, the longer stay was necessary because the timing of when experts would be presenting evidence was uncertain and because Mr. Sedley had to travel from Victoria to Fort McMurray, unlike Mr. Edgar who travelled from Calgary, which allowed for more flexibility in dates for travelling to Fort McMurray.

*Dr. Patricia A. McCormack*

[100] Fort McKay submitted that the details and history of its treaty and aboriginal rights are relevant because it was necessary to provide foundational evidence of Fort McKay's treaty rights and the scope of these rights. Dr. McCormack's evidence helped the AER appreciate the impacts of the Dover project on Fort McKay both legally and practically when considering whether the project was in the public interest. Brion also fails to appreciate that this evidence was a fundamental component of Fort McKay's notice of constitutional question, which was also part of these proceedings, and is therefore eligible for recovery.

*Lagimodiere Finigan Inc.*

[101] Fort McKay submitted that while Ms. Lagimodiere's report was not entered as evidence, parts of her report were incorporated into Mr. Stuckless's evidence. For example, maps that showed the existing and proposed development within Fort McKay's traditional territory are directly from Ms. Lagimodiere's report; therefore, Ms. Lagimodiere's report contributed to the hearing and her costs should be recoverable.

*Fort McKay's Fees, Honoraria, and Expenses*

[102] Fort McKay responded to Brion's claims that Dr. Pinto, Mr. Stuckless, and Ms. Buffalo from the Fort McKay Sustainability Department should not be entitled to expert fees by stating that these individuals attended the hearing in their capacity as experts who work for Fort McKay. They individually are not members of Fort McKay, nor is the Fort McKay Sustainability Department. *Directive 031* states that an expert "may be an expert in a certain field due to practical experience or specialized training." *Directive 031* says nothing about the necessity of a particular type of retainer or of employment arrangements between the intervener and its experts.

[103] Fort McKay submitted that the Sustainability Department employees meet the definition of experts or consultants in *Directive 031*, which says the following: "Those experts may be registered professionals, may carry on a consulting business, or may be expert in a certain field due to practical experience or specialized training." Fort McKay also pointed out that the panel found value in requesting the curriculum vitae of Dr. Pinto.

[104] Fort McKay stated that the AER has applied the principles of *Directive 031* to award expert costs to employees of an intervening group who act as witnesses. Fort McKay pointed to *Energy Cost Order 2012-002: Application for an Oil Sands Mine and Bitumen Processing Facility—Joslyn North Mine Project* in which expert fees were awarded to witnesses employed by the Oil Sands Environmental Coalition.

[105] Fort McKay said that there was no evidence that the Fort McKay Sustainability Department is funded "by industry to facilitate reviews of proposed projects and to participate in regulatory reviews," as Brion has submitted. Fort McKay went on to say that "this type of funding does not extend to attending a hearing, which is the only cost claimed for the Experts in Fort McKay's costs claim. In any event, we assure the AER that this statement is incorrect."

[106] Fort McKay said that it consists of two large groups—Fort McKay First Nation and Fort McKay Métis Association—that were both interveners and are entitled to an honorarium for each

of their 11 community witnesses and for each of their 3 members who supported the intervention. Fort McKay pointed to section 6.1.3 of *Directive 031*, which states the following:

For large participant groups, the regulator generally awards attendance honoraria to no more than six individuals but may consider additional attendance honoraria in exceptional circumstances.

[107] Fort McKay represented over 900 members, including First Nations and Métis people; therefore it is entitled to an intervention involving more than 6 members.

[108] Fort McKay submitted that Brion's claim that the community witnesses' attendance was unnecessary because they filed affidavit evidence prior to the hearing is wrong because Fort McKay must make its witnesses available for cross-examination. Brion never provided Fort McKay with notice that it accepted Fort McKay's witnesses' affidavit evidence, and that the witnesses were not required at the hearing even though the affidavits were filed several weeks before the hearing.

[109] Fort McKay submitted that Brion's claim that attendance honoraria can only be claimed by those who participated and for days in which the intervener participated in the hearing by giving evidence is incorrect. *Directive 031* states that "attendance at a hearing in support of an intervention may include giving evidence, being cross-examined, assisting counsel and consultants and presenting closing arguments."

[110] Fort McKay submitted that none of the members claiming an honorarium were simply general observers. All those who have claimed an honorarium were present to help the community witnesses, some of whom were elderly, and to help with Fort McKay's intervention in other logistical matters.

[111] Fort McKay pointed out that the AER has awarded honoraria to individuals who did not present evidence at the hearing but who coordinated the intervener group (e.g., *Energy Cost Order 2006-006: Applications for Well Licences and Pipelines (Bantry Field)*), played central roles in the intervention (e.g., *ECO 2006-001: Petrofund Corp., Application for a Well Licence, Armisie Field*), sat on witness panels, or attended as general observers (*ECO 2007-001: Suncor Energy Inc., Application for Expansion of an Oil Sands Mine (North Steepbank Mine Extension) and a Bitumen Upgrading Facility (Voyageur Upgrader) in the Fort McMurray Area*; and to general observers who endeavoured to support and assist the intervention (*EUB Energy Cost Order 2009-003: Shell Canada Limited, Applications for Well, Pipeline, and Associated Facility Licences, Waterton Field*), as in the case of the three Fort McKay members who helped with its intervention.

[112] Whereas the 11 community interveners were presenting evidence for only half a day in the afternoon, Fort McKay has claimed one full day for each of them as they had to take a full day away from work and home because of uncertainty about the exact timing of their evidence, and they had to travel to Fort McKay, which is an hour away. Fort McKay's scheduled transportation was also only available in the morning and evening.

[113] With respect to the claim by 6799817 Canada Ltd., Fort McKay explained that Jody Desmond provided software expertise for Fort McKay's submission, including the expert reports. The scale of costs in *Directive 031* entitles Fort McKay to disbursements for submission

preparation and for secretarial services for experts at an hourly rate. Therefore, Fort McKay submitted that these costs are eligible for recovery.

[114] Despite incurring costs for meals greater than the per diem rates, Fort McKay said that it claimed the per diem rate with one exception. It explained that it had requested actual costs for the catered lunch during the hearing because this expense was reasonable and necessary given the short breaks and the distance between the location of the hearing and restaurants in Fort McMurray. Furthermore, Fort McKay pointed out that it only claimed meals for its witnesses while they were in attendance at the hearing. Fort McKay does not request reimbursement for any alcohol expenses.

[115] With respect to claiming air fare above basic economy fares (i.e., Air Canada Flex and Latitude), Fort McKay said that while these costs are more expensive up front, they are more cost-effective than cancelling tickets and purchasing new tickers when requiring scheduling changes. Also, the chair advised that witnesses had to be available when called. Therefore, flexibility was required to account for changes in the pace of the hearing.

[116] In support of its claim for the meeting room and projector for days scheduled after the evidentiary part of the hearing, Fort McKay said that it was necessary for legal counsel to meet with clients before and after Brion's final argument in order to prepare for its final argument and respond to Brion's.

[117] Fort McKay submitted that its experts required paper copies of submission materials and that couriering hard copies was equally or more cost-effective than the time and disbursements of printing the necessary materials by the experts.

[118] Fort McKay submitted that due to unforeseen circumstances, Ms. Razzaghi missed her flight at the last minute, so she could not have cancelled her flight. A Red Arrow bus trip was the cheapest alternative to rescheduling a flight.

[119] After the AER's correspondence of August 14, 2013, in which the AER permitted Fort McKay to amend its costs claim because several costs were claimed outside of the proceeding's hearing phase, Fort McKay advised that all personal disbursements incurred by Fort McKay's experts and lawyers before April 21, 2013, were eliminated from the costs claim in compliance with the scale of costs that entitles claims for personal disbursements during the "hearing phase of the proceedings." Fort McKay assumed the hearing phase began the week of the scheduled hearing with a reasonable opportunity for travel to the hearing location. This resulted in changes to the personal expenses claimed for the following:

- Klimek Buss Bishop Law Group
- Witten LLP
- Fort McKay First Nation
- Kwusen Media
- Integral Ecology
- ALCES
- Lagimodiere Finigan
- Patricia McCormack

- John Sedley

## Views of the Regulator

[120] Brion did not take issue with Fort McKay's entitlement to make a costs claim. The panel has determined that Fort McKay is a group or association of persons who have been permitted to participate in a hearing for which notice of hearing was issued as provided in section 58 (1)(c) of the *Rules*, and that therefore it is entitled to a costs award.

[121] The panel notes that Brion's submissions primarily addressed the reasonableness of the time and fees claimed by Fort McKay's counsel and experts. As for Fort McKay's costs claim, Fort McKay addresses the amount of the work for counsel, the need for experts, and the efforts of Fort McKay people individually and as a group.

[122] The AER has carefully considered the substantial submissions filed by Fort McKay and Brion. The panel's decisions on the various costs claimed are explained below. Appendix B provides a summary of the costs claimed and awarded.

### *Reasonableness of Costs Claimed*

[123] The panel has considered Brion's argument that Fort McKay's submission focused on policy matters and therefore those parts of the evidence are not eligible for costs. The panel agrees that large portions of Fort McKay's evidence were related to LARP and to larger policy issues. As the panel noted in *Decision 2013 ABAER 014: Dover Operating Corp., Application for a Bitumen Recovery Scheme, Athabasca Oil Sands Area* at page 17,

the focus of the AER is on project-level effects and acceptability of the Project...the broader cumulative effect issues such as designation of protected area, land use policy and regulation, and access management on Crown lands, are the jurisdiction of ESRD.

[124] The panel understands that when addressing large in situ projects that are long-lived and are potential contributors to regional impacts, it is difficult to draw a precise line between project-specific impacts and general policy or planning matters that do no bear on the panel's assessment of the project. Nonetheless, the panel agrees with Brion that Fort McKay's presentation had an excessive focus on general policy and planning matters and had a paucity of information relating to project level effects. This focus resulted in Fort McKay's evidence being less helpful than would have been the case if the focus had been reversed.

[125] Fort McKay's claim for costs in this matter is the largest ever received by the AER or its predecessor organizations. This fact is particularly noteworthy given that the hearing was only four days in duration. Fort McKay defends the size of its claim on the basis that this matter was technical and complex. The panel cannot accept this justification. Like all matters before the AER, which adjudicates on oil and gas matters in its capacity as a technical expert, this was a technical matter. However, it was not more so than the majority of matters considered by the AER and its technical nature does not justify the inordinate size of Fort McKay's cost claim. This is particularly so given that very little of Fort McKay's intervention related to the technical aspects of the application. In terms of overall complexity, including the constitutional issues raised in advance of the hearing, the panel notes that this matter was no more complex than other projects of similar or larger size. In fact, it is the view of the panel that it was arguably less

complex than other matters before the AER where the claims for costs did not even approach the present claim.<sup>6</sup> The complexity of this matter does not justify the size of the cost claim.

[126] Intervenors are entitled to put as many resources as they choose into their interventions in AER matters, but they are only entitled to recover reasonable costs. What will be reasonable will of course vary with each matter as costs are very fact specific. However, in the circumstances and for the reasons further described below, the panel considers that a claim for costs of over \$1.2 million is not reasonable.

#### *Legal Fees and Disbursements*

[127] Fort McKay was represented by two law firms, Klimek Buss Bishop Law and Witten LLP. Fort McKay also retained the law firm McLennan Ross LLP to help it prepare for the hearing.

#### *Klimek Buss Bishop LLP*

[128] Klimek Buss Bishop Law claimed legal fees in the amount of \$232 299.00, expenses of \$12 180.48, and GST of \$12 232.97, for a total claim for legal services of \$256 703.45.41.

[129] With regard to the claimed legal fees for Klimek Buss Bishop LLP, the panel notes that legal fees were claimed for two counsel, Ms. Buss and Ms. Razzaghi. Ms. Buss claimed 382.90 hours of preparation time, while Ms. Razzaghi claimed 207.25 hours of preparation for a total of 590.15 hours. These hours 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,<sup>7</sup> in which Fort McKay’s counsel cross-examined Brion’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 Fort McKay throughout the proceeding.

[130] Furthermore, the panel notes that the time spent cross-examining the Brion panel was split between Ms. Buss and Ms. Lambert of Witten LLP. Similarly, the direct evidence presented by Fort McKay’s experts and community member panels was split between Ms. Buss and Ms. Lambert. Ms. Buss’s work focused on potential environmental impacts of the Dover project on the surface of the project area and on the 20 km setback requested by Fort McKay. Ms. Lambert’s work focused on the project’s potential impacts on Fort McKay’s traditional land use. The panel agrees with Brion that there would have been duplication between Ms. Buss and Ms. Razzaghi when reviewing information in preparation for the hearing.

[131] The panel notes that Ms. Buss and Ms. Razzaghi have claimed a total of 24.50 hours for their travel to and attendance at the meeting held in Calgary on April 16, 2013, where another

<sup>6</sup> Costs Order 2014-002: Shell Canada Energy, Application to Amend Approval 9756, Jackpine Mine Expansion Project; Energy Cost Order 2012-002: Total E&P Joslyn Ltd. Application for an Oil Sands Mine and Bitumen Processing Facility—Joslyn North Mine Project.

<sup>7</sup> On April 26 the hearing resumed for the day at 9:15 a.m. and was adjourned at 11:30 a.m. On April 29 the hearing resumed at 1:00 p.m. for arguments and ended at 4:55 p.m.

lawyer, Mr. Fitch, conducted mock cross-examination of Fort McKay's witnesses. The panel acknowledges that preparation of witnesses for the hearing is a legitimate cost that may be claimed in some circumstances, and its views on the costs claimed by Mr. Fitch are discussed below. However, the panel is very concerned about duplication of costs among all counsel retained by Fort McKay, particularly where separate counsel is hired to conduct the mock cross-examination. The panel finds that it was reasonable for Ms. Buss to attend this part of the witness preparation as Fort McKay's primary counsel to ensure continuity and consistency in preparation of Fort McKay's case, including during the mock cross-examination. The panel will allow Ms. Buss's claimed fees for the meeting. However, Fort McKay has not justified why the 13 hours Ms. Razzaghi claimed for attendance and travel should be reimbursed in addition to the time claimed by Mr. Fitch and Ms. Buss. The panel therefore disallows this part of Fort McKay's costs claim.

[132] For the reasons stated above, the panel finds that both Ms. Buss's and Ms. Razzaghi's fees for preparation should be reduced by 70 per cent. This means that the total hours allowed for preparation is 173.15, which equals about 21½ full eight-hour days. The panel finds this number of hours to be more reasonable for a hearing of this duration and for the work done by Ms. Buss and Ms. Razzaghi.

[133] Ms. Buss and Ms. Razzaghi claimed fees for 60.35 hours and 59.80 hours, respectively, for their attendance at the hearing. The panel notes that Ms. Lambert of Witten LLP has also claimed fees for her attendance at the hearing.

[134] As outlined in *Energy Cost Decision 2004-04: Polaris Resources Ltd., Applications for a Well Licence, Special Gas Well Spacing, Compulsory Pooling, and Flaring Permit*,

The AER does not generally award costs for the attendance of two counsel at a hearing. It is only in exceptional circumstances, such as where issues and the intervention are complex, will the AER find it necessary for counsels to have been in attendance at the hearing.

[135] Should hearing participants choose to have more than one or two counsel attend a hearing (as the case may be), they are expected to bear their own costs for each additional counsel's attendance and for the disbursements associated with that attendance.

[136] The panel acknowledges the division of work between Ms. Buss and Ms. Lambert as described above. Ms. Buss and Ms. Lambert both participated in the hearing by leading different aspects of Fort McKay's direct evidence, conducting cross-examination, and providing closing argument. However, the panel considers that neither the length nor the character of the issues at the hearing justified having two relatively senior counsel prepare for and attend the hearing. It is the view of the panel that the fees and disbursements claimed by Witten LLP for the actual hearing were not reasonably and necessarily related to the presentation of Fort McKay's evidence and argument. For example, Ms. Buss justified having two lawyers give Fort McKay's closing argument by saying the "bit of variation in voice" would increase the ease of listening to the argument. While that might be the case, the increased fees associated with the "bit of variation" are not reasonable.

[137] The panel has concluded that another issue arises with regard to the fees claimed by Fort McKay for its counsel's closing argument. Fort McKay submitted to the AER a notice of questions of constitutional law (NQCL) prior to the hearing. On April 19, 2013, the AER issued

its preliminary decision that it did not have the authority to determine the constitutional questions and they were dismissed from the proceeding. In the face of this ruling from the panel, Fort McKay raised and discussed at some length those constitutional questions in its closing argument. Therefore, the panel considers that the time Ms. Buss spent on this part of the closing argument—more than 15 per cent of Fort McKay’s total argument—was not directly and reasonably necessary for Fort McKay’s participation in the hearing. The fees related to this time will be deducted from the legal fees for which Fort McKay is entitled to be reimbursed for Ms. Buss’s claimed fees for preparation of argument and reply. This amounts to a \$1787.63 reduction in fees.

[138] The panel does accept that given the number of witnesses in the hearing, some second counsel fees are warranted to assist lead counsel, though not for the whole of the hearing. Accordingly, the panel would allow 50 per cent of Ms. Razzaghi’s attendance fees, or \$7 176.00, and 50 per cent of her disbursements, or \$968.36. The fees and disbursements that Ms. Lambert claimed for her attendance at the hearing are denied. The panel’s views on Ms. Lambert’s claim are discussed in further detail below.

[139] The panel notes that Klimek Buss Bishop Law claimed costs for work conducted by 6799817 Canada Ltd in the amount of \$1858.78. Fort McKay submitted that 6799817 Canada Ltd. provided software expertise for its submission, including the expert reports. 6799817 Canada Ltd. claimed hourly costs of \$75. Fort McKay submitted that *Directive 031* entitles it to disbursements for submission preparation and secretarial services for experts at an hourly rate.

[140] The panel notes that 6799817 Canada Ltd. provided the services to Klimek Buss Bishop Law and not to any experts directly. Reviewing its invoice showed that 6799817 Canada Ltd. provided the following services: preparing the hearing template and CD labels and sleeve artwork, purchasing office supplies for hearing documentation, arranging for presentation materials and courier pick up, downloading documents from Dropbox to put into document structure, finalizing all documents setting up jump drive structure, testing links, copying jump-drive contents, arranging envelopes and labels, and waiting for courier.

[141] Although Fort McKay is correct that experts may claim costs for secretarial or support staff under *Directive 031*’s appendix D scale of costs, those costs are for work done to specifically help the expert prepare his or her report or study for the hearing. The expert’s invoice would include the costs charged for this internal secretarial or support staff. In the case of 6799817 Canada Ltd., it appears to the panel that the work was done at the request of Klimek Buss Bishop to organize Fort McKay’s submission into an electronic format for filing, and that it was not done internally by the expert’s secretary or support staff.

[142] Appendix D scale of costs in *Directive 031* states the following:

Legal fees are deemed to include and cover all overhead charges implicit in the normal operation of a law firm. While the Regulator will not consider fees for secretarial work, in certain situations, it may also be appropriate for a paralegal to work on the application or intervention. The regulator will consider such claims for paralegal fees only if it can be demonstrated that the work performed required the expertise of a paralegal and could not have been performed by a legal assistant.

[143] The panel is of the view that the work conducted by 6799817 Canada Ltd. for Klimek Buss Bishop is of an administrative nature and can be categorized as overhead charges that

would be included and covered in the normal operation of the law firm. As a result, the panel disallows the hourly costs claimed by 6799817 Canada Ltd. It will allow the expenses claimed by 6799817 Canada Ltd., such as postage, courier, hearing supplies, and a thumb drive.

[144] The panel awards the remainder of the disbursements claimed by Klimek Buss Bishop Law.

*Witten LLP*

[145] Witten LLP has claimed costs of \$126 860.79, which includes \$113 628.00 in legal fees for the work of three lawyers, \$7191.00 in disbursements and expenses, and GST of \$6040.99. Ms. Lambert claimed 246.30 hours of preparation time, while Ms. Justine Mageau and Ms. Annmarie Clark claimed 71.20 hours and 2 hours, respectively. Witten LLP claimed a total of 319.50 hours for preparation. This equates to about 40 eight-hour days of preparation for the hearing.

[146] As noted above, Fort McKay prepared and filed an NQCL prior to the hearing. After receiving submissions from Brion, Alberta, and Fort McKay on the AER's jurisdiction to decide these questions, the hearing panel determined that it did not have jurisdiction over those questions. It was apparent that Ms. Lambert had primary responsibility for this part of Fort McKay's involvement in the proceeding. The panel is of the view that Ms. Lambert is entitled to fees associated with preparation of the NQCL, for the time spent addressing the issue of the AER's jurisdiction to consider the questions raised in the NQCL, and for preparing to address those issues at the hearing until the AER issued its decision on April 19, 2013, saying that it did not have the authority to consider the constitutional questions. Any fees and disbursements claimed on behalf of Ms. Lambert after that date were not reasonably necessary for Fort McKay's participation in the hearing, including, as noted in paragraph 130 above, any fees and disbursements Ms. Lambert incurred for attending the hearing. Furthermore, the fees claimed before that date to address those issues and evidence appear to be excessive, particularly given that another senior lawyer, Ms. Buss, and a junior lawyer, Ms. Razzaghi, were working on the file. For these reasons, Ms. Lambert's fees before April 19, 2013, will be reduced by 50 per cent and entirely disallowed after that date. The disbursements claimed on behalf of Ms. Lambert after April 19, 2013, are entirely disallowed.

[147] For the reasons outlined above, any fees claimed by Ms. Lambert's associates, Ms. Mageau and Ms. Clark, and incurred before the April 19, 2013, decision will be reduced by 50 per cent and entirely disallowed after that date.

[148] The panel notes that Ms. Lambert also attended Mr. Fitch's mock cross-examination in Calgary on April 16, 2013. The panel considers this to be duplicative of the work done by Mr. Fitch and therefore in addition to the above reduction, the eight hours claimed by Ms. Lambert are disallowed as are the disbursements associated with Ms. Lambert's attendance at this mock proceeding. Thus \$34 000 in fees are recoverable for Ms. Lambert, \$6688 for Ms. Mageau, and \$0 for Ms. Clarke.

[149] Fort McKay claimed \$25 for a "File Admin" fee charged by Witten Law LLP. This type of charge falls within the "overhead charges implicit in the normal operation of a law firm" that states are considered to be included in the legal fees awarded, and therefore the panel does not award this \$25 cost.

[150] Thus \$3599.28 of Witten LLP's expenses are awarded for the reasons given above.

*McLennan Ross LLP*

[151] McLennan Ross LLP has claimed costs of \$6895.18, which includes \$6525.00 in legal fees for Mr. Fitch, expenses of 41.84, and GST of \$328.34. Fort McKay submitted that Mr. Fitch was retained to help the expert witness panel prepare for the hearing to ensure that its evidence "was presented in a manner that was responsible, effective and efficient." Mr. Fitch conducted a mock cross-examination of several of Fort McKay's witnesses in preparation for the hearing.

[152] The panel notes that of the 14.5 hours of work claimed by Mr. Fitch, 7.5 hours were spent reviewing the submissions of Fort McKay and the relevant expert reports in preparation for the mock cross-examination. The panel considers these hours to be duplicative of work done by Fort McKay's other lawyers, who helped prepare the submissions and reviewed the expert reports. As a result, the panel disallows the 7.5 hours claimed.

[153] The remaining seven hours claimed are for Mr. Fitch's preparation and attendance at the April 16, 2013, mock cross-examination of Fort McKay's witnesses. The panel notes that Mr. Fitch has claimed an hourly rate of \$450. This rate is in excess of the scale of costs, which provides an hourly maximum rate of \$350 for a lawyer with more than 12 years of experience. Fort McKay has submitted that Mr. Fitch has considerable expertise attending hearings before the AER on behalf of proponents and that "his experience supports his hourly rate given the complex and unique issues before the AER." The panel is not satisfied that Mr. Fitch or any lawyer should receive more than the \$350 an hour as provided in the scale of costs in these circumstances. That rate reflects a decision of the AER as to what the maximum recoverable hourly rates should be, and the panel sees no basis for varying that number. Furthermore, the scale of costs does not distinguish between a lawyer who frequently appears before the AER and one that does not. Fort McKay is awarded the seven hours claimed by McLennan Ross LLP as well as Mr. Fitch's expenses.

Table 1. Summary of Legal Fees and Disbursements Awarded

	<b>Legal fees claimed</b>	<b>Legal fees awarded</b>	<b>Reduction</b>	<b>Disbursements claimed</b>	<b>Disbursements awarded</b>	<b>Reduction</b>
Karin Buss	\$167 055.00	\$71 456.88	\$95 598.12	\$10 243.76	\$9 437.01	\$806.75
Tarlan Razzaghi	\$66 684.00	\$22 314.00	\$44 370.00	\$1 936.72	\$968.36	\$968.36
Keltie Lambert	\$98 656.00	\$34 000.00	\$64 656.00	\$7 191.81	\$3 599.28	\$3592.53
Justine Mageau	\$14 592.00	\$6 688.00	\$7 904.00	\$0.00	\$0.00	\$0.00
Annemarie Clarke	\$380.00	\$0.00	\$380.00	\$0.00	\$0.00	\$0.00
Gavin Fitch	\$6 525.00	\$2 450.00	\$4 075.00	\$41.84	\$41.84	\$0.00
<b>Total Reductions</b>	<b>\$353 892.00</b>	<b>\$136 908.88</b>	<b>\$216 983.12</b>	<b>\$19 414.13</b>	<b>\$14 046.49</b>	<b>\$5367.64</b>

*Experts' Fees and Expenses*

[154] Directive 031 allows participants to recover the costs of hiring external experts to support a party's intervention.

*Integral Ecology (Integral)*

[155] Integral presented scientific evidence on the project's potential effects on Fort McKay and coordinated the evidence of the ALCES group. Integral has claimed professional fees totalling \$158 673 for the work done by Dr. Shanti Berryman, Ann Garibaldi, Justin Straker, Natalie Melschenko, Ryan Hilberts, Trudi Smith, and Sarah MacGrover of Cloverpoint. Dr. Berryman and Ann Garibaldi attended the hearing, where they presented evidence and were available for cross-examination.

[156] Integral claimed 987.60 hours for preparation. Specifically, Dr. Berryman claimed a total of 320.60 hours of preparation time and 92.80 hours for attendance. Ms. Garibaldi claimed 413.70 preparation hours and 71.10 hours for attendance. Integral prepared a traditional use update report with Kwusen. Integral also prepared a technical report of scenario modelling analyses with the ALCES group as well as a report entitled *A Community Approach for Landscape Planning*.

[157] The panel notes that the work of Integral included coordinating and reviewing the work done by ALCES. In the panel's view there was unnecessary duplication associated with the fees claimed by Integral due to Integral reviewing the work of ALCES. The hours Integral spent preparing for the hearing appear to the panel to be quite excessive given the reports filed and testimony presented at the hearing. The panel finds that much of the work done by Integral, as well as by ALCES and Kwusen, was in support of a larger and broader community-based project on the impacts of oil sands development on Fort McKay rather than specifically focusing on the Dover application. Furthermore, the panel finds Integral's contribution to have provided the panel with little value in better understanding the issues before it in this proceeding. Given these findings, the panel finds it appropriate to reduce Integral's professional fees for preparation and hearing attendance by 70 per cent. It therefore awards professional fees of \$47 601.90.

[158] Integral has claimed an administrative fee of \$4491 (\$1723.50 for secretarial work, including bookkeeping and administrative office work, and \$2767.50 for expert technical support to prepare report [charged at \$45/hr. rather than \$75/hr.]). The *Directive 031* scale of costs states that although some claims for administrative support services may be considered, the AER will not recognize an overhead claim that is based on a percentage of the fees or disbursements claimed. The panel restates that costs awards are intended to reimburse some but not all of the costs that are directly and necessarily incurred by a claimant to participate in a hearing. The AER has consistently refused to award administrative fees or similar charges that are general in nature and that are not directly and necessarily incurred to participate in a hearing. The panel has decided not to award the administration fee claimed by Integral.

[159] Integral has claimed accommodation for Integral and ALCES experts in the amount of \$4690.40. Dr. Berryman, Mr. Nishi, and Dr. Stelfox have claimed accommodation for April 26, 2013, although their flight itineraries indicate that they left Fort McMurray on Friday, April 26, 2013. The panel has decided not to award the accommodation costs for this day as it appears the accommodations were not used by these experts. The panel awards \$4050.80 for the accommodation costs for the Integral/ALCES witnesses.

[160] A \$273.62 claim for parking has been included for the Integral witnesses. Supporting documentation only shows amounts totalling \$76.52, therefore \$76.52 is awarded by the panel.

[161] The remainder of the expenses claimed by Integral is awarded.

#### *ALCES*

[162] ALCES presented modelling that estimated future regional effects of oil sands development on Fort McKay's traditional territory. The ALCES model was based on two scenarios: business as usual and a Fort McKay scenario using a variety of wildlife management levers. ALCES claimed \$219 460.48 for the professional fees of Matt Carlson, Dr. Brad Stelfox, John Nishi, Mika Sutherland, and Karen Manuel. Mr. Carlson, Dr. Stelfox, and Mr. Nishi attended the hearing as witnesses.

[163] ALCES claimed 914.40 hours for preparation: Mr. Carlson claimed 92 hours for preparation and 30 hours for attendance at the hearing, Dr. Stelfox claimed 536.75 hours for preparation and 78 hours for attendance, and Mr. Nishi claimed for 240.40 hours for preparation and 55.35 hours for attendance.

[164] The panel notes that Dr. Stelfox claimed 22 hours for his participation in Fort McKay's video produced by Kwusen. As discussed in the Kwusen section below, the panel disallows the professional fees of \$4950 claimed for the hours Dr. Stelfox spent working on the video because it sees this work as duplication of what was already presented by Dr. Stelfox in the ALCES reports and in his presentation to the panel.

[165] Similar to the panel's comments on Integral, the panel is also of the view that much of the work done by ALCES was done in support of a larger and broader community-based project on the impacts of oil sands development on Fort McKay rather than specifically focusing on the Dover project application. As outlined in *Decision 2013 ABAER 014*, the ALCES Fort McKay study area included 84 per cent of the Fort McKay traditional territory, excluded Wood Buffalo National Park, and was 3.62 million hectares (ha) in size. In the decision, the panel found that "the ALCES model, which has been used extensively at the regional scale for comparing various scenarios, was less useful for predicting impacts of a specific development at a local scale." In the panel's view, the modelling done by ALCES was relevant for larger-scale issues such as LARP and not useful for application to smaller-scale projects, such as the Dover project.

[166] Furthermore, the panel notes some flaws in ALCES modelling, including a 50 per cent overestimation of the number of wells that would be required for oil sands development in Fort McKay's traditional territory, creating a predicted cumulative land disturbance much higher than would actually occur. There was also argument about the avoidance buffers ALCES used from various linear disturbances. For example, the ALCES model used the same buffer for major roads and seismic lines in the moose and fisher HSI model. These buffers were not well supported, particularly in terms of adjustments made under various management scenarios. ALCES's modelling used zones ranging from zero to 1000 m for various footprint types and indicators. It was apparent that the ALCES modelling used conservative buffers and assumed that effects would occur throughout these areas. As noted in *Decision 2013 ABAER 014*, the panel did not rely fully on the results of the ALCES modelling in assessing the effects of the Dover project. Therefore, the panel finds it reasonable to reduce ALCES professional fees for preparation and hearing attendance by 70 per cent. It awards professional fees of \$61 218.

[167] The panel has reviewed the disbursements and expenses claimed by ALCES and finds them to be reasonable. The panel awards them in full.

### *Kwusen*

[168] Kwusen produced a 21-minute video entitled “Moose Lake Home and Refuge” for Fort McKay, and the video was presented during the hearing. Kwusen also worked with Integral to prepare a traditional use update report.

[169] Kwusen has claimed professional fees of \$128 523.00, disbursements and expenses of \$36 423.78, and GST of \$8247.34 for the work done by Towagh Behr, Trevor Bennett, Joshua Hazelbower, William Farrant, Nilesh Patel, and Tom Nightingale. Mr. Behr attended the hearing and participated on Fort McKay’s expert witness panel.

[170] The panel finds that although the video was interesting, it did not provide any evidence specific to this hearing that was not already filed or presented. In the video, Dr. Stelfox is seen summarizing the ALCES cumulative effects study. The video also includes a number of interviews with several of the Fort McKay community witnesses. The panel considers the video was of a general nature and appeared to address broader issues to Fort McKay, such as LARP. More specific evidence was provided to the panel through expert reports, witness testimony, “will say” statements, and affidavits filed by community members than was presented in the video.

[171] The panel does not find that the costs of the video are costs that are directly and necessarily incurred by a claimant to participate in the hearing. Fort McKay already presented the information found in the video to the panel in other ways, which the panel found to be more specific and helpful in understanding the project’s impacts on Fort McKay. Therefore the panel finds that costs of making the video were not necessary for Fort McKay to incur in order to participate in the hearing. As a result, all fees and expenses associated with the making, editing, and distribution of the video, including costs claimed by sub-consultants, are disallowed.

[172] On review of the invoices filed by Kwusen, it appears that most fees and expenses claimed are associated with the making, editing, and distribution of the video. However, Kwusen has also claimed professional fees for its work with Integral in preparing the traditional land use update report, as well as for preparing responses to some of Dover’s information requests. Mr. Behr, who is an anthropologist, has also claimed for 62.8 hours for attendance at the hearing.

[173] The panel will allow the costs for the preparation of the traditional use update report and Mr. Behr’s attendance at the hearing. These professional fees amount to \$29 503.50.

### *Expenses*

[174] Kwusen has claimed accommodation of \$852.80 for Towagh Behr for four nights’ accommodation for the hearing. His flight itinerary indicates that he arrived on April 23 and left Fort McMurray on April 26, 2013. The panel has decided not to award the accommodation costs for April 26 as it appears this expert did not use the accommodation. The panel awards \$639.60 for the accommodation costs for Towagh Behr.

[175] Kwusen has claimed \$25 275.00 and \$8 091.24 as miscellaneous for subconsultant fees and various other expenses relating to the production of the video. As noted above, the panel has decided not to award any of these expenses; therefore, these amounts are disallowed.

[176] The remainder of the expenses claimed by Kwusen is awarded in the amount of \$2826.34.

*Gould Environmental*

[177] Gould Environmental has claimed fees of \$72 360 for Mr. Gould's preparation and attendance at the hearing. Mr. Gould prepared a report in which he evaluated Brion's proposed mitigation of the Dover project's impact on wildlife. Brion submitted that the Gould report was only a critique of Brion's assessment and did not provide any new assessment of potential project impacts. The panel disagrees and considers that an expert witness does not need to complete its own assessment in order for his or her evidence to be helpful to a hearing panel.

[178] Brion also submitted that Mr. Gould was unaware of Brion's proposed off-site caribou habitat enhancement program, which was one of its primary mitigation strategies for reducing or avoiding effects on wildlife, and that Mr. Gould did not provide any new assessment of potential project impacts. Brion suggested that Mr. Gould's ignorance of this mitigation strategy significantly limited the value of Mr. Gould's conclusion.

[179] The panel agrees with Brion's submission that Mr. Gould should have considered Brion's proposed off-site caribou habitat enhancement program to reduce or avoid effects on wildlife in his report. This significantly diminished Mr. Gould's contribution to the hearing. It considers that the number of hours claimed for preparation of the Gould report is excessive and that the number of hours Gould Environmental claimed for preparation far outweighs the value of the contribution Mr. Gould provided to the panel.

[180] The panel finds that Mr. Gould's preparation time should be cut by 60 per cent to be more in line with the value that the panel considers Gould Environmental provided to the hearing panel. The panel awards Mr. Gould's claim for attendance in full. The panel awards \$31 536 for Mr. Gould's fees. The panel has reviewed the personal expenses claimed by Gould Environmental and awards them \$1578.08.

*Richard Edgar*

[181] 1144449 Alberta Ltd. claimed total professional fees of \$41 580 for Mr. Edgar's preparation of a report and his attendance at the hearing. Mr. Edgar is a professional geologist and businessman with nearly 40 years of experience in the upstream oil and gas industry in Canada and internationally. Mr. Edgar prepared a report entitled *Reservoir Development of the Dover Lease*, which looked at the geological feasibility of Brion developing the resource from the south part rather than the north part as proposed. Mr. Edgar concluded that there was no geological impediment to the Dover project beginning development in the southern part—specifically, phases 3 through 5 and outside of Fort McKay's proposed 20 km buffer zone. He did acknowledge that the best-quality reservoir was in the northern area of the leases.

[182] Brion submitted that despite claiming over 150 hours, Mr. Edgar's eight-page report ignored several key geological considerations for SAGD oil sands developments, such as porosity, bitumen saturation, SAGD reservoir quality, clay volume, horizontal and vertical permeability, burial depth to top of reservoir, and presence or absence of depleted gas accumulations. In Brion's view, the report provided no information that would help the AER in considering the project and should be allowed no costs.

[183] In *Decision 2013 ABAER-014*, the panel acknowledged that the bitumen reserves in the southern part of the Dover lease, which Mr. Edgar suggested could be developed first, are at much shallower depths and are in conjunction with extensive depleted gas caps. The hearing panel found additional time would be needed to develop the technologies necessary to produce the reserves effectively at lower steam-injection pressures and under such reservoir conditions. The hearing panel agreed that Dover's proposed sequencing of development of the northern part of the lease was the most reasonable.

[184] The panel is of the view that Mr. Edgar's report was more of a cursory evaluation and not a complete evaluation of the geological and reservoir engineering parameters that should have been conducted in order to properly evaluate the project's development potential. Mr. Edgar should have considered the other parameters noted in Brion's submission, such as porosity, permeability, reservoir quality, clay volume, and presence or absence of depleted gas accumulations. This would have allowed for a comprehensive evaluation of the potential development of the southern part of the Dover project as compared with development of the north part.

[185] The panel finds that the number of hours claimed for the preparation of Mr. Edgar's eight-page written report is very excessive given the value of Mr. Edgar's work provided to the hearing. The panel is of the view that Mr. Edgar's preparation time should be reduced by 70 per cent to reflect the actual value Mr. Edgar's work provided to the panel in this hearing. The panel approves Mr. Edgar's fees for attending the hearing.

[186] 1144449 Alberta Ltd. has claimed total expenses of \$1 671.85 for such things as flights, accommodations, taxis, and printing. The panel has reviewed the expenses claimed and approves them in full.

[187] The panel awards \$15 498 for Mr. Edgar's fees and \$1671.85 for expenses.

*Sedley Associates Inc.*

[188] Mr. Sedley is an economist with 35 years of experience assessing economic effects of major capital infrastructure projects, including pipelines, water supply, waste treatment, drainage, solid waste management, roads, and ports.

[189] Mr. Sedley said that he was asked by Fort McKay to assess the economic impacts on the province of Alberta if the Dover project development area did not include the area within Fort McKay's proposed 20 km buffer, and if the project area within that 20 km buffer area were to be developed at the end of the project period (2013–2079).

[190] The panel considers that Mr. Sedley's evidence was relevant and helpful. The panel has reviewed the fees claimed for Mr. Sedley's preparation and attendance at the hearing. Mr. Sedley claims preparation time of 75.50 hours. The panel views the amount of preparation time to be somewhat excessive given that Mr. Sedley produced a 5.5-page report. Accordingly, the panel finds it reasonable to reduce Mr. Sedley's preparation time by 20 per cent to reflect the actual value Mr. Sedley's work provided to the panel. With respect to concerns about Mr. Sedley's professional hourly rate increasing for his attendance at the hearing, the panel notes that it is a common practice among consultants that a higher hourly rate is charged for attendance at a hearing than for other work. The panel notes that the appendix D scale of costs allows for an

hourly rate of \$270 for a consultant or expert with more than 12 years of experience. Mr. Sedley's hourly preparation rate is well below that rate, and his hourly rate for attendance at the hearing does not exceed the scale of costs. The panel awards Mr. Sedley's professional fees claimed for his attendance at the hearing in full.

[191] The panel has reviewed Mr. Sedley's expenses, finds the expenses to be reasonable, and awards them in full.

[192] The total awarded to Mr. Sedley is \$17 811.00 for professional fees and \$2845.88 for expenses.

*Dr. Patricia A. McCormack*

[193] Dr. McCormack claimed professional fees of \$15 450 for preparation and \$1575 for attendance at the hearing. Dr. McCormack also claimed disbursements of \$1847.02. The disbursements included her mileage to Fort McMurray (\$417.00), accommodation for two nights (\$542.82), and \$912.10 for archival research done by Ms. Judith Hudson Beattie.

[194] Dr. McCormack's evidence related to the history of the Fort McKay community, a historical interpretation of Treaty 8, and the scope of Fort McKay's treaty rights. Her evidence was interesting and provided some context for the proceeding as it related to Fort McKay. However, this evidence did not help the panel assess possible effects of the project and determine whether the project was in the public interest. Furthermore, the fact that Fort McKay had treaty rights, and the extent of those rights, were not contested issues in the proceeding. For these reasons, the panel considers that most of Dr. McCormack's evidence was not necessary for Fort McKay's intervention in the proceeding, and the panel awards 30 per cent of the professional fees claimed for Dr. McCormack's attendance at the hearing. With regard to the disbursements claimed for Dr. McCormack, the panel notes that most of these amounts relate to historical searches done by a third-party consultant. This information was not necessary for Fort McKay's intervention, and for this reason the panel awards Fort McKay 30 per cent of the amount claimed for Dr. McCormack's disbursements related to the historical searches.

[195] The total awarded to Dr. McCormack is \$5107.50 for professional fees and \$1208.55 for disbursements and expenses.

*Lagimodiere Finigan Inc.*

[196] Fort McKay claimed professional fees for Lagimodiere Finigan Inc. Ms. Lagimodiere submitted a report entitled *Disturbance and Access Implications for Traditional Use Land Disturbance Update* in the hearing. Fort McKay submitted that it retained Mr. Finigan to help Fort McKay understand and assess emergency planning and risk assessment issues for the Dover application. Ms. Lagimodiere and Mr. Finigan did not appear on Fort McKay's behalf to address their work and be available for cross-examination. As a result, the panel could not rely on testimony from Ms. Lagimodiere and Mr. Finigan in its assessment of the project's impacts on Fort McKay. Fort McKay argues that their work was used by other expert witnesses in doing their work. In these circumstances, the panel cannot conclude that the work of Ms. Lagimodiere and Mr. Finigan was helpful, and so none of the costs and disbursements claimed by Fort McKay for Lagimodiere Finigan Inc. are awarded.

*Pravid Environmental Inc.*

[197] Fort McKay claimed professional fees of \$2850.00 and GST of \$142.50 for the work done by David Spink. Fort McKay filed two short reports by Mr. Spink in response to Brion's rebuttal evidence. Mr. Spink was unable to attend the hearing due to a personal conflict. However, Fort McKay was able to reach an agreement with Brion in which Mr. Spink's attendance was not necessary as long as Brion was able to ask written questions of Mr. Spink and as long as Brion could file a response to Mr. Spink's comments.

[198] The panel notes that Brion did not raise any concerns about Mr. Spink's claimed professional fees. The panel finds the fees reasonable and allows them in full.

*Other Consultant Fees and Expenses*

[199] Fort McMurray claimed professional fees and expenses for Peter Fortna of Willow Springs Strategic Solutions, Doug Geller of Western Water Associates Ltd., Gillian Donald of Donald Functional & Applied Ecology Inc., Fiera Biological Consulting, and Derek Whitehouse-Strong. These consultants did not file any reports and did not attend the hearing. However, Fort McKay submitted that the work of these consultants was used to support the work conducted by other expert witnesses.

[200] The panel restates that costs awards are intended to reimburse some but not all of the costs that a claimant directly and necessarily incurs to participate in a hearing. In these circumstances, the panel cannot conclude that the work of Mr. Fortna, Mr. Geller, Ms. Donald, Fiera Biological Consulting, and Dr. Derek Whitehouse-Strong helped the panel, so none of the fees and disbursements Fort McKay claims for these consultants are awarded.

Table 2. Summary of Expert Fees and Expenses Awarded

	<b>Expert fees claimed</b>	<b>Expert fees awarded</b>	<b>Reduction</b>	<b>Expenses claimed</b>	<b>Expenses awarded</b>	<b>Reduction</b>
Integral	\$158 673.00	\$47 601.90	\$147 792.00	\$13 166.51	\$7 838.61	\$5 327.90
Alces	\$209 010.00	\$61 218.00	\$111 071.10	\$4 602.75	\$4 602.75	\$0.00
Kwusen	\$128 523.00	\$29 503.50	\$99 019.50	\$36 423.78	\$2 826.34	\$33 597.44
Gould Environmental	\$72 360.00	\$31 536.00	\$40 824.00	\$1 578.08	\$1 578.08	\$0.00
Richard Edgar	\$41 580.00	\$15 498.00	\$26 082.00	\$1 671.85	\$1 671.85	\$0.00
Sedley Associates Inc.	\$20 529.00	\$17 811.00	\$2 718.00	\$2 845.88	\$2 845.88	\$0.00
Dr. Patricia McCormack	\$17 025.00	\$6 210.00	\$10 815.00	\$1 847.02	\$1 208.55	\$638.97
Lagimodiere Finigan Inc.	\$30 075.00	\$0.00	\$30 075.00	\$656.25	\$0.00	\$656.25
Pravid Environmental Inc., David Spink	\$2 850.00	\$2 850.00	\$0.00	\$0.00	\$0.00	\$0.00
Willow Springs Strategic Solutions, Peter Fortna	\$5 100.00	\$0.00	\$5 100.00	\$0.00	\$0.00	\$0.00
Western Water Associates Ltd., Doug Geller	\$1 300.00	\$0.00	\$1 300.00	\$0.00	\$0.00	\$0.00
Donald Functional, Gillian Donald	\$8 475.00	\$0.00	\$8 475.00	\$0.00	\$0.00	\$0.00
Dr. Derek Whitehouse-Strong	\$2 400.00	\$0.00	\$2 400.00	\$0.00	\$0.00	\$0.00
<b>Total Reductions</b>	<b>\$697 900.00</b>	<b>\$212 228.40</b>	<b>\$494 493.10</b>	<b>\$62 792.12</b>	<b>\$22 572.06</b>	<b>\$40 874.50</b>

### *Fort McKay Community Witness Panel*

[201] In the afternoon of April 24, Fort McKay presented a community witness panel composed of Elder Flora Grandjambe, Joe Grandjambe, President Ron Quintal, Councillor Raymond Powder, Councillor Gerald Gladue, Mel Grandjambe, Lee Wilson, Jean L'Hommecourt, Melinda Stewart, Elder Celina Harpe, and Dayle Hyde. The community witnesses either filed an affidavit in the proceeding or presented evidence during the hearing. The hearing ended at 5:30 pm that day, and the witness panel was excused. Fort McKay claimed a \$200 attendance honorarium for each witness, except for Dr. Pinto, Mr. Stuckless, and Ms. Buffalo. Fort McKay has claimed professional fees for these participants.

[202] *Directive 031* states that a \$100 attendance honorarium is available for each half day that a witness is participating in a hearing. Honoraria are not paid for other times during the hearing unless the witness is helping the counsel or a similar representative or is presenting argument. In addition to honoraria, witnesses are entitled to personal disbursements that are reasonable and that are directly and necessarily incurred to participate in a hearing. *Directive 031* also states that for large participant groups, the AER generally awards attendance honoraria to no more than six people. However, the AER may consider additional attendance honoraria in exceptional circumstances.

[203] The panel notes that Brion advocated that only six community witnesses should receive attendance honoraria because no new evidence was presented by the witnesses during the hearing and only three community witnesses were subject to any cross-examination. The panel notes that Fort McKay consists of the Fort McKay First Nation and Fort McKay Métis Association and finds that it was reasonable that community members from each of these groups participated in the hearing. Each of the witnesses provided evidence, either written or oral, that helped the panel determine potential impacts of the Dover project on the community of Fort McKay. The witnesses were also available for cross-examination during the hearing. The panel is of the view that each of the 11 community witnesses should receive an attendance honorarium.

[204] The panel does not consider that there is reason in this case to deviate from the practice of awarding witness honoraria for community witnesses, and will award \$200 for each of the Fort McKay witnesses who participated in the hearing plus \$40 per diem for meals. In addition, Fort McKay claimed an attendance honorarium of \$2400 for Leona Grandjambe, Barbara Falchney, and Rosita Boucher. Whereas these individuals attended the hearing, they did not make a presentation or file written evidence; therefore, the panel declines to award this amount.

[205] Fort MacKay has claimed professional fees for Dr. Pinto, Mr. Stuckless, and Ms. Buffalo for a portion of their preparation and attendance at the hearing. Fort McKay submits that due to their capacity with the Fort McKay Sustainability Department and their relevant experience with respect to the evidence provided, they qualify as expert witnesses. Brion asserted that none of these witnesses is an expert for the purpose of *Directive 031* and that therefore the panel should only award attendance honoraria for their participation.

[206] Under the heading, “Costs for Experts and Consultants,” *Directive 031* states the following:

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

be expert in a certain field due to practical experience or specialized training. An expert's assistance with a submission must be related to that person's expertise.

It is important that participants finalize their fee arrangements with their experts and consultants before they agree to use their services. If the participant's lawyer considers that the assistance of an expert or consultant is necessary, the lawyer must consult with the participant before hiring such assistance and explain how the expert or consultant wants to be paid.

Actual costs for services such as typing may qualify for a costs award if properly documented with a copy of the expert's account and sufficient detail to demonstrate that all items billed were necessary and related to the application or proceeding. (Emphasis added)

[207] The AER considered the issue of professional fees recently in *AER Costs Order 2014-002: Shell Canada Energy, Application to Amend Approval 9756, Jackpine Mine Expansion Project (CO 2014-002)*, which involved a joint panel hearing into an application to amend the Shell Jackpine Mine.<sup>8</sup>

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

[209] The difficulty with a hearing participant claiming professional fees for its employees or other personnel is apparent when one considers that an employee is constantly engaged in the entire spectrum of the business of his or her employer and only some of that work may relate to a matter that is set for a hearing. On the other hand, hired experts and consultants appearing before the AER are engaged periodically to provide services for a particular hearing and generally must provide a comprehensive accounting of the services rendered for that hearing. No such accounting is due from an employee to an employer. The AER has therefore, historically, not awarded professional fees for services provided by a participant's own personnel in the normal course of their duties.

[210] The panel in *CO 2014-002* continued on to say that the question of whether an employee's participation should be awarded as professional fees depends on whether the expert work for which the fees are claimed was dedicated to the employer's intervention in the hearing (i.e., whether it meets the "but for" test) or was done as part of the witness's responsibilities to the employer.

[211] At the hearing, Dr. Pinto testified that he is employed as executive director of the Fort McKay Sustainability Department. He also said that the department works on behalf of the Fort McKay First Nation and the Fort McKay Métis Community Association to facilitate engagement with industry, government, and community members to understand and manage the impacts of development and preserve the environmental quality necessary for traditional land use.

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<sup>8</sup> *Decision 2013 ABAER 011: Shell Canada Energy, Jackpine Mine Expansion Project, Application to Amend Approval 9756.*

[212] Dr. Pinto's resume was filed in the hearing. It stated that he has a Ph.D. in environmental sciences and engineering, a master of science degree in environmental sciences, and a bachelor of science degree in mining and metallurgical engineering. He also has a masters degree in business administration. His resume lists the following as his main responsibilities:

- As lead negotiator, representing Fort McKay during impact benefit agreements negotiations with industry
- Representing the community of Fort McKay on engagement and negotiations with the federal and provincial governments on matters related to the environment, consultation, and accommodation of aboriginal and treaty rights
- Developing strategies and advising the chief and council on matters related to environment, community consultation, stakeholder engagement, and technical issues
- Developing and establishing by-laws, policies, procedures, and practices pertaining to the department mandate
- Ensuring accurate, timely, and regular formal scans of the political, social, ecological, and economic external environments that may impact the community's immediate and long-term sustainability

[213] The panel notes that the filing of a witness's resume in a hearing does not necessarily qualify that witness as an expert in terms of how their evidence will be considered by a decision maker, nor does it guarantee that the witness will be entitled to receive costs as an expert under *Directive 031*.

[214] Dr. Pinto served as chair of Fort McKay's witness panels. Ms. Buss clarified that Dr. Pinto was Fort McKay's representative on the expert witness panel and was speaking from the point of view of Fort McKay.<sup>9</sup>

[215] In his "will-say" statement, Mr. Stuckless said that he is the manager of Environmental and Regulatory Affairs with the Fort McKay Sustainability Department. His responsibilities include environmental management, regulatory coordination and administration, and communication, consultation, and relationship building.

[216] In her "will-say" statement, Ms. Buffalo said that she is employed as the manager of Government Relations and Community Engagement with the Fort McKay Sustainability Department. In this capacity, she provides coordination and analytical and technical support in matters related to the development and implementation of industry- and government-related consultation. She is required to work with all matters relating to immediate, intermediate, and long-term sustainability—social, economic, and development strategies included in the consultation and government affairs relations function of the department.

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<sup>9</sup> At transcript page 540, line 21.

[217] Fort McKay's submission included several reports that were addressed by Fort McKay's expert witness panel, and none of those expert reports were authored by or addressed in detail by Dr. Pinto, Mr. Stuckless, or Ms. Buffalo.

[218] The panel acknowledges that some of the work done by Dr. Pinto, Mr. Stuckless, and Ms. Buffalo may have been specific to Fort McKay's intervention in the hearing; however, it is still work that was undertaken in the context of their employment or engagement with the Fort McKay Sustainability Department and not as a discrete and dedicated task.

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

[220] Dr. Pinto gave evidence on April 24, 2013, and appeared as part of the witness panel on April 25. In addition, as the executive director of the Fort McKay Sustainability Department and as chair of Fort McKay's witness panels, the panel accepts that Dr. Pinto helped Fort McKay's counsel during the hearing. The panel awards him an honorarium for the four days of the hearing.

[221] Mr. Stuckless and Ms. Buffalo gave evidence on April 24 and 25, 2013, as part of both of Fort McKay's witness panels. The panel will award an honorarium for those attendances equal to two full days.

#### *Expenses*

[222] *Directive 031* is clear that witnesses are only entitled to claim a \$40 per diem for meals on days that they are actively participating in the hearing.

[223] Fort McKay claimed per diem for legal counsel, experts, community witnesses, and members. It also claimed an additional \$1674 for the difference in the amount paid for lunches for 30 people on April 23, 24, 25, and 26. The total claim for meals is \$5534. *Directive 031* is clear that witnesses are only entitled to claim a \$40 per diem for meals on days in which they are actively participating in the hearing. This results in a per diem of \$40 for each of the 11 community witnesses. Dr. Pinto, Dan Stuckless, and Karla Buffalo participated in the hearing on two days, so the award is \$80 for each.

[224] The lawyers were involved in five days of hearing. Allowing for one additional day for each week, the panel believes it reasonable to award a per diem of \$280 for Ms. Buss and \$200 for Ms. Razzaghi.

[225] With the exception of Ann Garbaldi, Dr. Stelfox, John Nishi, and Matthew Carlson, all the Fort McKay's experts were empanelled on April 24 only. The panel awards \$120 each for them and \$80 for Richard Edgar, Lorne Gould, Dr. McCormack, John Sedley, Towagh Behr, and Shanti Berryman. This represents \$40 for each day the witness was empanelled to give evidence plus one additional day.

[226] The panel makes a total award of \$2480 for meals.

[227] Fort McKay also claimed \$4700 for bus service to transport community members from Fort McKay to the hearing in Fort McMurray. Fort McKay said that it was important for Fort McKay members to attend the hearing to hear the experts and legal counsel presenting on their behalf. Many are elderly, which made organized travel preferable for the community. The invoice indicates that the expense included shuttle runs to the high schools and wait times. *Directive 031* allows for transportation for individuals involved in the hearing but not for observers. The panel has decided to award 50 per cent of the claimed amount for bus services.

[228] Fort McKay claimed \$3635 for rental of a room necessary for experts, clients, community witnesses, and counsel to meet in during hearing breaks to prepare for evidence. Brion pointed out that rental costs for two days, which were after the conclusion of the evidentiary part of the hearing, were included in the rental and that these costs were not necessary to prepare for final argument. Fort McKay replied that it was necessary for legal counsel to meet with clients before and after Dover's final argument in order to prepare for its final argument and respond to Dover's. The panel has decided to award Fort McKay the costs claimed for the room rental for the days of the hearing because the panel sees these costs as reasonable given the number of experts and community witnesses who participated in the hearing. The panel excludes the \$720 for the rental claimed for Sunday, April 28, as the hearing was not in session that day and it appears, based on her airline ticket that Ms. Buss arrived in Fort McMurray the evening of April 28, 2013.

[229] Fort McKay claimed \$775.55 for office expenses and supplies for use by experts and legal counsel during the hearing. No receipts or further justification have been provided for this claim; therefore, the panel declines to award this amount.

[230] Fort McKay has claimed \$1923.84 for meeting room and business facilities on April 16, 2013. Fort McKay said that it was necessary to prepare expert witnesses to present direct evidence and prepare for cross-examination and to coordinate on areas of overlap. The cost included audio-visual equipment, which was required to practice PowerPoint presentations. The panel has decided to award this amount believing it that it was important for the witnesses to be prepared for the hearing.

Table 3. Summary of Expert Fees/Honoraria and Expenses Awarded

	Expert fees/ honoraria claimed	Expert fees/ honoraria awarded	Reduction	Expenses claimed	Expenses awarded	Reduction
Alvaro Pinto	\$12 960.00	\$800.00	\$12 160.00	\$0.00	\$0.00	\$0.00
Dan Stuckless	\$11 040.00	\$400.00	\$10 640.00	\$0.00	\$0.00	\$0.00
Karla Buffalo	\$11 040.00	\$400.00	\$10 640.00	\$0.00	\$0.00	\$0.00
FMFN 11 Community Witnesses	\$2 200.00	\$2200.00	\$0.00	\$0.00	\$0.00	\$0.00
FMFN, 3 Community Members	\$2 400.00	\$0.00	\$2 400.00	\$0.00	\$0.00	\$0.00
FMFN - various expenses				\$24 446.29	\$17 546.74	\$6819.55
<b>Totals</b>	<b>\$39 640.00</b>	<b>\$3800.00</b>	<b>\$35 840.00</b>	<b>\$24 446.29</b>	<b>\$17 546.74</b>	<b>\$6819.55</b>

[231] The panel notes that Brion and Fort McKay were in discussions after *Decision 2013 ABAER 014* was issued, and it appears that Brion was able to resolve Fort McKay's concerns because Fort McKay withdrew its original objection to the Dover project. The panel encourages parties to also discuss, as part of such resolution discussions, any costs applications that have been filed so that they can be resolved without the need for the AER to issue a costs order. The AER and its staff expend significant resources and time reviewing costs applications and submissions filed by parties. The panel notes that under the AER's *Rules of Practice* it can direct parties involved in a costs application to attend an alternative dispute resolution meeting.

## ORDER

[232] The AER hereby orders that Brion Energy Corporation pay costs to Fort McKay in the amount of \$407 102.57 and GST of \$20 165.13 for a total of \$427 267.70. This amount must be paid within 30 days of issuance of this order to Klimek Buss Bishop Law Group as the submitter of the claim at

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

Dated in Calgary, Alberta, on August 5, 2014.

## ALBERTA ENERGY REGULATOR

<original signed by>

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

*< original signed by >*

T. C. Engen.  
Hearing Commissioner

## **Appendix A    Section 64 of the AER Rules of Practice prior to the November 30, 2013, Amendment**

The *AER Rules of Practice* was amended on November 30, 2013, in accordance with the *Alberta Energy Regulator Rules of Practice Amendment Regulation* (AR 203/2013). The excerpt below is from the *Rules of Practice* prior to that amendment.

### **Costs awarded**

- 64(1)** The Regulator may award costs to a participant if the Regulator is of the opinion that
- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
  - (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Regulator.
- (2)** In determining the amount of costs to be awarded to a participant, the Regulator may consider whether the participant did one or more of the following:
- (a) asked questions on cross-examination that were unduly repetitive of questions previously asked by another participant and answered by that participant's witness;
  - (b) made reasonable efforts to ensure that the participant's evidence was not unduly repetitive of evidence presented by another participant;
  - (c) made reasonable efforts to co-operate with other participants to reduce the duplication of evidence and questions or to combine the participant's statement of concern with that of similarly interested participants;
  - (d) presented in oral evidence significant new evidence that was available to the participant at the time the participant filed documentary evidence but was not filed at that time;
  - (e) failed to comply with a direction of the Regulator, including a direction on the filing of evidence;
  - (f) submitted evidence and argument on issues that were not relevant to the proceeding;
  - (g) needed legal or technical assistance to take part in the proceeding;
  - (h) engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs;
  - (i) denied or refused to admit anything that should have been admitted;
  - (j) took any step or stage in the proceeding that was
    - (i) improper, vexatious or unnecessary, or
    - (ii) taken through negligence, mistake or excessive caution;
  - (k) failed to comply with this Part;
  - (l) any other matter the Regulator considers appropriate.

**Dover Operating Corp.**  
**Application for a Bitumen Recovery Scheme**  
**Costs Application No. 1763928**

	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	Reduction
Karin Buss	\$167,055.00	\$10,243.76	\$8,864.90	\$186,163.66	\$71,456.88	\$9,437.01	\$4,044.69	\$84,938.58	\$101,225.08
Tarlan Razzaghi	\$65,244.00	\$1,936.72	\$3,431.03	\$70,611.75	\$22,314.00	\$968.36	\$1,164.12	\$24,446.48	\$46,165.27
Keltie Lambert	\$98,656.00	\$7,191.80	\$5,362.19	\$111,209.99	\$34,000.00	\$3,599.28	\$1,879.96	\$39,479.24	\$71,730.75
Justine Mageau	\$14,592.00	\$0.00	\$729.60	\$15,321.60	\$6,688.00	\$0.00	\$334.40	\$7,022.40	\$8,299.20
Annemarie Clark	\$380.00	\$0.00	\$19.00	\$399.00	\$0.00	\$0.00	\$0.00	\$0.00	\$399.00
Gavin Fitch	\$6,525.00	\$41.84	\$328.34	\$6,895.18	\$2,450.00	\$41.84	\$124.59	\$2,616.43	\$4,278.75
Alvaro Pinto	\$12,960.00	\$0.00	\$648.00	\$13,608.00	\$800.00	\$0.00	\$0.00	\$800.00	\$12,808.00
Dan Stuckless	\$11,040.00	\$0.00	\$552.00	\$11,592.00	\$400.00	\$0.00	\$0.00	\$400.00	\$11,192.00
Karla Buffalo	\$11,040.00	\$0.00	\$552.00	\$11,592.00	\$400.00	\$0.00	\$0.00	\$400.00	\$11,192.00
Fort McKay First Nation (14 Community Witnesses)	\$4,600.00	\$24,446.29	\$987.32	\$30,033.61	\$2,200.00	\$17,546.74	\$877.34	\$20,624.08	\$9,409.53
Integral Ecology	\$158,673.00	\$13,166.51	\$8,522.59	\$180,362.10	\$47,601.90	\$7,838.61	\$2,772.03	\$58,212.54	\$122,149.56
Alces	\$209,010.00	\$4,602.75	\$10,680.61	\$224,293.36	\$61,218.00	\$4,602.75	\$3,291.04	\$69,111.79	\$155,181.57
Kwusen Research & Media Ltd.	\$128,523.00	\$36,405.78	\$8,310.18	\$173,238.96	\$29,503.50	\$2,826.34	\$1,616.49	\$33,946.33	\$139,292.63
Gould Environmental	\$72,360.00	\$1,578.08	\$3,695.44	\$77,633.52	\$31,536.00	\$1,578.08	\$1,655.70	\$34,769.78	\$42,863.74
1144449 Alberta Ltd.	\$41,580.00	\$1,671.85	\$2,161.52	\$45,413.37	\$15,498.00	\$1,671.85	\$858.49	\$18,028.34	\$27,385.03
Sedley Associates Inc.	\$20,529.00	\$2,845.88	\$1,168.59	\$24,543.47	\$17,811.00	\$2,845.88	\$1,032.84	\$21,689.72	\$2,853.75
Dr. Patricia A. McCormack	\$17,025.00	\$1,847.02	\$943.60	\$19,815.62	\$6,210.00	\$1,208.55	\$370.93	\$7,789.48	\$12,026.14
Lagimodiere Finigan Inc.	\$30,075.00	\$656.25	\$1,536.56	\$32,267.81	\$0.00	\$0.00	\$0.00	\$0.00	\$32,267.81
Pravid Environmental Inc.	\$2,850.00	\$0.00	\$142.50	\$2,992.50	\$2,850.00	\$0.00	\$142.50	\$2,992.50	\$0.00
Donald Functional & Applied Ecology Inc.	\$8,475.00	\$56.25	\$426.56	\$8,957.81	\$0.00	\$0.00	\$0.00	\$0.00	\$8,957.81
Dr. Derek Whitehouse-Strong	\$2,400.00	\$0.00	\$120.00	\$2,520.00	\$0.00	\$0.00	\$0.00	\$0.00	\$2,520.00
Western Water Associates Ltd.	\$1,300.00	\$0.00	\$156.00	\$1,456.00	\$0.00	\$0.00	\$0.00	\$0.00	\$1,456.00
Willow Springs Strategic Solutions	\$5,100.00	\$0.00	\$180.00	\$5,280.00	\$0.00	\$0.00	\$0.00	\$0.00	\$5,280.00
	\$1,089,992.00	\$106,690.78	\$59,518.53	\$1,256,201.31	\$352,937.28	\$54,165.29	\$20,165.13	\$427,267.70	\$828,933.61