File No. CA 001-00

L. Kamerman	)	Wednesday, the 1st day
Mining and Lands Commissioner	)	of October, 2003.

THE CONSERVATION AUTHORITIES ACT

IN THE MATTER OF

An appeal to the Minister of Natural Resources under subsection 28(15) of the **Conservation Authorities Act** against the refusal to grant permission for development through the construction of a single family dwelling on Lot 40, Plan M-16 in the Town of Innisfil (Gilmore Avenue).

B E T W E E N:

WESLEY COOPER

Appellant

- and -

LAKE SIMCOE REGION CONSERVATION AUTHORITY

Respondent

ORDER ON COSTS

WHEREAS an Order was issued by this tribunal on the 14th day of February, 2003, wherein Mr. Marvin Geist, Counsel for the Appellant, sought to make submissions as to costs in the event his client's case was successful;

AND WHEREAS the parties were directed to file submissions as to costs within 90 days of the date of the Order **AND FURTHER** a hearing on costs was convened on the 25th day of June, 2003;

AND WHEREAS the tribunal has determined that the Appellant is entitled to a portion of his costs, comprised of legal fees, disbursements and engineering fees;

1. THIS TRIBUNAL ORDERS that it will fix costs (on a partial indemnity basis) in the amount of $44,379.78 to be awarded by the Respondent, Lake Simcoe Region Conservation Authority to the Appellant, Wesley Cooper.

Reasons for this Order on Costs are attached.

DATED this 1st day of October, 2003.

Original signed by L. Kamerman

L. Kamerman
MINING AND LANDS COMMISSIONER

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REASONS

Notwithstanding that counsel for the parties agreed to provide written submissions, which were received, Mr. Geist, counsel for the appellant and Mr. Hill, counsel for the respondent, also sought to make oral submissions. Both were clear that this would not be a duplication of their written submissions.

Submissions during In-Person Motion

Mr. Geist, acting on behalf of Mr. Cooper, asked the tribunal to regard the process by which Mr. Cooper's appeal came to be heard as consisting of a four stage process:

1. Commencing with the application to the Lake Simcoe Region Conservation Authority (the "LSRCA"), having been refused in 2000, and the issuance of the Order to File by the tribunal in February, 2000.

2. Commencing with the first Pre-Hearing Conference through to the winter of 2001.

3. The time leading up to the second Pre-Hearing Conference and a second decision of the Executive of the LSRCA.

4. The actual hearing before the tribunal.

There were five conditions attached to the Order allowing the appeal, which Mr. Geist submitted were not new. In his submission, this matter could have been settled at the first stage, but for the actions of the LSRCA, and instead the appellant was required to complete the fourth stage.

On page 2 of a letter written to the tribunal on April 7, 2000, Mr. Geist set out that the floodplain mapping was not accurate for the Cooper site and that there would be no risk of flooding should any dwelling be permitted, as the building would be adequately flood protected. As early as that date, Mr. Geist raised with the LSRCA, that its position was biased and unreasonable. He urged the LSRCA to undertake a complete review of the mapping within the floodplain.

Mr. Geist submitted that the LSRCA had been put on notice from the first stage that these matters should be looked at and have an impact on the outcome and this had been his consistent approach. During the course of stage 2, Mr. Geist stated that he discussed the Sprague, Hampshire and Allerton properties, all cases where the LSRCA mapping was wrong and where permits had been granted. Throughout, he had suggested to the LSRCA that it settle the matter along the lines of the five points listed and was told that it was "not convinced", as set out in Mr. Hill's letter of July 28, 2000.

Stage 2 saw the preparation of a second hydraulic report, towards the winter of 2001. The LSRCA was requested to respond and again, they did not find it reliable or persuasive, according to their correspondence of February 28, 2001. On March 2, 2001, Mr. Geist contacted the LSRCA with a view to determining the discrepancies allegedly found in the analysis, in an attempt to narrow and scope the issues. Mr. Geist's efforts were made in an attempt to settle the matter and determine what the LSRCA did not like about the second hydraulic analysis. On March 13, 2001, the LSRA set out some of its concerns regarding the analysis, which prompted Cosburn Patterson Mather ("CPM") to write seeking additional information. A response was received on April 25, 2001.

This led to Stage 3, with a proposal for a second Pre-Hearing Conference, and what Mr. Geist characterized as the marked reluctance on the part of the LSRCA to participate. It was pointed out that only two or three lots were affected by the Cooper proposal. Unable to settle the matter, it was sent back to the Executive Committee of the LSRCA for consideration of

the second hydraulic analysis and revised changes to the encroachment lines. This process took a period of six months and culminated with the refusal to grant permission on the revised application coupled with questions surrounding the cost of a hearing. It was the staff response to this question, that the hearing would cost $1,500.00 which Mr. Geist submitted was erroneous and misleading.

Stage 4 involved the hearing itself, which resulted in the appeal being allowed on the same conditions as those initially proposed. Mr. Geist submitted that costs should follow the cause. The LSRCA didn't take his client up on his offer, and until April 25, 2001, it did not recognize that improvements made to the culvert and channel straightening affected the flood plain mapping. Even in its Reasons, the tribunal found that the LSRCA was grasping at straws, but for its unwillingness and intransigence towards considering changes to mapping resulting from improvements. Had it been willing to consider the changes to mapping resulting from the culvert replacements and improvements, this matter could have been settled early on.

Mr. Geist pointed out that there are not many conservation authority appeals where the appellant wins, nor are there many cases which are published, making it difficult to find any one case where the appellant is awarded costs. Factors governing the exercise of discretion by the Courts include the conduct of the parties. Mr. Geist drew the tribunal's attention to the cases submitted in his written submissions, in particular, the **Collingwood** case.

With respect to the accounts submitted, Mr. Geist pointed out that he charged Mr. Cooper $275 per hour. He drew the tribunal's attention to excerpts in his materials filed from M. Orkin**, The Law of Costs, Second Edition** (2002), at pages 2-51 to 2-53.

Mr. Geist submitted that the actions of the LSRCA were vexatious, demonstrated by its unwillingness to consider changes in the flood plain which affected the mapping. The uniqueness of this case is confined to Mr. Cooper and is not a test of law. It is merely unique to this floodplain. No other cases involved the encroachment line running through the length of a property. As such, Mr. Cooper should not be penalized for his situation. Mr. Geist submitted that there was an over reliance on the part of the LSRCA on cumulative effect. There was no such concern in this case, as it would not affect other situations where permission had been refused.

Mr. Hill submitted that the LSRCA did not have the factual basis upon which it could have agreed to move the encroachment lines until, at the earliest, the final hydraulic analysis. Even at that time, it was not convinced. However, it was the tribunal which was swayed by the report. Even so, it was the tribunal's own analysis and calculations which led it to the conclusion that it could safely allow the appeal.

Mr. Hill submitted that the LSRCA had a duty to not grant permission until it was satisfied that a proposal can meet the conditions of the **Conservation Authorities Act**. The basis for that decision was apparent only after the hearing commenced. With respect to the other decisions referred to within the watershed, it is clear that ways were found in which the policies of the LSRCA could be complied with, without adjustment or movement of the encroachment

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lines. The tribunal is well aware that the practices within the watershed indicate that the LSRCA was flexible where conditions warranted, in locations other than those involving the encroachment lines.

Mr. Hill expressed concern regarding argument and allegations of unreasonableness on the part of the LSRCA to confer with experts, stating that the record does not support this position. The letter of March 12, 2001 in which his client indicated a willingness to meet with experts, shows the contrary. With respect to alleged reluctance concerning the second Pre-Hearing Conference, Mr. Hill submitted that the correspondence does not show reluctance, but rather is aimed at eliciting the particulars of an agenda and new proposal, so that time and costs would not be wasted. There was no such second proposal forthcoming until the time of the second Pre-Hearing Conference, so that comments regarding its reluctance were mischaracterized. At the second Pre-Hearing Conference, the proposal was to move the encroachment lines to coincide with lot lines of all of the properties affected. This proposal was not acceptable to the LSRCA, nor was it acceptable to the tribunal after the hearing, as was clear from the Reasons.

Concerning the Executive Meeting and the alleged cost of proceeding to a hearing, Mr. Hill submitted that this is not relevant. However, estimated cost is a factor which a party is entitled to know, although it should not be the deciding factor. Mr. Hill expressed concerns that Mr. Hogenbirk has been besmirched in this manner.

Mr. Hill stated that there is no disagreement between counsel as to the standard to be applied with respect to the exercise of discretion in awarding costs. It is his submission that there was no abuse of process by the LSRCA. Based on the decisions of the Ontario Municipal Board (the "OMB"), to award costs the conduct would have to be clearly unreasonable, frivolous or vexatious. That the parties held a different view is not indicative of unreasonableness. The LSRCA was concerned about moving the encroachment lines without evidence that it was safe to do so. Even though the tribunal disagreed, Mr. Hill submitted that his client's position was not sufficiently unreasonable as to be considered vexatious.

Mr. Hill pointed out that the tribunal stated in its Reasons that this was a test case. It involved a contentious issue determined for the first time, one for which the LSRCA now has guidance for future cases. The tribunal determined that changes within the watershed can go to the benefit of property owners without having to offset changes which may have occurred which would eliminate that benefit. This constitutes a new finding or policy on the issue. Mr. Hill submitted that this is not a case where costs should be awarded. To do so would cast a chill on the exercise of discretion by conservation authorities.

Concerning the actual amount for costs claimed, Mr. Hill pointed out that costs awards serve to indemnify a party. Costs are not intended to provide payment over and above what has been charged to the client. He submitted that, even if costs were to be awarded, they should not be on a substantial indemnity basis and that the costs charged should be reduced accordingly.

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Mr. Hill also brought to the tribunal's attention that there is no breakdown in the expenses claimed for expert witnesses. It would, furthermore, not be appropriate to award all of those costs as two of the reports were not helpful to the tribunal in reaching its decision. He recalled for the tribunal that one hydraulic analysis involved changes to the encroachment line on only one side of the creek and the other involved moving the lines to coincide with lot lines. In conclusion, he submitted that to meet the test for the awarding of costs, the LSRCA would have to be proven willfully blind or totally obstructionist.

Answering the tribunal's comments that there had been no indication of a direction in which to develop its proposals, Mr. Hill stated that there had been no refusal to consider the various proposals put forward. The LSRCA had serious concerns about moving the encroachment lines and adding obstructions which would affect large areas of the floodway. It would have been risky for the LSRCA to recommend spending money in a given direction and it was dealing with experts who could advance proposals which would meet its concerns. The giving of directions or responding to inquiries would be a matter of discretion. It is difficult to set a standard in that area.

Mr. Geist invited the tribunal to examine closely what did occur. His client did not have limitless financial resources. Despite efforts made, it was not until April, 2001, that there was acknowledgement concerning the culverts. There was no answer with respect to the height of the road and Cooper withdrew this line of inquiry.

Written Submissions Regarding Costs

On February 14, 2003, the tribunal released its Order and Reasons for granting the appeal for permission for development to Mr. Cooper. The hearing took place on January 11 and April 8, 2002. Mr. Geist requested that the tribunal entertain his application for costs, in the event that the appeal was successful and the parties were directed to file written submissions and materials in support. The purpose of the costs hearing on June 25, 2003, was to allow Mr. Geist and Mr. Hill, to highlight any material of particular relevance and to answer any concerns or questions that the tribunal might have. The following submissions are taken from the written submissions provided on behalf of the parties, having been edited and changed for purposes of brevity.

On Behalf of Mr. Cooper

Mr. Cooper, in seeking his costs of the appeal, is seeking a lump sum costs award of $81,515.79 from the LSRCA. This sum includes legal fees incurred and disbursements paid, including expert witness fees. Detailed breakdowns of the accounts are included in the materials filed. The sum of $38,025.00 represents the equivalent of the substantial indemnity scale of costs as provided for under Rule 58.05, Tariffs, of the **Rules of Civil Procedure** or, alternatively, $29,575.00, being the equivalent of partial indemnity scale of costs. In addition, Mr. Cooper is seeking the costs of this motion, with a detailed breakdown of the account included.

Jurisdiction

The tribunal found that the challenge to the location of the encroachment line was valid for several reasons. The original figures used in the study commissioned by the LSRCA have proved suspect. The mapping of two-foot contours may have oversimplified the computer analysis. Through improvements to the culverts, their size and number affected projections of flooding, as did the channel straightening. The tribunal granted the request to hear submissions on costs, despite regarding the appeal as a test case for the movement of encroachment lines in an analogous two – zone concept.

Sections 126 and 127 of Part VI of the **Mining Act** provide authority for the tribunal to award costs to any party, in its discretion, in an appropriate case. Costs may be awarded in a lump sum or through assessment by an assessment officer, with the scale being that of the Ontario Superior Court of Justice. These sections form part of the powers that are given to the tribunal in dealing with appeals to the Minister under section 28 of the **Conservation Authority Act**, by virtue of subsection 6(6) of the **Ministry of Natural Resources Act**.

The question of whether or not the tribunal has the jurisdiction to award costs was settled in the decision of **Vanden Brink v. Niagara Peninsula Conservation Authority,** March 10, 1992*,* Order on Motion for Costs, unreported. The case reviewed the decisions of **Credit Mountain Land Co. Ltd. v. Credit Valley Conservation Authority***,* (unreported), December 19, 1978, **Re Drover et al v. Grand River Conservation Authority**, 62 O.R. (2d) 141 and **Yorkville North Development Ltd. v. The Central Lake Ontario Conservation Authority** (unreported), May 25, 1990. The tribunal concluded that it has the authority and discretion to award costs on appeals from conservation authorities.

Factors Governing Discretion

At the oral hearing on costs, Mr. Hill stated that he agreed that the tests set out by the OMB should apply to any decision regarding costs made by the tribunal in respect of conservation authority matters. Mr. Geist relied on the cases of **Canadian Development Management Corporation v. Town of Blue Mountains***,* PL001195, **Re Township of Scugog Zoning Bylaw 23-89 (No. 2)**, 24 O.M.B.R. 240 and **Village Masonry Construction Inc. v. the York West Residents Association***,* PL010719, to review the applicable standard. Included are the concept that, if a public entity acts in a manner which is frivolous, vexatious, clearly unreasonably, in bad faith and not in the public interest, such conduct may attract costs. Furthermore, the reasonable man test would require an examination of the course of conduct to determine its reasonableness.

In **Wallbridge Mining Company Limited v. Inco**, (unreported) File No. MA040-99, the tribunal indicated that it would rely on the principles set out in the **Rules of Civil Procedure**, in determining whether and in what manner to exercise its discretion. While not bound by those Rules, the tribunal found the principles useful.

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Circumstances Justifying Costs Award – Chronology

The appeal commenced on February 23, 2000. Mr. Geist submitted that the conduct of the LSRCA throughout caused delay and bias and showed an unwillingness to co-operate and caused unnecessary and significant expense which necessitated a hearing notwithstanding offers of settlement. The filings conducted by the LSRCA pursuant to the Order to File documentation were late on both occasions, requiring written intervention.

At the first Pre-Hearing Conference, held on June 19, 2000, Mr. Geist produced a report which indicated that the road was rebuilt and that the Carson drain culverts were replaced. Discussions regarding the accuracy of the encroachment line ensued. Mr. Geist communicated his client's willingness to do whatever was required to secure a building envelope on the lot, including the provision of an indemnity agreement with respect to the proposed construction. It was Mr. Geist's position at that time that the LSRCA had an obligation to review certain changes in the flood plain since the original study was over ten years old.

As was the tribunal's practice, a hearing would not be scheduled until all attempts at settlement were exhausted. The first Pre-Hearing Conference resulted in an Offer of Settlement to the LSRCA, with five terms and conditions, which were sent to counsel for the LSRCA on July 4, 2000:

1. A site plan for any building on the property will be sited in accordance with the local by-laws to the northerly limit of the property.

2. That any garage will be sited on the southern portion of the building.

3. That all windows will be constructed above the flood plain.

4. The fill be reduced to a minimum.

5. An Agreement will be registered on title acknowledging that the building is within an encroachment area and releasing the Conservation Authority from any liability with respect to its consent to a building permit.

The final Order in this matter allowed the appeal of Mr. Cooper with essentially the same terms and conditions.

On July 28, 2000, the LSRCA rejected the proposed settlement and Mr. Hill set out that "if your client wishes to proceed, you will have to either provide convincing information regarding the above, by way of an engineering study or we will have to proceed to hearing". The first hydraulic analysis (the "First Analysis") was completed by CPM and sent to the LSRCA on January 19, 2001. Once again, the LSRCA rejected the information, indicating that it was not persuasive or reliable. Particulars were requested. Mr. Geist submitted that these efforts were indicative of his client's attempts to avoid the significant costs associated with a hearing as well as the attempts to satisfy the concerns and requests of the LSRCA on every occasion which arose.

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The ensuing correspondence, over a period of months, culminated with a request by Mr. Geist for a second Pre-Hearing Conference on May 17, 2001, which was met with a less than enthusiastic response on behalf of the LSRCA. A request was received on June 13, 2001 from Mr. Hill for a proposal for settlement, to which CPM responded on June 19, 2001, outlining the proposed terms of settlement. The second Pre-Hearing Conference took place, as planned, on June 22, 2001, leading to consideration before the LSRCA Executive in September, 2001, where it was resolved that the matter should go to a hearing.

Costs

The total costs incurred up to and including the hearing of the appeal are $65,693.16 including legal fees spent and the cost of expert witnesses. The costs incurred by Cooper are broken down as follows:

> Expert Witness Nancy R. Mather (Cosburn, Patterson, Mather) $41,074.20.
>
> Legal Costs services of Marvin Geist for meetings with expert witnesses, correspondence, attendances on site, attendance at Pre-Hearing Conferences, preparation for Hearing and attendance at Hearing including submissions 84.5 hours of billable time based on dockets and estimates at a reduced billable rate of $275.00 per hour $23,237.50.

Due to the age, resources and retired status of the Appellant, Mr. Geist reduced his standard billable rate from $375.00 per hour to $275.00 per hour.

Mr. Geist was called to the Bar in 1974 and as such is Senior Counsel with extensive experience in matters before Conservation Authorities, the tribunal, Municipal Councils and the OMB. Relying on Rule 58.05 by analogy, Mr. Geist is seeking the substantial indemnity scale of $450.00 per hour.

Prior to the initial Pre-Hearing Conference with the tribunal Registrar on June 19, 2000, the fees and disbursements incurred were $3,987.50, based upon the rate of $275 per hour. After the initial Pre-Hearing Conference, legal fees totaled $19,250.00, plus $612.00 for disbursements and taxes of $1,669.46. The fees for the engineering firm was $40,174.20, including disbursements. Mr. Geist stated that the post-June 19, 2000 costs for the engineers was $39,513.48.

Lump Sum v. Assessment

It is submitted that it is preferable that the tribunal fix costs in a lump sum amount rather than ordering an assessment. The tribunal noted in **Vanden Brink** that, although the tribunal has both the options of assessment and lump sum awards for costs, it preferred a lump sum award for costs. Its reason for doing so was to choose the less expensive route of awarding lump sum payments over the expenses associated with assessment.

Mr. Geist submitted that the LSRCA was fully aware that Mr. Cooper is an elderly retired gentleman with limited funds. It was unfair for it to require him to undertake the extensive hydraulic analyses dated January 18, 2001 (the First Analysis) and August 9, 2001 (the Second Modified Proposal) for the entire flood plain. It was unfair and unreasonable on the part of the LSRCA to provide limited responses on numerous occasions, thereby requiring more correspondence and more investigation.

The improvement to structures in the Carson Creek Drain and error messages were also read within the model. Mr. Geist pointed out that the LSRCA was apprised of both at the second Pre-Hearing Conference pursuant to the First Analysis. There were no technical responses forthcoming from the LSRCA. Instead, they were general in nature, were consistently negative and did not contain specific details as to shortcomings. Mr. Geist submitted that CPM was dealing with closed minds. Mr. Geist submitted that Mr. Cooper was treated similarly to the appellant in **Dick v. Ausauble Bayfield Conservation Authority**, having been caught up in a "variable bureaucratic nightmare."

Mr. Geist made several references to the tribunal's Reasons in this matter. In particular, at page 40, the significant effect of the twelve error messages was noted. At page 41, the tribunal disagreed that the benefit attributable to public works should accrue to those in the flood fringe. At page 42, the tribunal disagreed that the precautionary principle should be exercised when determining whether to move the established encroachment lines, stating that the findings of the original CCL Study were called into doubt. The challenge to their location was successful, and as such, the movement of the lines was justified. At page 46, the tribunal did not consider the re-mapping of the flood plain to be necessary to the appeal, stating that the responsibility to determine the extent of illegal development is properly within the mandate of the authority and not required by the appellant. At page 50, the tribunal disagreed that the flood plain is extremely sensitive to encroachment. Using the figures supplied by the parties, it determined that the errors and changes to culverts had a sufficient impact on the floodplain that it could withstand some degree of additional encroachment. At pages 52 and 53, the tribunal stated that concerns regarding ingress and egress did not make sense, given that those in the flood fringe would have to travel further and through the entire floodway to gain meaningful safe egress.

At the Executive meeting on September 28, 2001, in response to a question, Mr. Hogenbirk advised that the budget for an appeal would be $1,500.00. This was, in Mr. Geist's submission, a deliberate underestimation causing the LSRCA to pursue the cost of a hearing, demonstrating that it did not act in good faith and was biased in rendering its position to advance to a hearing.

Mr. Geist submitted that a reasonable person advised of all of the facts of this case would consider it "unfair" or not right that Mr. Cooper be obligated to bear the cost of the appeal. At a time when conservation authority budgets have been increasing, Mr. Cooper should not suffer by having to take on a well-funded institution that holds the "big stick." Under the circumstances, this is not a fair fight and is inequitable.

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The LSRCA was not interested in altering the location of the encroachment line at any time, nor was it interested in entertaining factual based studies prepared by professional engineers in an effort to accurately establish its location, let alone alter it. Mr. Geist submitted that the actions and approach of the LSRCA were stubborn, arrogant, unfaltering, self-serving and unhelpful and were an abuse of the tribunal's processes, as contemplated by section 23 of the **Statutory Powers Procedure Act**.

The tribunal has relied upon Rule 57.01 of the **Rules of Civil Procedure** in **Graf v. Palu** (unreported) October 15, 1996, File No. MA-012-95 at pp. 16 and 17. Rule 57.01 (1) provides that: "In exercising its discretion under Section 131 of the **Courts of Justice Act** to award costs the Court may consider, in addition to the **result** in the proceeding…..," eight specific factors and "any other matter relevant to the question of costs." Mr. Geist submitted that the following factors are most relevant:

- in the **result:** Cooper has been totally successful in his appeal

- the **amount at issue** Rule 57.01 (1)(a): The amount claimed, being the lump sum costs already incurred by Cooper, are in excess of the fair market value of the lot owned by Mr. Cooper. On the sale of the lot Mr. Cooper will be in a negative equity position.

- the **conduct of a party** that tended to shorten or to lengthen unnecessarily the duration of the proceedings – Rule 57.01(1)(e): The matter could have been concluded after the first Pre-Hearing Conference when the five terms and conditions of settlement were raised and submitted.

- whether any step in the proceedings was **improper or vexatious** – Rule 51.01(1)(f): Failure to respond adequately to requests for further information and explanation served to prolong the process, was improper and vexatious, and discourteous to the tribunal. The cost estimation of an appeal was unrealistic and deliberately miscalculated. The Executive should not have asked such a question of its staff.

- the **complexity** of the proceeding – Rule 57.01(1)(c): The appeal was made more and more complex as a result of the manner in which the LSRCA treated successive hydraulic analyses.

- the **importance** of the issues Rule 57.01(1)(d): It was exceedingly important to Mr. Cooper to have his lot be recognized as a lot outside of the floodway. The loss in value to him, had his appeal failed, would be considerable., Mr. Cooper is a retired gentleman of modest means and it was a matter of principle that he "took on" the LSCRA. Mr. Cooper's costs for the Hearing exceeds the fair market value of the lot.

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The settlement offers submitted to the LSRCA were within the objects of the LSRCA and found in the **Conservation Authorities Act**. Specifically, section 20 provides, where "an Authority has power to enter into Agreements with owners of private lands to facilitate the due caring out of any project."

The LSRCA was encouraged by the tribunal Registrar to settle the matter on two occasions, but refused to do so. Such refusal to settle was not in compliance with the spirit and intent of the Procedural Guidelines, nor with objective number 3 of the LSRCA **Watershed Development Policies** nor consistent with sections 1.1 and 1.2 of the **Provincial Policy Statement** revised February 1, 1997. It was also not in keeping with the Commissioner's address to the Urban Development Institute on March 20, 2002.

Order Requested

Mr. Cooper requests that the LSRCA reimburse him on a substantial indemnity scale of costs of $81,515.79 or alternatively on a partial indemnity scale of costs of $72,474.29. Alternatively, Mr. Cooper seeks reimbursement for legal fees actually incurred and disbursements paid, including expert witness fees of $65,693.16. In addition, Mr. Geist submitted that Mr. Cooper be entitled to the cost of this motion.

On Behalf of the Respondent

Mr. Hill submitted that this is not an appropriate case for a costs order, the test for such an order has not been met and the quantum of costs sought by Mr. Cooper is excessive and goes beyond the principle of indemnification which is at the root of the law concerning costs awards.

Jurisdiction

Mr. Hill stated that he concurs with Mr. Geist's submission that the tribunal has the discretion to award costs of proceedings such as these in an appropriate case.

Factors Governing Discretion

The discretion to award costs has been used sparingly by this tribunal in conservation authority matters. No cases were found in which the tribunal has awarded costs against a party where there was a genuine dispute and the parties acted reasonably. This was the rationale in **Vanden Brink v. Niagara Peninsula Conservation Authority**, March 10, 1992, page 4.

In the tribunal cases sited on behalf of Mr. Cooper, the discretion was exercised due to disreputable conduct or abuse of the process. In the **Vanden Brink** decision, the tribunal found (at page 7) that the appellant had attempted to deceive the tribunal and had raised a false issue which had unnecessarily prolonged the hearing and put the respondent to considerable extra expense. In the **Credit Mountain Land Co. Ltd.** decision, the appellant was found to have taken an unreasonable position apparently contrary to professional advice.

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The practice of the OMB in considering the exercise of its discretion to award costs is of some assistance to this tribunal. Mr. Hill submitted that there exists no reason that this tribunal should have a less stringent test for its exercise. Mr. Geist has provided references to OMB decisions which indicate that the Board has, like this tribunal, been reluctant to award costs and has generally awarded costs only against a party "…whose conduct or course of conduct is found to be clearly unreasonable, frivolous or vexatious having regard to all the circumstances." **Township of Scugog Rezoning Bylaw** 23-89 (No. 2), (1991), 24 O.M.B.R. 240, p. 241.

In **Hanna v. Sheffield Township Committee of Adjustment** [1996], O.M.B.D. No. 485, at paragraph 29, the OMB has required that, in order to attract cost consequences, the "unreasonable, frivolous or vexatious" behaviour must also be intentional.

Re City of Etobicoke Official Plan Amendment No. C-65-86 at pages 12 and 13, addressed the standard of care to be exercised by public bodies in the context of the hearing process, where to be "clearly unreasonable", there would have to be a finding that the body "acted intentionally, without regard for public and private interests, without regard for an open and proper … process or without giving proper consideration to bona fide … issues." The conduct must intentionally depart from reasonable standards. The onus is on Mr. Cooper to show that the LSRCA intentionally acted **unreasonably**. [**City of Etobicoke Official Plan Amendment *No.*** C-65-86, OMB Decisions [1992] O.M.B.D. No. 1410*,* pages 12 & 13.]

The OMB has recognized that awarding costs against a municipal government body is a serious step given the conditions under which such a body must operate and the difficulties they face in dealing with a variety of competing interests in an effort to make decisions in the public interest. Mr. Hill submitted that the LSRCA is in an analogous position and deserves the same consideration. In **Trilea Centres Inc. v Regional Municipality of Ottawa-Carleton**, 31 O.M.B.R. 10, issued July 14, 1994, the Board noted that municipal councils are not exempt from acting reasonably and that it " may award costs against a municipality whose conduct or course of conduct has been clearly unreasonable, frivolous or vexatious … and awards have been made where the board found a council clearly acted in an irresponsible manner."

The test to be applied is whether the municipality, or, as in this case, the LSRCA "clearly acted in an irresponsible manner".

The case of **Village Masonry Construction Inc.** was raised because the possibility of settlement was a factor in the decision to award costs against a party. There, the conduct which the OMB found objectionable was the decision of the party to not participate in the planning process but to nevertheless trigger the appeal process, only to accept during the hearing a proposal it had received long before. That was clearly an abuse of process.

Although the tribunal noted in the **Wallbridge Mining Company Limited** decision that it found the principles set out in the **Rules of Civil Procedure** and the cases discussed to be of some assistance in determining when and how to exercise the discretion regarding costs, Mr. Hill submitted that, unlike the case of civil proceedings before the courts, costs in administrative proceedings are not routinely awarded. In cases such as these the decision whether to award costs is governed by the reasonableness as to conduct tests as set out above.

The Appellant's Grounds for Seeking an Award of Costs

The LSRCA was accused of being unwilling to co-operate, of causing unnecessary delay and expense and insisting on a hearing notwithstanding offers of settlement. The record shows that it acted responsibly throughout, keeping in mind its obligation to act in the public interest. There was no fault or neglect of the LSRCA which delayed the proceeding or added unnecessarily to its cost. Many of the delays and expenses were caused by decisions and choices made on behalf of Mr. Cooper.

Mr. Hill submitted that the allegation of bias is particularly unfair in view of the clear evidence that the LSRCA was applying the same test to Mr. Cooper's application as it had applied consistently in numerous applications over many years. For reasons understood and endorsed in the Reasons for Decision, the LSRCA correctly took a very cautious and conservative position in considering this application which had the potential to increase the flood impact on properties within the floodplain. Even the tribunal, which was satisfied of the safety of moving the encroachment lines, did so only after careful consideration of the third and final CPM report. Without the information in that report, the onus of proving that the permission ought to be granted to build in the flood plain would not have been met.

The earlier hydraulic analyses of CPM were fraught with inadequacies and simply did not sufficiently address the issues. The Third Proposal was not provided to the LSRCA prior to the commencement of the hearing in January, 2002 and that necessitated an adjournment. The tribunal did find adequate support in the final hydraulic analysis to grant relief to Mr. Cooper. Nonetheless, Mr. Hill submitted, the concerns expressed by the LSRCA regarding the last analysis were reasonable, appropriate and motivated by an appropriate sense of responsibility. The tribunal reflected its appreciation of the authority's position at page 53 of its Reasons, where it stated, "The reluctance of the LSRCA to consider any deviation from a set location of pre-existing and modeled encroachment lines is, frankly, understandable from the tribunal's perspective."

The correspondence and the evidence given at the hearing simply do not support Mr. Geist's allegation that the LSRCA was unhelpful in responding to the reports submitted by his client. In fact, in the Reasons, at page 39, the tribunal pointed out that the position of the LSRCA which Mr. Geist alleged was heard for the first time at the hearing was in fact contained in earlier correspondence from Mr. Hogenbirk. This was in clear contradiction of Mr. Geist's allegations.

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Any delays and additional time and costs incurred in this matter were caused by the actions on behalf of Mr. Cooper, three instances of which were drawn to the tribunal's attention: 1) the failure on behalf of Mr. Cooper to comply with the tribunal's Order To File; 2) the refusal to provide the details of the second report or the particulars of Mr. Cooper's settlement proposals prior to the second pre-hearing; and 3) the attempt to present the third engineer's report without first providing it to the LSRCA.

One of the minor delays in the filing of the LSRCA's materials was caused by the failure of the appellant to provide a list of witnesses and a summary of their anticipated testimony. Despite being brought to Mr. Geist's attention, the deficiency was not remedied. To **avoid** delay, the LSRCA response was as best as could be done under the circumstances. Mr. Hill stated that he finds it disconcerting that this minor delay occasioned by Mr. Geist's own default is now being relied upon in this way.

There was no unwillingness on the part of the LSRCA to proceed with a second Pre-Hearing Conference. To ensure that the parties did not waste time and money, the LSRCA requested as a condition to holding the Conference, that there should first be new information and the particulars of any new settlement proposal should be provided. Even so, the second Pre-Hearing Conference proceeded without such particulars of the new proposals.

The attempt to file a new and complex engineering study, which was presented to the LSRCA on the first day of the hearing (for the first time) made an adjournment of the hearing inevitable resulting in increased costs for all parties. Mr. Hill submitted that it is only the conduct on behalf of Mr. Cooper which caused or led to unnecessary delays and additional costs. No costs are sought on behalf of the LSRCA, but Mr. Hill submitted that it is Mr. Cooper who should be liable for the costs thrown away by the respondent as a result of the adjournment of the hearing.

Contrary to the position advanced by Mr. Geist, the LSRCA has shown itself on many occasions to find and adopt creative ways to resolve appropriate cases. With this appeal, however, a new and difficult issue was raised which could not in good faith be resolved on the basis of the materials presented by CPM prior to the hearing. The LSRCA did not change its opinion in this regard, even after the end of the hearing.

As to whether it was unfair to require Mr. Cooper to incur the costs of the hydraulic analyses undertaken, Mr. Hill submitted that the subject property is clearly subject to flooding and it is not the LSRCA but the Regulation which casts the onus on him to satisfy it or this tribunal that the proposed construction will not have adverse effects. The findings of the tribunal confirm the need for substantive technical evidence to move encroachment lines. According to Mr. Hill, it would have been irresponsible for the LSRCA to grant permission to Mr. Cooper without requiring such evidence. The LSRCA had a duty to not grant permission unless it was satisfied by reliable evidence. It was up to Mr. Cooper to decide whether it would be in his best interests to have the investigations conducted and presented. The message from the pre-hearing correspondence was consistently that it would be difficult to satisfy the LSRCA in this particular case. Mr. Cooper had experienced counsel throughout and must have understood the obstacles he had to overcome and the costs and risks of proceeding.

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Mr. Hill submitted that the early studies prepared for Mr. Cooper were clearly inadequate. Moreover, it was his choice to prepare a study showing encroachment lines which followed the lot lines in the area, an approach which was rejected by both the LSRCA and this tribunal. The difficulties with the engineering evidence and the inability of the engineers to agree was, in part, due to their reasonably held differences of opinion. In the Reasons, the tribunal found that it disagreed with the LSRCA's engineer on certain points but also accepted some of his criticisms, particularly the earlier CPM reports. In addition, the tribunal itself was critical of CPM's evidence in certain respects at pages 37 and 41 of the Reasons, being the discrepancy which CPM did not highlight of the increase of velocity of .4 as opposed to .2 feet per second and the comment that CPM did not provide figures limited to correction of error messages to determine their impact on the model.

Mr. Hill disputed the allegation that the LSRCA was unresponsive to CPM, and was "not improper, vexatious and extremely discourteous to this tribunal", stating that it is not supported by the evidence. Mr. Geist's correspondence is merely self-serving in this regard. The correspondence shows that the LSRCA co-operated with CPM by supplying information, meeting from time to time and providing responses to their submissions. It was suggested that the less than favourable responses to the substance of the analyses should not be confused with the conduct of the LSRCA. To illustrate the extent to which the appellant was given every chance to satisfy the LSRCA, Mr. Hill pointed to the second appearance before the Executive, in September, 2001, which took place while the appeal was pending before the tribunal.

As for the alleged anticipated cost of a hearing, no one who was present can recall the question, but if it was asked, it falls far short of an indication of bias or lack of good faith, as alleged. Any party to a proceeding has the right to know and take into account the anticipated cost of the proceeding. The allegations that the costs were deliberately understated is no more than speculation and unfair to Mr. Hogenbirk who does not recall the exchange. After pointing out that the LSRCA uses in-house witnesses, Mr. Hill suggested that the projections would have been accurate, but for the adjournment. Costs as of January, 2002, including pre-hearing preparation were $1,578 and for the continuation of the hearing were $2,214. Mr. Hill questioned the propriety of making such an allegation in this way and Mr. Hill submitted that Mr. Hogenbirk deserves an apology.

Applicability of the Rules of Civil Procedure

The **Rules of Civil Procedure** are of limited assistance in the context of an administrative proceeding. Mr. Hill offered the following comments on the applicability of the various factors: a) **the result:** In civil proceedings costs normally follow the outcome, but as that is not the case in proceedings of this kind; b) **the amount at issue:** If the amount expended by Mr. Cooper exceeded the value of his property as alleged, without any supporting evidence, that is an argument against his recovery in the amount sought; c) **the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding:** The only conduct of a party to this proceeding which lengthened it unnecessarily was that on behalf of Mr. Cooper; d) **whether any step in the proceeding was improper or vexatious:** Mr. Hill submit-

submitted that none of the submissions on behalf of Mr. Cooper on this point have any substance; e) **the complexity of the proceeding:** There were complex issues inherent to this case which were not dreamed up by the LSCRA; and f) **the importance of the issues:** The issues were important to both parties.

Relying on **Rowsell & Associates Engineers Ltd. v. Brandt** [2002] O.J. No. 344, 1, Mr. Hill submitted that judges have frequently declined to award costs to a successful litigant where the case involved a question not previously decided by the courts.

Mr. Hill declined to provide a detailed analysis of Mr. Geist's accounts, this not being a proper case for such an award. He did, however, point out what he considered to be a fundamental misunderstanding of the proper use of the new costs Tariff, which provides a range of hourly rates 'up to' which costs may be calculated. It remains, in his submission, a fundamental principle that an award of costs is intended as partial or full indemnity from costs actually incurred by the party. There has been an implication creating uncertainty, when read on its own, that costs can be awarded in excess of the amounts actually charged to the client. The jurisprudence is clear, however, and is set out in Mark Orkin's **The Law of Costs, 2nd edition**, (2002), pages 2-26 and 2-27, that since costs are an indemnity, they cannot be made a source of profit to a party. Being a partial indemnity to the successful litigant against his liability to pay his solicitor's accounts, it follows that one cannot recover more than has been paid. To the extent that Mr. Geist has submitted a request for more costs than his client actually incurred, the claim is excessive.

Application of the Test to the Facts

There is no evidence that any of the conduct of the LSRCA in this case could properly or fairly be described as being "clearly unreasonable, frivolous or vexatious" nor can it be said that the LSRCA "clearly acted in an irresponsible manner". It acted consistently with its past policies and practices, acting in the public interest and in the interests of property owners within the floodplain, in a case involving important principles of flood plain management. The tribunal recognized that this difficult case was "unusual if not unique" and, after careful consideration, it set out for the first time a test which may be applied to permit the adjustment of established encroachment lines in an analogous two zone concept area. With differing opinions being reasonably held, it was not such a clear case that the LSRCA should be faulted or penalized for applying established policies and practice in refusing the permit. It was not unreasonable for the Executive to have reached its decision, and in so doing, it maintained its position and carried out its duties in good faith.

The bringing of this motion was submitted to be ill advised, resulting in further costs being incurred by both sides and should be dismissed. Mr. Hill stated that it would be appropriate to seek costs of the motion, but he has not been instructed to do so.

Reply Submissions

Factors Governing Discretion

Mr. Geist is in agreement with Mr. Hill's submission that the discretion to award costs has been used sparingly by this tribunal, noting the discussion in **Chalmers v. Grand River Conservation Authority**, (unreported) CA 007-9, November 13, 1997, at page 23, but each case should be decided on its own merits and must also be distinguishable on its merits. The merits of this case show that the LSRCA had relied solely on its standard practice of denying its permission based on its standard set of principals, failing to take into account improvements within the floodplain which had an impact on the CCL Study. He submitted that by having failed to respond to each successive position advanced concerning the location of the encroachment line, its conduct was unreasonable and was an abuse of process. Notwithstanding that it was aware of improvements as early as April 7, 2000, it continued to rely on its standard response of safe access, cumulative impacts, loss of storage capacity and obstruction within a floodplain. Despite repeated attempts to obtain detailed specific information regarding its concerns, this was not forthcoming, which was unreasonable and intentional.

In **City of Etobicoke Official Plan Amendment number C-65, -86** OMB Decisions [1992] O.M.B.C. No. 1410 at pages 12 and 13, "clearly unreasonable" requires a finding of acting intentionally, without regard to *bona fide* issues. The LSRCA was consistent in failing to provide adequate, timely responses and with no real input to the main issue of the location of the encroachment line, from the first Pre-Hearing Conference, through to the decision to proceed to hearing, made on September 29, 2001.

It was recognized in **Trilea Centres Inc. vs. Regional Municipality of Ottawa/Carlton** 31 OMBR 10 issued July 13, 1994 that the awarding of costs against a government body is a serious step. In **Canadian Development Management Corporation of Town of Blue Mountains**, PL001195, issued March 1, 2002 at pages 10 and 11, the OMB heard that an award fixed against a municipality should be nominal, having a chilling effect on its willingness to pursue the public interest. The Board found that being charged with protection of the public interest does not mean it can be assumed that the responsibility is properly discharged and further found that the Town acted in a manner which was frivolous, vexatious, clearly unreasonable, in bad faith and not in the public interest. **Hanna v. Sheffield Township Committee of Adjustments** [1996], O.M.B.D. No. 485, at paragraph 29 can be distinguished because Mr. Hanna's actions were not intentional and as a result, no order as to costs was granted.

The Appellant's Grounds for Seeking an Award of Costs

It was the application of the usual test by the LSRCA to the facts of the appeal which was the basis of the problem. It failed to consider the merits. Mr. Geist submitted that his client did meet the onus. Contrary to Mr. Hill's statement, at page 46 of the Reasons, the tribunal did not require re-mapping to have been done by the appellant to prove his case, finding that this

was properly part of the responsibilities of the LSRCA, once problems with the original model were uncovered. It was reiterated that the LSRCA did not respond to the expert reports provided by CPM until April 25, 2001, which would lead a reasonable, well informed person to conclude that it would be unfair and improper for Mr. Cooper to bear the costs of the appeal.

Mr. Geist asked the tribunal to consider the submissions of Mr. Olah in **Chalmers v. the Grand River Conservation Authority** (*supra*), advising the tribunal in a motion for costs that the advice of the Deputy Commissioner regarding offers to settle should be taken into account, when proven correct. It was submitted that an informed person could not expect to take an expensive appeal to its conclusion, without some costs consequences upon losing, especially after having received advice from a knowledgeable source about the chances of success."

The Quantum of Costs Claimed

Mr. Geist entered into a financial arrangement with Mr. Cooper as a result of his financial circumstances and reduced his fee accordingly. It is submitted that Mr. Geist should be indemnified for such loss. The appeal was allowed and Mr. Cooper should not be prejudiced. If Mr. Geist had acted "pro-bono" or on contingency, it would follow on this argument that he would not be entitled to be paid at all. The tribunal has relied upon **Apotex Inc. the Egis Pharmaceuticals and Novopharm Ltd**. 4 O.R. (3d) 321 in **Graf v. Palu** (*supra* at pages 21, 22 and 23) adopting the principles contained in subsection 57.01(2), clauses (1) (e) and (4)(c) and subclause (1)(f)(i) of the **Rules of Civil Procedure** in awarding costs to Mr. Palu on a solicitor and client basis.

Mr. Geist pointed out that, during the course of the hearing, he had reviewed five cases with the tribunal within the same floodplain, all of which were distinguished from the facts in this appeal. He submitted that this is not a test case, and that it was distinguished from the other cases discussed due to their respective locations within the floodplain. Mr. Geist submitted that a "test case, involves the public interest", which does not describe the current appeal. It is not a matter of great public interest and is unique only to the circumstances and specifics of the case. Mr. Geist relied on M. Orkin, **The Law of Costs, 2nd edition**, (2002) at pages 2-51, 2-52 and 2-53.

Application of the Test to the Facts

Mr. Geist submitted that he agreed that this case was a unique case within the Carson's Drain area. It would not be precedent setting as there were only two other lots within the floodplain that are not built upon and have an encroachment line going through them. The case was unique in this regard keeping in mind the entire floodplain.

This case is not unique with respect to the moving and location of encroachment lines. In this regard, Mr. Geist referred the tribunal to the cases of **Hampshire**, **Allerton** and **Sprague** as well as **Dyck v. Ausable Bayfield Conservation Authority** with respect to costs.

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In summary, there was no element of compromise offered by the LSRCA, which chose to go to a full hearing, as was the case in **Wallbridge**. Mr. Geist submitted that the LSRCA knew, or should have known, the risks involved and have been prepared to bear the result, including the assessment of costs.

The tribunal has the discretionary power to award costs and once the tribunal has determined that it will exercise its discretion and award costs, it has one of three choices. It may fix costs. It may assess costs or, it may direct the assessment of costs, as set out in **Wallbridge**.

It is respectfully submitted that the tribunal should fix costs as submitted pursuant to the Appellant's Submissions regarding costs, dated April 7, 2003.

Findings

Unreasonable, Frivolous or Vexatious, or Acting in Bad Faith

The jurisdiction of this tribunal to award costs and the factors governing its discretion to do so were well covered by counsel. Notwithstanding the powers found in sections 126 and 127 of the **Mining Act**, costs are not normally awarded in conservation authority hearings. As was noted in **Vanden Brink** (*supra*), in certain cases, the award of costs is appropriate. The test applied by the OMB, against a party whose conduct is found to be clearly unreasonable, frivolous or vexatious, is a reasonable standard for an administrative tribunal to consider. This reflects the powers found in clause 17.1(2)(a) of the **Statutory Powers Procedure Act**, which has the added consideration of whether a party was acting in bad faith. While that legislation requires that the tribunal must make rules in order to exercise its cost awarding power, the provisions of the **Mining Act** render such rule-making unnecessary.

Prior to January 19, 2001, the date of the First Analysis, there was little for the LSRCA to consider, other than an unspecified report that improvements had been made to culverts and the assertion that the changes would affect the original CCL Study results. It was urged by the appellant that the responsibility to re-run the model rested with the LSRCA. In fact, no expert witnesses or reports were filed pursuant to the tribunal's order. The LSRCA did not make substantive responses up to this date, because it had nothing to respond to.

The tribunal has reviewed the relevant correspondence, commencing with February 28, 2001, which states, in summary, that the analysis is not found to be reliable or persuasive, that the LSRCA does not agree with the methodology used, in particular with the extent of area selected for study and is not satisfied that the proposed construction would not affect control of flooding. There is no mention of impact of culvert improvements or errors. There is also no explanation of these bald statements. After a flurry of documentation, on March 6, 2001, Cosburn, Patterson, Mather ("CPM") wrote directly to the LSRCA asking for a "more detailed account of your review." The four points in the response of March 13, 2001, state, 1) the CPM analysis confirms the CCL Study recommendations; 2) In addition to culvert changes,

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all intervening development within the floodway must be surveyed and added before running the model; 3) the rationale for shifting the northern encroachment line only, as the extensive floodplain suggests that the area would be unsuitable for development **and** safe access requires travel over an extensive length of flooded roadway; and 4) the proposal would result in small increases in maximum flood levels at four cross sections.

There is no mention of the errors issue. The issue of whose responsibility it is to survey and model intervening development in the floodway was raised from the outset and it is continued by the LSRCA in this correspondence, thereby deflecting the impact of the culvert changes. Upon reflection, the matter of whose responsibility this was remained in dispute until the tribunal issued its order and may have defied any and all settlement attempts. The matters of access and nominal increases were discounted in importance by the tribunal in its order.

The matter of errors not addressed was raised by Mr. Geist in subsequent correspondence. Further, CPM addressed the four issues raised by the LSRCA. It 1) justified the manner in which the model was applied; 2) disputed the need for updated survey data from the floodway area, arguing that this would eliminate a reasonable basis for comparison; 3) pointed out that the length of flooded roadway (access) would remain the same, despite the theoretical application of encroachment; and 4) stated that the increases discussed range from .1 foot to .24 feet (between 1 and 3 inches), but were still less than the previously approved increases.

The LSRCA response, dated April 25, 2003, 1) reiterated that the new development in the encroachment area must be determined and input into the model; 2) stated that improvements within the floodplain accrued to the benefit of those in the flood fringe; 3) reiterated, with respect to access, that the distance of travel through the deepest part of the floodway would be increased; 4) reiterated that small increases would be experienced and that the model was sensitive to reductions in the floodway, noting increases in 17 left overbank, 18 channel and 18 right overbank areas compared with the original encroachment model, leading to the conclusion that the proposal would adversely affect the control of flooding; and 5) reiterated the criteria for establishment of the encroachment lines. The letter also acknowledged several errors, but minimized their impact.

A second Pre-Hearing Conference took place with consideration of the Second Modified Proposal, which was done, one presumes, when the LSRCA resisted a meeting without there being new evidence to consider. This proposal was further considered by the Executive in September, 2001, at which time the decision was made that the matter should proceed to a hearing. At the January, 2002 hearing, CPM introduced the Third Proposal, which the LSRCA had not previously seen, requiring an adjournment so that it might adequately prepare cross-examination and its response.

The tribunal has reviewed the various steps and correspondence taken in this matter with considerable care. Despite the arguments made, the tribunal can find no evidence indicative of the LSRCA acting in a frivolous or vexatious manner, nor in bad faith throughout this appeal. The LSRCA did conduct itself in a manner which demonstrated reluctance and

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unwillingness to consider the impact of the very important information concerning the changes to infrastructure. Similarly, the tribunal finds that it failed to respond in a meaningful manner to the requests for information regarding the shortcomings of the various hydraulic analyses provided by CPM, merely maintaining that further surveying and data was needed and standing by its ludicrous statement about access. It does not follow that this conduct is frivolous or vexatious.

The test for vexatious is very onerous. In **Re Lang Mitchener, et al. v. Fabian et al.** (1987) 59 O.R. (2d) 353 (H.C J.) Henry J., at page 358 sets out principles for determining whether a proceeding was conducted in a vexatious manner, as contemplated by section 150 of the **Courts of Justice Act**, (1984) (S.O.):

> I have been referred to the following judicial decisions by counsel for the applicants: *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 at p. 226, 102 D.L.R. (3d) 342 at p. 348, 12 C.P.C. 188 (Ont. C.A.); *Re Kitchener-Waterloo Record Ltd. And Weber* (1986), 53 O.R. (2d) 687 at p. 693 (Ont. S.C.); *Re Law Society of Upper Canada and Zikov* (1984), 47 C.P.C. 42 (Ont. S.C.).
>
> From these decisions the following principles may be extracted:
>
> (a.) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
> (b.) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
> (c.) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
> (d.) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
> (e.) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
> (f.) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
> (g.) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

While the LSRCA believed in the correctness of its position, to its detriment, it did not conduct these proceedings in an improper or vexatious manner, as understood by the principles outlined above.

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Reasonableness – Test and Findings

Rather, the LSRCA failed to consider the possibility that it could be wrong about the correctness of the modeling in the CCL Study. Further, and this seems consistent from the beginning, the LSRCA was of the opinion, notwithstanding the considerable efforts of CPM to find errors and impacts of culvert and channel straightening, that the responsibility to survey and model intervening development within the floodway rested with the appellant. The LSRCA did not produce alternative evidence or arguments to this fundamental position. The evidence presented supported its position that it was not persuaded by efforts on Cooper's behalf. No concessions as to the impact of the channel straightening, culverts and errors were acknowledged. The only remaining question is whether the conduct of the LSRCA was clearly unreasonable, essentially amounting to "willful blindness"?

The test for reasonableness applied by the OMB set out in **Township of Scugog Zoning Bylaw 23-89 (No. 2)**, (1991), 24 O.M.B.R. 240 at 241, as found in its guidelines, was presented for the tribunal's consideration:

> The test is: would a reasonable person, having looked at all of the circumstances of the case, the conduct or course of conduct of a party proven at the hearing, and the extent of his or her familiarity with the Board's procedure, exclaim "that's not right; that's not fair; that person ought to be obligated to another in some way for that kind of conduct".

Although the tribunal has no such test in its own Procedural Guidelines, it finds that this test is an acceptable standard and will be adopted.

Throughout the process, after each proposed model and up to the completion of the hearing, the LSRCA maintained that Cooper had not satisfied its concerns regarding movement of the encroachment lines. It further maintained that the tribunal ought not to be satisfied with the Third Proposal, which was the only proposal at issue at the hearing. The tribunal conducted no in-depth analysis of CMP's First Analysis or Second Modified Proposal. Such analysis would have had to be along the lines of the information found in Chart B: LSRCA Flood Level Comparison, found in the Order on the merits.

The objections of the LSRCA to the First Analysis was that only the northern encroachment line would be moved. This ran contrary to modeling theory, which requires that such encroachment lines be placed equidistant from the centre of the watercourse, with adjustments for differences in topography. There were two additional LSRCA objections to the Second Modified Proposal. The LSRCA was emphatic that floodlines would not respect the proposed perpendicular boundaries corresponding with lot lines. Also, the lower road elevations were not accepted as accurate, due to the lack of a common benchmark. In other words, what was required was a survey of the entire Subdivision to determine whether there was, in fact, a change in the road elevations relative to the surrounding terrain. The issue of the survey of intervening development once again interceded.

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What are the respective responsibilities of the appellant and conservation authority vis-à-vis changes within the flood plain which may affect the placement of the existing encroachment lines. The tribunal stated at page 46 of its Reasons, "The tribunal does not consider the re-mapping of the flood plain to be necessary in this appeal." Although stated later in that paragraph that the responsibility for such re-mapping rests with the LSRCA, the initial statement may be misleading and could properly be stated as, "The tribunal does not consider the re-mapping of the flood plain as the responsibility of the appellant in proving his case." The illegal placement of fill was not irrelevant to the decision. Rather, the responsibility for survey and the impact of illegal construction and fill within the encroachment lines was that of the LSRCA. It did not undertake such a survey, but maintained that it was not satisfied and that Cooper had failed to prove his case.

The LSRCA did not provide evidence of any illegal development which may have occurred in the intervening period since the CCL Study was adopted. With each of the proposals, when the evidence of errors and culverts was presented, along with the changes proposed to the encroachment lines, the burden of proof actually shifted to the LSRCA. At all times, it was concerned about a survey, and with the Second Modified Proposal with a common benchmark. When faced with the position of the LSRCA, and given the magnitude and cost of undertaking a survey of the Subdivision, the appellant, instead, once again revised the proposal. The revised road elevations were abandoned in the Third Proposal, the position being that the data from the errors and culverts would support the movement of the encroachment lines, even without favourable road elevation figures.

Was the course of conduct on the part of the LSRCA clearly unreasonable, as contemplated by the test set out above? The tribunal finds that it was. The LSRCA stridently adhered to a strict application of "no increases" as opposed to an examination of the underlying absolute flood levels and velocities. In this regard, the tribunal considers it to have been "willfully blind" in two regards. First, it did not acknowledge, on a continuing basis, that the errors, channel straightening and culvert changes would have an impact on the reliability of the original numbers generated by the CCL Study. It maintained its position that any benefit derived from the channel and culvert changes should accrue to those outside the floodway as originally modeled by the CCL Study. Second, it did not acknowledge that the location of the existing encroachment lines was arbitrary and could be repositioned, to some extent, on the basis of those errors and changes. Nor did it acknowledge that their movement to allow for a minimal number of additional building envelopes would be fair and equitable in the circumstances in an analogous Two Zone Policy Area. The tribunal recognized that, once the Two Zone Policy is applied, there is somewhat of a departure from strict floodplain planning principles, to encompass consideration of "land use planning concerns, such as economic and social considerations and community viability."[p. 43].

Costs Award Against Body Charged with Protecting Public Interest

The tribunal agrees with the submission that an award of costs against a Conservation Authority is a serious step, one which it does not take lightly. The actions of the appellant were out of the ordinary in this appeal. Data was collected for the new culverts and for

the resurfaced roads. Errors were found through analysis of the CCL Study and corrected. The encroachment model was re-run to encompass the proposal for movement of the encroachment line(s) by taking into account the entire Subdivision. The main disagreement between the parties was whose responsibility it was to survey and input the data from intervening development within the encroachment lines from the time of the CCL Study.

The LSRCA did not treat the efforts on behalf of Cooper with the considerable respect they deserved. It did not acknowledge, in a timely fashion, the errors found, nor the impact of the changes and improvements to the culverts and the straightening of the channel to the original CCL Study. It clung to a very rigid test of "no net change" to flood elevations and velocities between an updated encroachment model and the proposal(s). By doing so, it ignored the underlying rationale of the proposal(s), of no net increase between the updated non-encroachment model and the proposal(s), which was faithful to the premise of the original CCL Study. In referring to **Chart B: LSRCA Flood Level Comparison** from the decision on the merits, in the second last column, "Difference between revised LSRCA and CPM encroachment lines, the differences are additional increases of between -.02 and .09 feet, being -.24 to +1.08 inches. While the difference of an inch could readily see flooding of previously flood proofed development, the actual increases in flood elevations, shown in the next column, "Difference between revised CPM non-encroachment and proposed encroachment, was within the limits tolerated by the original CCL Study, a fact which was ignored by the LSRCA. The LSRCA similarly clung to its rationale regarding ingress and egress, stating that the deepest part of the floodplain would have to be traversed to ensure meaningful evacuation (i.e. road access rather than a farmer's field), minimizing or outright ignoring the fact that owners from those properties to the north of the original encroachment lines would have to travel an even greater distance along flooded roadway to gain meaningful evacuation. This was found acceptable in the original CCL Study.

The tribunal finds that the LSRCA should have provided meaningful responses to the efforts made on behalf of Cooper instead of the empty rationale it used. The tribunal notes that appellants are changing their historical tactics, to some degree, in appealing refusals of conservation authorities. As was noted in the decision on the merits, this move to engage engineers to conduct extensive flood plain analysis has provided the tribunal with a substantive basis to consider the issues under appeal. This is a departure from the earlier propensity to simply reason that because a property had not been flooded in recent memory, it was not prone to severe flooding. Such efforts must be treated by Conservation Authorities with the respect they deserve, through the provision of meaningful challenges to data. For all of the above reasons, the tribunal finds that, on the facts of this case, it would be reasonable and fitting to award costs against the LSRCA.

Discretion

The tribunal has relied elsewhere on the factors outlined in Rule 57.01(1) of the **Rules of Civil** Procedure in determining whether to exercise its discretion. Mr. Hill has urged that there are other considerations, including the fact that this was regarded by the tribunal as a test case, and the matter of casting a chill on public bodies from carrying out their function.

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Turning first to the considerations outlined, taken from the Rules, put forward by Mr. Geist:

1. **The result**. Mr. Cooper has been successful in this matter. However, for reasons which will be discussed further below, the tribunal is not persuaded that the result could have come about much earlier than either the second Pre-Hearing Conference or presentation to the LSRCA Executive.

2. **The amount in issue**. The fact that Mr. Cooper expended more in legal and engineering fees than the property is worth is not persuasive. It is not unreasonable to expect to incur some considerable legal and engineering fees when one hopes to unseat the model underlying the establishment of encroachment lines. The tribunal is, however, convinced that the extent of the fees and the need to run successive models was unnecessary and unreasonable, based upon the LSRCA's unwillingness to provide what may be considered adequate feedback and its having continued to maintain that Cooper needed to survey the entire encroachment area to include data from illegal fill and development which had occurred since the CCL Study had been adopted.

3. **The conduct of a party**. The tribunal does not agree that, just because the same terms and conditions as were initially suggested by Mr. Geist made their way into the Order that there was sufficient technical information to settle this matter at the first Pre-Hearing Conference. However, the conduct of the LSRCA is significant in several ways. It failed to acknowledge the impact of errors and changes to culverts to the original CCL Study. It maintained that the appellant should be responsible for surveying intervening illegal development within the existing floodway and modeling its impact on the model. It stridently insisted that the test to be applied was no net impact between the updated encroachment model and the proposal, rather than look at absolute increases over what had initially been modeled and found acceptable.

4. **Improper or vexatious steps in the proceeding**. The LSRCA did conduct itself in a manner which demonstrated reluctance and unwillingness to consider important information concerning the original CCL Study. Similarly, it failed to respond in a meaningful manner to the requests for information regarding the shortcomings of the various hydraulic analyses provided by CPM. It does not follow that the steps taken meet this test, as discussed in detail above.

5. **The complexity of the proceeding**. The hearing of this appeal was not complex, nor was it made more complex as a result of the conduct of the LSRCA. Its conduct in not answering questions did tend to prolong matters, as CPM sought alternatives which would be acceptable to the LSRCA concerns. The actual subject matter was not complex. It did not involve a number of procedural, jurisdictional or preliminary motions.

6. **The importance of the issues**. Mr. Geist characterized this matter as important to Mr. Cooper, who would be stuck with a worthless lot, if not successful, but of little interest to anyone else, as there would only be one other lot in the Subdivision affected by the decision. Mr. Hill submitted that it did not merit costs, due to its novel nature, addressing the question of movement of pre-existing encroachment lines.

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The tribunal agrees with Mr. Hill that that this is a novel matter, and perhaps even a test case for providing direction on when encroachment lines within a Two-Zone Concept Area may be changed. If this were the only factor under consideration, the tribunal would not exercise its discretion to award costs.

However, the determinative factor in this case is the unwillingness of the LSRCA to consider factors which brought the modeling in the original CCL Study into doubt. The tribunal finds that the LSRCA acted in a manner which was unreasonable in the circumstances of this case. Throughout, it maintained that the responsibility for surveying illegal development in the floodway within the whole Subdivision rested with the appellant. The appellant proved that the original establishment of those lines was in question. This matter was drawn out by the LSRCA's persistent unwillingness to acknowledge, in a meaningful manner, CPM's assessment. It took this one step further by permitting CPM to perform three hydraulic analyses, keeping alive the Cooper hopes of reaching a settlement, without providing meaningful feedback in a timely manner, or providing direction which CPM's efforts should have taken. It also mistakenly believed, throughout, that CPM should be responsible for the survey of intervening development in the floodway, refusing to otherwise consider the data generated by CPM as being significant.

Responsibility of the Parties

The tribunal has prepared a chart, based on Mr. Geist's chronology with one modification, which depicts dates in this matter and corresponding charges:

Stage 1

Date	**Activity**	**Billings**
Jan. 19, 2000	Staff Report confirms soundness of CLL study	
Feb. 24, 2000	Order to File	
April 7, 2000	Cooper filing, notes culverts and channel straightening	

Stage 2A

Date	**Activity**	**Billings**
June 19, 2000	PHC, Cooper not willing to undertake site survey	
June 21, 2000	Cooper proposal	
June 21, 2000	Geist bills Cooper	*$4,316.91*
July 17, 2000	CPM bills Cooper	$ 660.72
July 28, 2000	LSRCA rejects proposal	

Stage 2B

Date	**Activity**	**Billings**
Up to Dec. 23, 2000	CMP bills Cooper	$3,082.34
Up to Jan. 20, 2001	CPM bills Cooper	$2,395.99
	Subtotal for recent CPM activity	**$7,387.21**
Jan. 19, 2001	CPM provides first hydraulic analysis, containing culvert information and 12 errors	
Feb. 28, 2001	LSRCA does not find analysis persuasive or reliable	
March 2, 2001 March 15, 2001	Correspondence to determine reasons for rejection from LSRCA	
March 17, 2001	CPM bills Cooper	$999.91
March 26, 2001	CPM correspondence disputing LSRCA's concerns	
April 25, 2001	LSRCA proposal requires topographic survey to determine illegal placement of fill, increases in flood levels and sensitivity of model	
May 12, 2001	CPM bills Cooper	$1,401.62
	Subtotal for recent CPM activity	**$2,401.53**

Stage 3

Date	**Activity**	**Billings**
May 22, 2001 June 19, 2001	Correspondence concerning second PHC, with Cooper in support and LSRCA not wishing to waste time and money	
June 19, 2001	CPM drafts proposal to move lot lines	
June 22, 2001	PHC and second proposal	
June 30, 2001	Geist bills Cooper	*$5,378.89*
July 17, 2001	Proposal to resubmit to LSRCA Executive	
July 19, 2001	CPM bills Cooper	$9,091.32
Sept. 1, 2001	CPM bills Cooper	$1,766.68
Sept. 13, 2001	CPM revises proposal	
Sept. 28, 2001	LSRCA rejects proposal and requests hearing before tribunal	
Sept. 28, 2001	CPM bills Cooper	$1,330.81
	Total for recent CPM activity	**$12,188.81**
Sept. 28, 2001	Geist bills Cooper	*$2,142.14*

Stage 4

Date	**Activity**	**Billings**
Hearing	January & April, 2002	
Jan. 10, 2002	CPM bills Cooper	$3,023.22
Jan. 17, 2002	Geist bills Cooper	*$6,215.63*
Jan. 19, 2002	CPM bills Cooper	$8,675.23
March 15, 2002	CPM bills Cooper	$3,023.22
April 12, 2002	Geist bills Cooper	*$7,465.39*
May 10, 2002	CPM bills Cooper	$5,837.48
	Total for recent CPM activity	**$17,535.93**

Through this review of the correspondence and technical evidence filed, it becomes apparent that the available information was insufficient to allow this matter to be settled at either Stage 1 or Stage 2A. A review of the charges by CPM reveals that a very small portion of the total billed is attributable to work done for Stage 2A, which ended with rejection of the proposal following the first Pre-Hearing Conference. The notes from the Pre-Hearing Conference reveal that Mr. Cooper was not at that point prepared even to undertake a site survey let alone a hydraulic analysis, and this fact is mirrored in the billings.

There is no evidence that the terms and conditions which appear in the Order, being those proposed at Stage 2A, were supported with any substantive, persuasive technical analysis by CPM. In his April 7, 2000, covering letter to the tribunal [at Stage 1], Mr. Geist raised culvert changes and channel straightening. As of that date, no data or technical analysis was offered in support. Rather, it was Mr. Geist's position at the time of the initial filing that the LSRCA should be required to undertake a review of the CCL Study, reserving the right to call experts and produce reports at later stages in the proceedings. At point #8 of this letter, Mr. Geist alleged that the LSRCA acted with bias and without consideration of the reality of the situation, which he characterized as unreasonable. One can only assume that this last reference dates back to the actual hearing before the Executive, from which the appeal arose.

The tribunal notes that it was not until almost a full year after the appeal was commenced that the First [hydraulic] Analysis was undertaken. This was the first meaningful step of providing sufficient technical evidence in support of Mr. Cooper's appeal.

Had the LSRCA provided the surveyed elevations within the floodway, the road elevation portion of the Second Modified Proposal might have proved acceptable and not been abandoned. This, however, is speculative. The fact remains that two additional hydraulic analyses were undertaken by CPM. The LSCRA did not provide sufficiently meaningful feedback or generate data according to its mandate to support its concerns regarding the potential impact of illegal development on the original CCL Study results. Throughout, the LSRCA indicated that it was not satisfied by each successive proposal. CPM could gain no direction for its efforts in successive analyses. It pursued novel and disparate approaches, convinced that achieving approval for a building envelope for Cooper was possible. The LSRCA was not satisfied and resolutely refused settlement proposals and a second application before the Execu-

tive. Once there was an appeal, it was the tribunal which the parties were to persuade. That this fact wasn't kept in mind makes it difficult, at this point, to assess the successive proposals for purposes of necessity, given that each was not adjudicated. This point must fall in Cooper's favour in this motion for costs.

The tribunal did consider doing analysis similar to that found in Chart B, done in the Order on the merits of February 14, 2003. It has determined that such an exercise would be unnecessarily time consuming and be unlikely to yield conclusive results concerning the acceptability of the First Analysis and Second Modified Proposal. The First Analysis involved changes to only the northern encroachment line, so that it would have been necessary to undertake a second analysis, at the very least. The total for CPM billings up to consideration of the First Analysis is $10,449.46, which the tribunal finds it the responsibility of Cooper in its entirety. This amount encompasses the time frame after rejection of the First Proposal, when CPM was involved in attempting to discern what its shortcomings were. This corresponds to May 12, 2002, to the end of Stage 2A.

The remaining CPM costs total $29,724.74. Of this, the tribunal finds that it will order that all of the costs attributable to the Second Modified Analysis, $12,188.81, be paid by the LSRCA. Of the remaining $17,535.93, which corresponds to the Third Proposal and the hearing, the tribunal is of the opinion that some additional work was required by CPM from the First Analysis. The January hearing had to be adjourned until April because CPM had failed to provide the LSRCA with its modeling data for the Third Proposal. These two factors lead the tribunal to find that it will apportion the remaining engineering cost for Stages 2B, 3 and 4 equally between Cooper and the LSRCA. This amount is fixed at $8,767.97. The LSRCA will be ordered to pay $20,956.78 of the CPM expense.

Costs of Mr. Geist

One other issue raised by Mr. Geist was whether the fixing of costs could exceed that which was billed to the client, where the client, was given a discount.

O'Connor v. Gelb (1988) 29 C.P.C. (2d) 124 (Ont. S.C.) involved a medical malpractice case for damages, whose value was far less than the costs incurred. The master had assessed costs against the defendant. In the appeal, the court noted that if the plaintiff had been willing to pay costs disproportionate to the amount recovered, the solicitor would have been entitled to collect the disproportionate costs. In the situation where the defendants are ordered to pay those costs, the fact that the solicitor admitted that he would have reduced the bill substantially, did not mean that the defendants were entitled to the same discount.

What distinguishes this appeal from **O'Connor** is that Mr. Cooper has already paid the amounts billed by Mr. Geist, although this does not seem to matter in at least one of the cases cited below, **Formea Chemicals**.

In **Willowrun Investment Corporation v. Greenway Homes Ltd.** (1987), 21 C.P.C. 129, (Ont. S.C.), the Master, whose assessment was appealed, discussed the fees paid to a subcontracted lawyer for research. $40 per hour was allowed, but it came to the attention of the defendants that the firm had actually paid only $10 per hour for this service. The Master determined that the work was actually performed and that $40 per hour was an appropriate amount on a party and party assessment. The court found that there was no evidence that the rate exceeded "the amount required to indemnify the firm for its costs for fees [being] a rule [which applies] to aggregates of such costs and not to each separate item." [p. 143] **Formea Chemicals Ltd. V. Polymer Corporation Ltd.** (1967) 2 O.R. 424 (Ont. S. C. Taxing Office) was referred to as authority. The party and party taxed fees exceeded the solicitor and client fees actually paid, but the solicitor and client disbursement exceeded the party and party taxed disbursements. The taxing officer did not reduce the taxed costs. He found that the term "costs" referred to both fees and disbursement. He found that the solicitor and client fees already paid by the defendant to his solicitor do not operate to limit the taxed party and party costs. The headnote states:

> A successful party cannot recover more party-and-party costs than he has paid to his own solicitor, but "costs" refers to the total of fees and disbursements, and he may therefore recover more in fees than he has actually paid.

The responsibility for the need for adjournment of the January, 2002 hearing is found to rest with Mr. Cooper. The LSRCA was not provided with notice or an adequate opportunity to prepare, when the Third Analysis was sprung on it and the tribunal at that hearing. This factor will also be taken into account when fixing costs.

The tribunal finds that Mr. Cooper is entitled to a portion of Mr. Geist's fees and disbursements, awarded on a partial indemnity scale. The total claimed on this basis, is $32,300.09, while the actual costs were $25,518.96. The tribunal finds that Cooper will be fully responsible for Mr. Geist's legal bills through Stage 2A, reflecting the fact that it was not realistic to expect to settle the matter until some hydraulic analysis had been undertaken. Mr. Geist's billings for Stage 2B appear to have been incorporated into those of Stage 3. Total actual billings for Stage 3 were $7,521.03, but realistically, the major portion of the actual June 30, 2001, billing of $5,378.89 was attributable to Stage 2B. The billings for Stage 4 were $13,681.02. A portion of the January, 2002, billings were attributable to the adjourned hearing, which was necessary because the LSRCA had not received advanced warning of the Third Proposal and underlying modeling. It had been unable to adequately prepare for cross-examination and an adjournment was required. The tribunal finds that it will fix costs on account of legal fees and disbursements payable to Mr. Cooper by the LSRCA on account of the proceeding in the amount of $16,575.

Motion Costs

The tribunal will allow a similar portion of the costs of this motion and fixes the costs in the amount of $6,848.00

Actual Legal Fees less than Amount Claimed

Given that the amount fixed for costs does not exceed the amount actually paid, the issue of the hourly rates charged and claimed by Mr. Geist are found to not be determinative. Had the tribunal found that it would award all costs as claimed, then the issue would have had to be determined. As it rests, on the authority of **Formea Chemicals** and **Willowrun Investments**, it is not necessary to separate out the various elements in the award, but merely to deal with the aggregate.

Conclusion

The tribunal finds that the LSRCA will pay a portion of the costs (legal fees, disbursements, engineering fees) to Mr. Cooper, which have been fixed by the tribunal. The legal fees have been fixed on the basis of Partial Indemnity. The total costs fixed is $44,379.78.