Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: May 3, 2017 **CASE NO.:** 12-033

PROCEEDING COMMENCED UNDER section 41 of the *Environmental Bill of Rights*, *1993*, S.O. 1993, c. 28, as amended

Appellant:	Concerned Citizens Committee of Tyendinaga and Environs (CCCTE)
Instrument Holder:	Waste Management of Canada Corporation
Respondent:	Director, Ministry of the Environment and Climate Change
Subject of appeal:	Terms and conditions imposed under section 20.3 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended, for an Amended Environmental Compliance Approval of the use, operation, and closure of the Richmond Landfill Site.
Reference No.:	A371203
Property Address/Description:	Lot Pt 1, 2, 3, Concession 4
Municipality:	Town of Greater Napanee
Upper Tier:	County of Lennox and Addington
ERT Case No.:	12-033
ERT Case Name:	CCCTE v. Ontario (Environment and Climate Change)
Heard:	In writing

APPEARANCES:

Parties	**Counsel**
Mohawks of the Bay of Quinte	Eric Gillespie and Priya Vittal
Waste Management of Canada Corporation	Harry Dahme and Julia Vizzaccaro

ORDER DELIVERED BY MAUREEN CARTER-WHITNEY

REASONS

Background

[1] This Order addresses an application for costs by the Mohawks of the Bay of Quinte ("MBQ") against Waste Management of Canada Corporation ("WMC"). The application arises from an appeal to the Environmental Review Tribunal ("Tribunal") in 2012 by the Concerned Citizens Committee of Tyendinaga and Environs ("CCCTE") of certain conditions of Amended Environmental Compliance Approval No. A371203 ("ECA") issued by the Director, Ministry of the Environment and Climate Change ("MOECC") to WMC, in relation to the closure of the Richmond Landfill Site ("Landfill") in the Town of Greater Napanee. The Tribunal granted party status in this matter to the MBQ.

[2] Additional background information about this proceeding is provided in the Tribunal's order of December 24, 2015 (*Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 62 ("December 2015 Order")), and in the Tribunal's final decision in this matter (heard over 19 days from April to June, 2015), which was issued on April 14, 2016 (*Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Ministry of the Environment and Climate Change)*, [2016] O.E.R.T.D. No. 19).

[3] The MBQ initially brought an application for costs against WMC prior to the main hearing in this matter. On February 2, 2015, the Tribunal dismissed that application in part to the extent that the MBQ sought advance costs, allowing the hearing of the application to continue with respect only to costs sought in relation to past conduct in the proceeding, under Rules 225 to 227 of the Tribunal's *Rules of Practice* ("Rules") ("February 2015 Order"). The Tribunal's reasons for its February 2015 Order were issued on June 18, 2015 (*Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Ministry of the Environment and Climate Change)*, [2015] O.E.R.T.D. No. 24)

("June 2015 Order"). On March 27, 2015, the Tribunal issued an order, at the MBQ's request and on consent of the parties, adjourning the MBQ's application for costs for past conduct to a date to be scheduled after the completion of the main hearing.

[4] In November 2015, the *Statutory Powers Procedure Act* ("*SPPA*") was amended to require, at s. 17.1(7), that submissions for a costs order be made by way of written or electronic documents, unless a party satisfies the Tribunal that to do so is likely to cause the party significant prejudice.

[5] In February 2016, the MBQ requested that the costs application be heard in person. The Tribunal heard submissions on this request and, on April 29, 2016, ordered that the MBQ's application would be heard in writing and set dates for submissions by the parties on the application for costs (*Concerned Citizens Committee of Tyendinaga and Environs v. Ontario (Ministry of the Environment and Climate Change)*, [2016] O.E.R.T.D. No. 21). The parties subsequently requested and were granted extensions to these deadlines.

[6] After receiving the MBQ's reply materials, WMC submitted that a significant portion of the reply submissions were not proper reply. WMC also noted that these materials had been submitted three days late. The MBQ stated that the delay was limited and should not prejudice the fair hearing of the application. The Tribunal accepted the late submission of MBQ's reply materials, which were due on Friday, August 26, 2016 and provided on Monday, August 29, 2016. The Tribunal determined that, although the materials were not filed on time, there was a delay of only one business day in providing the materials and the Tribunal was not provided with submissions indicating that this created any prejudice to WMC.

[7] The Tribunal received submissions from the parties on the nature of proper reply, but reserved its decision on WMC's request that the Tribunal, in considering the application, exclude paras. 2 to 12, 18, 21 and 22 of the MBQ's reply submissions and the entirety of Chief R. Donald Maracle's reply affidavit and exhibits. For the reasons outlined below under Issue 1, the Tribunal allows paras. 7 to 9 of the MBQ's reply

submissions, and strikes paras. 2 to 6, 10 to 12, 18, 21 and 22 of those submissions, as well as paras. 3 to 7 of Chief Maracle's reply affidavit and the attached exhibits.

[8] On September 30, 2016, the Tribunal, with reasons to follow, granted WMC leave to file surreply in order to address the statement at para. 14 of the MBQ's reply submissions that WMC had consented to the service of additional materials (including witness statements and expert reports) by the MBQ prior to the start of the main hearing in this proceeding. The Tribunal's reasons for permitting surreply by WMC are set out below under Issue 2.

[9] The MBQ seeks an order of the Tribunal directing WMC to pay the MBQ costs in the amount of $445,037.19 for legal representation and expert evidence, on the grounds that WMC's conduct and/or course of conduct in relation to this proceeding has been unreasonable.

[10] For the reasons set out below, the Tribunal dismisses the MBQ's application for costs.

Issues

[11] The issues before the Tribunal are:

1. whether to strike paras. 2 to 12, 18, 21 and 22 of the MBQ's reply submissions, along with Chief Maracle's reply affidavit and exhibits in support of the MBQ's reply submissions, as improper reply;
2. whether to grant WMC leave to file surreply in response to para. 14 of the MBQ's reply submissions; and
3. whether to order WMC to pay costs to the MBQ.

Relevant Legislation and Rules

[12] The relevant provisions of the *SPPA* and the Rules that apply to this proceeding are:

Statutory Powers Procedure Act

> 17.1(1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding.
>
> (2) A tribunal shall not make an order to pay costs under this section unless,
>
> (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
>
> (b) the tribunal has made rules under subsection (4).
>
> (3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4).
>
> (4) A tribunal may make rules with respect to,
>
> (a) the ordering of costs;
>
> (b) the circumstances in which costs may be ordered; and
>
> (c) the amount of costs or the manner in which the amount of costs is to be determined…

The Tribunal's Rules

> 212. A costs award refers to the reimbursement of reasonable and eligible expenditures incurred by a Party for participation in a proceeding before the Tribunal. The objectives of the Tribunal's costs Rules are to: provide consistency and predictability in the awarding of costs by outlining relevant principles and evaluation criteria; to encourage responsible conduct in proceedings; and to discourage unreasonable conduct.
>
> 217. The Party seeking a costs award bears the burden of proof and must demonstrate that any requested costs are:
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> (a) directly and necessarily incurred in relation to the proceeding before the Tribunal;
>
> (b) reasonable in the circumstances;
>
> (c) properly documented and verified; and
>
> (d) consistent with the principles and criteria outlined in these Rules.

218. When filing a costs application with the Tribunal, the Party seeking a costs award shall provide:

(a) an explanation of how the requirements in Rule 217 (a), (b) and (d) have been met;
(b) a summary statement of hours and fees for each lawyer and consultant, supported by time dockets, invoices and a detailed description of the activity; and
(c) a summary statement of disbursements for each lawyer or consultant supported by corresponding invoices or receipts. Where invoices or receipts are not obtainable for good reasons, the Tribunal may accept a written record of individual disbursements and associated dates.

225. Under section 17.1 of the *Statutory Powers Procedure Act*, the Tribunal may only order costs to be paid if the conduct or course of conduct of a Party has been unreasonable, frivolous or vexatious or if a Party has acted in bad faith.

This power applies to all proceedings before the Tribunal except proceedings under the *Oak Ridges Moraine Conservation Act, 2001,* proceedings under the *Greenbelt Act, 2005* and Niagara Escarpment Plan amendment proceedings under the *Niagara Escarpment Planning and Development Act*, unless the Niagara Escarpment Plan amendment proceeding is brought under the *Consolidated Hearings Act*.

It is expected that this power will only be used in the rare case where a Party's conduct warrants such an award. In determining an award of costs under this Rule, the Tribunal may consider, among other things, the conduct of the requesting Party as well as whether the Party against whom a costs award is sought:

(a) failed to attend a Hearing or to send a representative when properly given notice, without contacting the Case Coordinator;
(b) failed to co-operate, changed a position without notice, or introduced an issue or evidence not previously mentioned;
(c) failed to act in a timely manner;
(d) failed to comply with the Tribunal's Rules or procedural orders;
(e) caused unnecessary adjournments or delays or failed to prepare adequately for Hearings;
(f) failed to present evidence, continued to deal with irrelevant issues, or asked questions or acted in a manner that the Tribunal determined to be improper;
(g) failed to make reasonable efforts to combine submissions with Parties of similar interest;
(h) acted disrespectfully or maligned the character of another Party; and,
(i) knowingly presented false or misleading evidence.

226. The Tribunal is not bound to order costs when any of the instances listed in Rule 225 occurs nor does the Tribunal have to find that one of the instances occurred in order to conclude that the conduct of a Party has been unreasonable, frivolous or vexatious or that a Party

> has acted in bad faith. The Tribunal will also consider whether the issues respecting the conduct of such a Party can be addressed by a denial or reduction of costs in its favour rather than a costs award against it.

Discussion, Analysis and Findings

Issue 1: Whether to strike paras. 2 to 12, 18, 21 and 22 of the MBQ's reply submissions, along with Chief Maracle's reply affidavit and exhibits in support of the MBQ's reply submissions, as improper reply

[13] WMC submits that reply is to be limited to a response to new matters first raised in the respondent's submissions, and reply may not: add new issues or evidence that the applicant was aware of or could have reasonably anticipated or addressed at first instance in their submissions; or attempt to bolster earlier submissions. WMC notes that the rule for proper reply is set out in the Supreme Court of Canada decision in *R. v. Krause*, [1986] 2 S.C.R. 466 ("*Krause*"), and states that the application of that rule does not allow the MBQ to file additional materials or make additional arguments unless they are in direct response to something that was raised for the first time in the responding submissions of WMC.

[14] WMC asserts that paras. 2 to 12, 18, 21 and 22 of the MBQ's reply submissions attempt to bolster their earlier submissions. WMC further asserts that the submissions contained in paras. 2 to 12, 18, 21 and 22 of the MBQ's reply submissions and Chief Maracle's supporting affidavit and exhibits constitute improper reply, and requests that they be excluded from the materials considered by the Tribunal on this application. WMC further submits that the MBQ's rationale (set out below) for providing these submissions and materials in reply does not operate so as to set aside the rule for proper reply.

[15] WMC disagrees with the suggestion by the MBQ that, if their position in their initial submissions on this application was not clear to WMC, then this would provide a sufficient rationale for ignoring the rule and practice regarding proper reply. WMC

submits that this rationale should not operate so as to set aside the rule for proper reply from *Krause*.

[16] The MBQ agree that the definition of proper reply is set out in *Krause* but adds that *Krause*, at para. 16, goes on to state that reply "will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other." The MBQ submit that they realized, after reviewing WMC's submissions, that the MBQ's position in their initial submissions was not clear to WMC. The MBQ say they are seeking to ensure that the Tribunal has the MBQ's full submissions where it appears any uncertainty or ambiguity may exist.

[17] The MBQ submit that WMC raised new issues in its responding submissions, such as the need for the MBQ to demonstrate actual harm from the Landfill, and that WMC made reference to a number of new cases regarding First Nation rights and status, as well as the conduct of mediation. The MBQ assert that it is clearly proper to reply to these matters as well. The MBQ further submit that WMC states in its submissions that additional financial records are necessary. The MBQ state that they initially put forward a financial record as an example, and submits that they should be permitted to respond with additional material where a direct challenge is raised for the first time by a respondent in its submissions.

[18] As noted by both parties, the Supreme Court of Canada sets out the requirements of proper reply in *Krause*, a criminal law decision, at paras. 15 and 16:

> At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings…. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The

> underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.
>
> The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

[19] As stated in the excerpt of *Krause* quoted above, the Crown or plaintiff is required in the first instance to produce and enter all of the clearly relevant evidence it has or intends to rely on to establish its case, with respect to all the issues raised, to ensure that it does not split its case. The Court states that this rule is intended to prevent the "unfair surprise, prejudice and confusion" that could result if the moving party is allowed to close its case and then later add further evidence to bolster its position, after the defending party completes its case. The Court explains that the reason for this rule is that the defending party is entitled to have the moving party's full case before it so that it knows from the outset what it must meet in response.

[20] However, the Court in *Krause* acknowledges that there is a limited opportunity for reply evidence after the defending party presents its responding case. It is available only for the moving party to reply where the defending party has raised a new matter or defence that the moving party could not reasonably have anticipated and, therefore, had no opportunity to address. The Court makes clear that there is no right to reply regarding matters that "merely confirm or reinforce earlier evidence" that could have been brought before the defending party made its case.

[21] The Tribunal observes that *Krause* is a criminal law case, and that the rules of evidence are not necessarily applied as strictly in administrative law proceedings. However, the Tribunal finds that it is appropriate in the circumstances of this case to apply some of the principles enunciated in *Krause*, for the reasons set out below.

[22] In paras. 2 to 6 of their reply submissions, the MBQ submit that they have suffered serious impacts because funding has been taken away from infrastructure and education projects in their community in order to engage in this litigation. In providing these reply submissions, the MBQ specifically identify paras. 52 and 76 of WMC's submissions. At para. 52 WMC states that the MBQ did not provide any evidence that they suffered any impact beyond incurring costs, or any evidence of any adverse impact on the hearing as a result of WMC's allegedly unreasonable conduct. At para. 76 WMC states that the reason put forward by the MBQ for their participation in the hearing, namely the potential for leachate from the Landfill's prior operations to adversely impact their Territory or potential land claims, is insufficient to merit the exercise of the Tribunal's discretion to award costs because it is not a ground for the awarding of costs pursuant to s. 17.1 of the *SPPA* and there is an insufficient evidentiary basis to substantiate the MBQ's allegations.

[23] Having reviewed paras. 52 and 76 of WMC's submissions, the Tribunal finds that WMC was not asserting that the MBQ had failed to provide evidence that they suffered serious impacts due to redirecting funding within their community. Instead, it was WMC's submission that the MBQ had not provided sufficient evidence of adverse impacts resulting from WMC's allegedly unreasonable conduct, given the context of s. 17.1 of the *SPPA*, which provides that a tribunal shall not make an order to pay costs unless the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith.

[24] The Tribunal observes that the MBQ had already described, at paras. 47 to 50 of their initial submissions, that they were bearing a significant financial burden due to this proceeding because funds that should have been used for other infrastructure and programming needs of the community had been diverted to this litigation. The MBQ's reply submissions in paras. 2 to 6, which cite additional evidence provided in paras. 3 to 6 of Chief Maracle's reply affidavit concerning the funding and financial situation of the MBQ, would serve only to confirm and reinforce their earlier submissions. The Tribunal finds that WMC did not raise a new matter in its responding submissions and, therefore, it was not proper reply for the MBQ to provide further submissions on how they funded

the costs of their role in the hearing process. The Tribunal strikes paras. 2 to 6 from the MBQ's reply submissions. Because paras. 3 to 6 of Chief Maracle's reply affidavit only address additional evidence relating to the matters set out in paras. 2 to 6 of the MBQ's reply submissions, which are being struck, paras. 3 to 6 of Chief Maracle's reply affidavit are therefore also struck.

[25] At para. 7 of the MBQ's reply submissions, they say that they should not be required to demonstrate harm from the Landfill itself. The MBQ state that this submission is in reply to para. 78 of WMC's submissions, which asserts that there is no evidence of actual impact from Landfill leachate on the MBQ's lands. The MBQ's initial submissions addressed potential or probable impact.

[26] WMC's submission in para. 78 appears to raise a new matter in suggesting that the MBQ needed to demonstrate actual harm resulting from the Landfill in seeking costs. The Tribunal finds that this is a new matter that the MBQ could not reasonably have anticipated. As a result, the Tribunal allows para. 7 of the MBQ's reply submissions.

[27] In paras. 8 to 12 of the MBQ's reply submissions, they provide additional submissions regarding the relevance of the MBQ's status as a First Nation to their request for costs. The MBQ state that these submissions constitute proper reply to paras. 68, 69, 73, 77 and 79 of WMC's submissions.

[28] At paras. 68 and 69 of its submissions, WMC states that neither advancing a First Nation's rights nor funding of a First Nation's participation trigger the limited power provided to the Tribunal to award costs under s. 17.1 of the *SPPA*. Citing *Xeni Gwet'in First Nations v. British Columbia*, 2001 BCSC 1641 ("*Xeni Gwet'in*") and *Preserve Mapleton Inc. v. Ontario (Ministry of the Environment)*, [2012] O.E.R.T.D. No. 19 ("*Preserve Mapleton Inc.*"), WMC asserts that the Tribunal does not have the authority to award costs for the purpose of protecting Aboriginal or First Nations rights, and cannot override the requirement to find improper conduct or course of conduct under s. 17.1 of the *SPPA* in order to reduce barriers to participation. In reply, the MBQ seek to

respond to *Xeni Gwet'in* and *Preserve Mapleton Inc*. The Tribunal finds that WMC has introduced new case law, upon which it relies, and that the MBQ should be permitted to reply. Therefore, the Tribunal allows paras. 8 and 9 of the MBQ's reply submissions.

[29] The MBQ seeks to reply to WMC's assertions at para. 73 (regarding the Tribunal's June 2015 Order finding that it has no jurisdiction to address the MBQ's concerns regarding the Honour of the Crown), para. 77 (that the MBQ have provided insufficient evidence regarding the basis of their land claim and potential land claim), and para. 79 (that the MBQ have provided no basis for the suggestion that their Boil Water Advisory is in any way related to the matters at issue in the hearing). However, the Tribunal finds that WMC has not, in its submissions, raised any new matters that the MBQ could not reasonably have anticipated. The reply submissions put forward by the MBQ would only confirm and reinforce their earlier evidence and submissions. As a result, the Tribunal strikes paras. 10 to 12 of the MBQ's reply submissions.

[30] In para. 18 of their reply submissions, the MBQ seek to respond to paras. 75 and 76 of WMC's submissions. At para. 75, WMC notes, regarding Chief Maracle's evidence about the MBQ's financial status, that the MBQ have failed to provide financial statements for 2013, 2015 and 2016. WMC suggests that the Tribunal is therefore unable to assess the veracity of Chief Maracle's evidence in respect of the MBQ's finances. WMC's submissions at para. 76 are summarized above at para. 22 of this order. WMC submits that the financial statements included in Chief Maracle's reply affidavit and referenced in para. 18 of the MBQ's reply submissions provide new evidence that the MBQ were aware of and should have included in their initial costs submissions.

[31] The MBQ submit that the financial statements they originally included were meant to provide an example of the MBQ's financial status, and the omission of the 2013, 2015 and 2016 financial statements was not intended to deprive the Tribunal of necessary information.

[32] The MBQ now seek to provide the 2013, 2015 and 2016 financial statements as exhibits to Chief Maracle's reply affidavit, which refers to these attached exhibits at para. 7. WMC submits that the 2013, 2015 and 2016 financial statements provide new evidence that the MBQ were aware of and should have included in the MBQ's initial cost submissions. The MBQ submit that, because WMC has raised a direct challenge for the first time in its responding submissions and said that additional financial records are necessary, the MBQ should be permitted to reply with additional material.

[33] The Tribunal observes that the MBQ did submit financial statements for certain years as exhibits with their initial submissions on this costs motion. In their initial submissions, the MBQ cite many specific paragraphs of Chief Maracle's affidavit, dated June 27, 2016, but do not directly cite para. 57 of his affidavit, which referenced Exhibits J, K and L to his affidavit, respectively: the MBQ's consolidated financial statements as of March 31, 2012 and March 31, 2014; and MBQ's Historical Unaudited Financial Report. These exhibits were included amongst exhibits that included invoices for environmental consulting services and legal fees, as well as a breakdown of the costs being sought by the MBQ. The fact that the MBQ provided examples of certain financial statements indicates that they were aware of the relevance of such financial statements in making a claim for costs. The MBQ made a conscious choice to provide only examples of these financial statements at a point when it was open to them to provide all of these statements.

[34] Given that the MBQ are seeking costs over an extended period of time in relation to this proceeding, the Tribunal finds that it was reasonable to expect the MBQ to provide financial statements for that entire period of time from the outset, with their initial submissions. The Tribunal further finds that, in pointing out a deficiency in the range of financial statements produced by the MBQ, WMC did not raise a new matter that the MBQ could not have anticipated. In seeking to provide the additional financial statements in reply, the MBQ are attempting to reinforce their case. Therefore, the Tribunal strikes para. 18 of the MBQ's reply submissions. Para. 7 of Chief Maracle's reply affidavit notes that the MBQ's Consolidated Financial Statements from 2013, 2015 and 2016 are attached as Exhibits A, B and C to the reply affidavit, and provides an

explanation as to why they were not attached to the MBQ's initial submissions. Because para. 7 of Chief Maracle's reply affidavit and the accompanying exhibits are solely concerned with the matters set out in para. 18 of the MBQ's reply submissions, which are being struck, it follows that para. 7 of Chief Maracle's reply affidavit and the exhibits are also struck.

[35] In paras. 21 and 22 of their reply submissions, the MBQ seek to reply to WMC's submissions concerning mediation. WMC submits that the MBQ are attempting to bolster their earlier submissions regarding the mediation. The MBQ assert that it is proper for them to provide reply submissions because WMC made reference to the conduct of the mediation.

[36] In their initial submissions, the MBQ state that they engaged in mediation discussions with WMC and submit that, at the time of the mediation, WMC knew or ought to have known the MBQ's position on the Landfill and how pursuing the hearing would affect the MBQ. The MBQ submit that they should therefore be awarded the costs of mediation. In response, WMC submits that the proceeding for which costs may be awarded does not include the mediation. Asserting that the MBQ's allegations relate to conduct that occurred in the mediation, WMC provides information concerning the terms under which the mediation was conducted and notes that it was on a confidential, privileged and without prejudice basis.

[37] The Tribunal finds that, having made submissions about WMC's knowledge about the MBQ's position within the context of mediation discussions, and having submitted that they should be awarded the costs of mediation, the MBQ could reasonably have anticipated that WMC might make responding submissions concerning the terms under which the mediation was undertaken. The Tribunal finds that the rule for reply, as set out in *Krause*, does not permit the MBQ to provide reply submissions in response to WMC's submissions with respect to the terms and conduct of the mediation merely to confirm or reinforce earlier evidence that the MBQ could have brought before WMC made its case. Therefore, the Tribunal strikes paras. 21 and 22 of the MBQ's reply submissions.

[38] To conclude on this issue, the Tribunal allows paras. 7 to 9 of the MBQ's reply submissions, and strikes paras. 2 to 6, 10 to 12, 18, 21 and 22 of those submissions, as well as paras. 3 to 7 of Chief Maracle's reply affidavit and the attached exhibits.

Issue 2: Whether to grant WMC leave to file surreply in response to para. 14 of the MBQ's reply submissions

[39] As noted above, the Tribunal granted WMC leave to file surreply in order to address para. 14 of the MBQ's reply submissions. In that paragraph, the MBQ asserted that WMC consented to the service of additional materials by the MBQ prior to the start of the main hearing in this proceeding.

[40] WMC disagreed with the contention that it consented to the service of additional materials (including witness statements and expert reports) beyond the deadlines agreed upon by the parties or directed by the Tribunal. WMC submitted that the Tribunal's decision to allow the MBQ to file and rely on the late served materials at the hearing should not be construed as consent on the part of WMC to the late delivery by the MBQ of new evidence immediately before the start of the hearing. WMC requested that it be granted leave to file surreply in order to address this issue.

[41] The MBQ submitted that there is no difference whether WMC consented to the admission of the MBQ's additional materials at the main hearing or the Tribunal directed that they be received in evidence. The end result was that the MBQ's evidence was properly before the Tribunal. The MBQ submitted that the issue was *res judicata* and did not warrant reopening the hearing at this stage with new evidence from WMC, which might require the MBQ to file responding evidence or undertake cross-examinations.

[42] The Tribunal observes that the MBQ submitted in reply that WMC consented to the service of certain materials by the MBQ prior to the hearing in this matter. WMC disagreed with this submission by the MBQ, and therefore asserted that it must file surreply to address it. Given the disagreement between the parties on this submission

by the MBQ in reply, the Tribunal permitted surreply submissions from WMC in order for the Tribunal to fairly assess whether or not WMC provided consent in this instance.

[43] Therefore, the Tribunal granted WMC leave to file surreply to address the statement in para. 14 of the MBQ's reply submissions.

Issue 3: Whether to order WMC to pay costs to the MBQ

[44] The Tribunal's authority to award costs in relation to an appeal under the *EPA* arises solely from s. 17.1 of *SPPA*, which provides, at s. 17.1(2), that a tribunal shall not make an order to pay costs under s. 17.1 unless: the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious, or a party has acted in bad faith; and the tribunal has made rules relating to costs under s. 17.1(4). As set out above, the Tribunal has developed rules concerning costs.

[45] The language in s. 17.1(2) is mandatory, prohibiting the Tribunal from ordering a party to pay costs unless its conduct has been unreasonable, frivolous or vexatious, or in bad faith. In *Preserve Mapleton Inc.,* at para. 88, the Tribunal discussed its authority to award costs:

> …The Tribunal only has the authority given to it under an express statutory grant. With respect to the issue of costs, section 17.1 provides this specific statutory authority to grant costs only on the basis that the conduct of a party has been unreasonable, frivolous, vexatious or in bad faith. The Tribunal has consistently held that its authority to grant costs under the *SPPA* is limited, and that it can only award costs in situations of improper conduct.

[46] The Rules confirm that the Tribunal has only this limited authority to award costs. Rule 225 emphasizes that it is expected that the power to award costs will only be used in the rare case where a party's conduct warrants such an award.

[47] In considering applications for costs, the Tribunal has consistently applied a three-stage analysis, set out in numerous past decisions. The Tribunal adopts that framework in this instance and therefore, in determining whether to grant the award of

costs sought by the MBQ, the Tribunal will engage in the following analysis as set out in *Baker v. Ontario (Ministry of the Environment)*, [2009] O.E.R.T.D. No. 29 ("*Baker*") at para. 38:

> 1. The Tribunal must first determine whether a Party has engaged in unreasonable, frivolous, or vexatious conduct or acted in bad faith.
> 2. If so, the Tribunal then considers whether to exercise its discretion to award costs.
> 3. If the Tribunal exercises its discretion to award costs, the Tribunal then exercises its further discretion in determining the appropriate amount of the cost award.

The Parties' Submissions

Mohawks of the Bay of Quinte

[48] The MBQ provide background submissions describing: their history and status as a band within the meaning of the *Indian Act*; the lands they hold in Aboriginal title ("Territory"); and the lands that are not yet ceded and subject to land claim agreements ("Traditional Lands"). They describe the location of the Landfill relative to their Territory and Traditional Lands, and their concerns that the release of leachate from the Landfill into Mud Creek, or migration of leachate below ground, may directly impact drinking water quality in the Territory. The MBQ note their opposition to the unsuccessful attempt to expand of the Landfill in the past and their retainer of XCG Consultants Ltd. ("XCG") to perform independent testing for off-site leachate impacts. (Similar background information is summarized in the Tribunal's December 2015 Order.) The MBQ state that WMC paid $329,464.38 in costs to the MBQ for professional expenses, excluding legal fees, incurred by the MBQ until June 2009 in relation to the previously proposed Landfill expansion.

[49] The MBQ assert that they have requested for many years that WMC pursue meaningful and long-term off-site investigation of leachate impacts in order to protect their community but they say they have been met with resistance and lack of cooperation from WMC and, consequently, have been required to continue to retain expert and legal assistance and participate in this proceeding. They describe their

involvement in the Tribunal hearing process and their recommendations to the Tribunal during the hearing. The MBQ submit that the Tribunal's final decision in this matter reflects most, if not all, of the key recommendations that the MBQ made, and what the MBQ have been requesting of WMC for many years.

[50] The MBQ state that they are a First Nation community that is severely constrained by their limited resources. They submit that, as a First Nation, the MBQ must be regarded differently than an impacted individual, municipality or corporation when considering the issue of costs. The MBQ cite a passage from *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015 ("Truth and Reconciliation Commission report"), which states that the central goals of Canada's Aboriginal policy for over a century were to eliminate Aboriginal governments, ignore Aboriginal rights, terminate the Treaties and cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious and racial entities in Canada, through a process of assimilation that amounted to cultural genocide. The MBQ assert that the effects of this legacy remain and the heavy burden of disadvantages faced by First Nations must be considered when deciding costs.

[51] Citing *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*"), at paras. 113-115, the MBQ submit that land held in Aboriginal title (as well as land under claim) is *sui generis*, distinguished from other proprietary interests and characterized by the following dimensions: it is inalienable to third parties as it cannot be transferred, sold or surrendered to anyone other than the Crown; it arises from the prior occupation of Canada by Aboriginal peoples before the assertion of British sovereignty; and it is held communally and cannot be held by individual Aboriginal persons. The MBQ rely on *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 37-38 to support the proposition that the potential existence of Aboriginal right or title, while asserted but unproven, must be respected and, therefore, the MBQ's Aboriginal title over their Territory and claims over their Traditional Lands must be recognized and respected.

[52] The MBQ assert that their proprietary rights have direct implications for the awarding of costs in this case because, given the nature of their lands, their history and ownership by the entire community and the inability to sell or relocate, the Tribunal must give special recognition to the MBQ's responsibilities to protect their Territory and Traditional Lands. They state that they cannot disassociate themselves from obvious threats, and they have been forced to defend their interests for reasons that extend beyond the concerns and obligations of most other landowners. The MBQ further state that, because of the nature of their lands, WMC has an obligation to recognize and respect its responsibility in respect of these lands.

[53] The MBQ state that, of the estimated 1,100 homes on the Territory, approximately 750 rely on well water and, as a result, they have a strong interest in groundwater quality on the Territory. They note the history of failing to provide safe drinking water to indigenous communities in many parts of Canada and the short-term and long-term drinking water advisories in place in many First Nation communities. The MBQ state that they are on the Federal government's drinking water advisories list due to a Health Canada precautionary Boil Water Advisory. They submit that they have been taking prudent and necessary actions to protect their citizens from further contamination from the Landfill, but that WMC has failed to acknowledge the unique vulnerabilities and needs of MBQ or to properly respond to them.

[54] The MBQ state that, in order to fully participate in the hearing, they required and continue to require legal representation and expert assistance, and so it was and continues to be necessary for the MBQ to seek advice from various scientific professionals to review and assess the data generated by WMC. The MBQ submit that this has added substantially to the cost of their participation in this process and they have struggled to keep up with the expenses outstanding. They further submit that they are now subject to a significant financial burden, and funds that should be used to address other infrastructure and programming needs of the community are being spent on litigation, directly compromising the community's standard of living.

[55] The MBQ note that First Nations do not receive specific funds from Aboriginal and Northern Affairs Canada to participate in the Tribunal process, and their requests to WMC for funding have been denied on multiple occasions, except for funding of $5,000 provided by WMC. They assert that because they do not have a litigation fund, they have been forced to fund their participation in this proceeding by using Ontario Lottery Gaming allocation funds, which are not intended to fund litigation but to develop infrastructure and housing and provide funds for post-secondary education, health and safety. The MBQ state that, as a result, they now require costs in this case to reinvest in these types of community programs.

[56] The MBQ submit that WMC knew or ought to have known that contamination from the Landfill was leaking from its property prior to the commencement of the Tribunal hearing process and should have been working to ensure that the leachate would not impact the MBQ. They further submit that they should not have had to take on the costs and responsibilities of assessing risks and testing for contamination that could have an impact on their Territory and Traditional Lands, and their costs and legal fees are the direct result of WMC continuing to oppose them throughout this process. The MBQ cite the “polluter pays” principle, which imposes the direct and immediate costs of remedying contamination on those responsible for the pollution, and state that WMC is now a known polluter and should pay the costs associated with this pollution, rather than the MBQ.

[57] The MBQ assert that the Tribunal is part of the Executive Branch of the Crown in right of the Province of Ontario and therefore has the obligation to ensure that the Honour of the Crown is upheld at all times. While the MBQ acknowledge that tribunals are confined to the powers conferred by their constituent legislation, they stated that tribunals should provide whatever relief they consider appropriate in the circumstance in accordance with the remedial powers expressly or impliedly conferred upon them by statute. In support of this proposition, they cite the Supreme Court of Canada decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 (“*Rio Tinto*”) at paras. 60-65.

[58] Further to the Honour of the Crown, the MBQ state that the Tribunal should be cognizant of protecting the rights and interests of the MBQ and, where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Tribunal must balance Aboriginal concerns reasonably with the potential impact of its decision on the asserted right or title and with other societal interests. They submit that the MBQ require a cost award in order to continue to protect their Territory and Traditional Lands, and to fully enjoy their rights to the land without the fear of being unable to manage the contamination from the Landfill. The MBQ assert that the Honour of the Crown requires the Tribunal to have direct regard to this form of accommodation in this case.

[59] The MBQ states that the Supreme Court of Canada determined, in *Rio Tinto,* at para. 69, that while the Legislature did not delegate the Crown's duty to consult to the British Columbia Utilities Commission, the Commission had the power to consider questions of law and matters relevant to the public interest. They acknowledge that the matter before the Tribunal does not raise issues directly pertaining to the duty to consult, but say that it does raise similar fundamental principles of access to justice and the public interest of First Nations participation. The MBQ note that one of the purposes of the Rules, set out in Rule 1, is to facilitate and enhance public participation, and that barriers to access to justice and public participation may be a factor considered by the Tribunal in awarding costs. They submit that the Tribunal should award costs to the MBQ as a matter of public interest and access to justice, due to the implications of the contamination of the Landfill infringing on their Aboriginal rights and title, and the importance of Aboriginal groups being able to fully and fairly participate in litigation that directly affects their interests.

[60] Addressing the Tribunal's jurisdiction regarding costs, the MBQ review the applicable *SPPA* provisions and Rules, replicated above, and the three-stage analysis in *Baker*. They then address the three elements of that analysis.

[61] The MBQ submit that WMC's conduct or course of conduct was unreasonable. They assert that WMC failed to address their concerns in a timely manner, that many

days of hearing time could have been avoided, and that WMC's course of conduct interfered with the Tribunal's ability to secure the most expeditious determination of the proceeding. The MBQ further assert that WMC's conduct interfered with the Tribunal's ability to secure the most cost-effective determination of the proceeding, stating that WMC knew of the MBQ's vulnerable financial situation and limited resources, and was unreasonable in requiring the MBQ to engage in a lengthy and expensive proceeding. The MBQ also submit that WMC interfered with the Tribunal's ability to secure the most just determination of the proceeding because WMC unjustly and unreasonably exacerbated the MBQ's vulnerable position as a historically disadvantaged group with environmental, health and financial difficulties, by forcing them to go through the hearing rather than addressing their issues in relation to contamination from the Landfill at the outset.

[62] Regarding the question of whether the Tribunal should exercise its discretion to award costs, the MBQ acknowledge that the authority to award costs will be used only in rare cases but submits that costs are warranted in this case given the unique nature in which their lands are held and the adverse health and environmental issues they already face. The MBQ assert that the courts have found in favour of awarding costs to Aboriginal litigants who demonstrate a meritorious case where there are special circumstances. In support of this assertion, the MBQ cite the Supreme Court of Canada decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371 ("*Okanagan*"), at paras. 26 and 36, and note that the First Nations cost applicants in *Okanagan* could not afford to pay for legal representation.

[63] The MBQ submit that, in *Xeni Gwet'in*, while the British Columbia Supreme Court concluded that the plaintiffs did not have a constitutional right to publicly funded legal fees in that case (at paras. 23-24), the court had "no difficulty in concluding it is a case of great public importance" (at para. 32) and did not distinguish it from *Okanagan*. The MBQ submit that the Tribunal should, likewise, recognize the unique and exceptional circumstances of the MBQ, and interpret s. 17.1 of the *SPPA* and the Rules within an Aboriginal context.

[64] The MBQ state that their leaders decided to pursue litigation despite the financial impacts in order to advocate for the health and safety of their community, but their ability to address issues concerning the Landfill has been compromised and they have continued to divert funding from other projects that maintain the future of the community. The MBQ submit that the Tribunal should take into consideration a number of unique circumstances in determining whether to exercise its discretion to award costs, including: the threat of contamination from the Landfill and its effects on the MBQ's lands and community; the MBQ's historical disadvantages as an Aboriginal community; their proprietary interests in Aboriginal title; the historical lack of water protection for Aboriginal peoples and the MBQ's alleged water crisis that will be exacerbated by contamination from the Landfill; the MBQ's financial circumstances; and their status as a First Nation.

[65] With respect to the appropriate amount of costs, the MBQ state that all of their costs should be awarded due to the special circumstances noted as well as the pre-hearing conduct of WMC.

[66] The MBQ assert that the Tribunal should consider WMC's pre-hearing conduct and courses of action, citing the decision of the Ontario Municipal Board ("OMB") in *Egremont (Township) Zoning By-law No. 8/1995 (Re)*, [1999] O.M.B.D. No. 57, in which costs were awarded against the Township for its conduct prior to the commencement of the appeal. The MBQ acknowledge that they engaged in mediation and settlement discussions with WMC prior to and during the hearing of these proceedings but state that, at the time of the mediation, WMC knew or ought to have known the MBQ's views and expert opinions on the Landfill, and how pursuing the hearing would affect the MBQ.

[67] The MBQ submit that the Tribunal should also award the costs of mediation when determining the appropriate amount of costs. In making this submission, they rely on the OMB's decision in *Wright v. Victoria (County) Land Division Committee*, [1993] O.M.B.D. No. 1841 ("*Wright*"), which held that where mediation not only clarifies the

issues but also suggests the ultimate answers, the failure to observe such suggestions without valid reason should be penalized through costs.

[68] The MBQ assert that the costs they request were directly and necessarily incurred in relation to the proceeding before the Tribunal, and are reasonable. They provide documentation in Chief Maracle's affidavit and reserve the right to seek additional funding as required as the proceeding continues. The MBQ note that the amounts contained in the spreadsheet at Exhibit G of Chief Maracle's affidavit are the full fees, whereas the amounts identified in Exhibits I and M are the legal fees calculated in accordance with Rule 229 of the Tribunal's Rules, and do not exceed the fee rates under Rule 229.

[69] The MBQ submits that they should not have to demonstrate harm from the Landfill itself because it would be contrary to the *Environmental Protection Act* ("*EPA*") to suggest that the MBQ are required to demonstrate adverse impacts from the leachate before a cost award can be considered. The MBQ state that the purpose of the *EPA*, set out in s. 3(1), is to provide for the protection and conservation of the natural environment, and further state that the precautionary principle should also be considered, noting that the intent of both the *EPA* and the precautionary principle is to protect from environmental harm occurring in the first place.

[70] With respect to their decision not to participate in a Community Liaison Committee ("CLC"), the MBQ assert this was not unreasonable or improper as that body has no authority to address or make orders regarding the MBQ's concerns and participating in the CLC would have added to the costs of this process with no benefit. Regarding the additional materials that the MBQ served on the parties, the MBQ submit that WMC consented to the service of these materials. Regarding the video evidence referred to by WMC, the MBQ note that they elected not to rely on the video evidence at the hearing and submit that there is no evidence to suggest that this prejudiced WMC or delayed the hearing in any substantive way.

[71] The MBQ submit, in reply to WMC's submissions, that the MBQ's accounting has been changed and the MBQ request costs in the amount of $422,654.14 to reflect their costs, minus the HST. However, the MBQ state that this change makes no material difference and would have no economic effect on WMC as any amounts paid would be deducted from WMC's HST remittances.

[72] The MBQ further submit that WMC fundamentally misunderstands the nature of the MBQ's costs claim. The MBQ recognize that they are claiming costs from the time prior to being granted party status, as well as costs related to WMC's pre-hearing conduct and the mediation process. The MBQ rely on their initial submissions in this regard.

[73] The MBQ disagree with WMC's submission that the MBQ cannot rely on the Tribunal's December 2015 Order in this proceeding. The MBQ assert that every costs decision must be based at least in part on the outcome of the case. The MBQ further assert that, had the Tribunal found that none of the MBQ's concerns were valid and none of their requests or recommendations should be granted, it would be difficult to imagine a costs claim being brought or succeeding. The MBQ submit that the Tribunal's December 2015 Order demonstrates the reasonableness of the MBQ's approach and highlights how and why WMC has been unreasonable.

[74] The MBQ submit that it is open to the Tribunal to provide direction if additional details of MBQ's claims require clarification or if the Tribunal decides that portions of the costs claimed should not or cannot be awarded. The MBQ state, however, that none of the concerns raised by WMC provide any basis in principle to not award costs.

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[75] WMC requests that the application for costs be dismissed. WMC states that the MBQ have not satisfied the three-pronged test for an award of costs set out in *Baker*, submitting that the MBQ bear the burden of proof and must provide some rationale, supported by authorities and factual evidence that there was unreasonable conduct

during the hearing. WMC notes that Rule 225 states that the Tribunal will only exercise its discretion to order costs in rare cases.

[76] WMC further submits that the MBQ has not established that WMC's conduct has met the high threshold of unreasonableness to be assessed using the three elements of the test for unreasonable conduct set out in *Baker*, at para. 34: the actual impact of the impugned conduct on the proceedings; the circumstances at the time the conduct occurred; and whether the impacts of the impugned conduct go beyond negative effects on another party. WMC further submits that the Tribunal in *Baker*, at para. 34, concluded that conduct or a course of conduct is unreasonable if it "interferes with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of the proceeding before it."

[77] WMC asserts that the threshold for granting a cost award is high, citing the Tribunal's decision in *Cham Shan Temple v. Ontario (Ministry of the Environment)*, [2014] O.E.R.T.D. No. 60, at para. 38, in which the approval holder failed to cooperate and follow the Tribunal's express directions with respect to modifications to a renewable energy project, timelines for completion and exchange of reports relating to the project modification. Notwithstanding that conduct, the Tribunal in that matter found that the approval holder's conduct only came close to being unreasonable conduct and the Tribunal refused to award costs.

[78] WMC asserts that the MBQ have failed to demonstrate that WMC acted unreasonably, having provided no evidence to suggest that WMC acted in a way that interfered with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of the issues dealt with at the hearing, or that WMC's conduct was unreasonable at the time the conduct occurred. WMC states that the MBQ rely on the Tribunal's decision in its December 2015 Order as a "springboard" to suggest that WMC's earlier conduct was unreasonable. WMC submits, however, that the Tribunal's decision cannot be used retroactively to measure the unreasonableness of WMC's earlier conduct, or as evidence that WMC acted unreasonably at the time the alleged conduct occurred.

[79] WMC states that the MBQ provide no evidence regarding unreasonable conduct by WMC with respect to the hearing itself. WMC states that while Chief Maracle's affidavit evidence suggests that WMC failed to respond to the MBQ's concerns during the hearing, he does not provide examples or facts to support this allegation and does not identify any occasions in the hearing where WMC acted unreasonably. WMC denies Chief Maracle's allegation but asserts that, even if it was true, the failure to address a party's concerns of and by itself is not "unreasonable" and does not give rise to the obligation to pay costs.

[80] WMC goes on to submit, citing *Baker* at para. 35, that conduct that negatively affects another party does not by that fact alone make the conduct unreasonable, and that simply causing the other side to incur costs does not alone merit a finding of unreasonableness. WMC states that the MBQ have not provided any evidence to suggest that they have suffered any impact beyond incurring costs as a result of WMC's allegedly unreasonable conduct, and have not produced evidence of any adverse impact on the hearing due to any unreasonable conduct by or on behalf of WMC. WMC says it complied with all deadlines established by the Tribunal, set out in the Minutes of Settlement or agreed to by the Parties, and completed all the work that it was required to do or agreed to complete. Regarding the allegation in Chief Maracle's affidavit evidence that WMC did not comply with the Public Notification Plan ("PNP"), WMC notes that the MOECC agreed that WMC did comply with the PNP and asserts that the Tribunal, in its decision in the December 2015 Order, did not take issue with WMC's conduct in respect of its obligations under the PNP.

[81] WMC asserts that, in the absence of a clear obligation on WMC to act, it is too difficult for the Tribunal to look back in time at the complex conduct of the Parties and determine what obligations WMC was subject to, when precisely those obligations arose and whether WMC failed to comply with those obligations. WMC further asserts that the MBQ advanced no evidence to suggest that WMC's conduct fell into any of the categories of conduct identified in Rule 225 such that its conduct warrants a costs award, and that even if conduct identified in Rule 225 occurred, an award of costs is not mandatory and the Tribunal may exercise its discretion not to make a costs award.

[82] WMC emphasizes that s. 17.1(1) of the *SPPA* limits the Tribunal's jurisdiction to award costs to "costs in a proceeding" and submits that the "proceeding" is the hearing. WMC submits that the Tribunal should not consider some of the conduct relied on by the MBQ in support of their application for costs. With respect to allegations by the MBQ that WMC acted unreasonably in relation to the Landfill, WMC states that its actions relating to the Landfill prior to the hearing are irrelevant to the issue of costs. Furthermore, WMC disagrees with statements by the MBQ regarding its conduct prior to the hearing, stating that: it made efforts to engage the MBQ, for example in the CLC, but they refused to become involved; and it provided the MBQ with reports, in accordance with the ECA, at the same time they were submitted to the MOECC.

[83] WMC notes that while CCCTE obtained leave to appeal certain conditions of the ECA under s. 38 of the *Environmental Bill of Rights*, the MBQ were not a party to the application for leave to appeal but sought and obtained party status at the preliminary hearing. WMC further submits that some of the MBQ's allegations relate to the period prior to the MBQ being granted party status in this proceeding, stating that the Tribunal does not have jurisdiction to award costs incurred prior to party status being granted, and has no factual record upon which to make any determination as to whether WMC's conduct, as it relates to the MBQ, was unreasonable prior to the MBQ becoming a party.

[84] Citing s. 17.1(1) of the *SPPA*, WMC asserts that the "proceeding" does not include the mediation and, therefore, the Tribunal has no jurisdiction to award costs in relation to the mediation. Noting that a number of the MBQ's allegations relate to conduct that occurred in the mediation of this matter, WMC asserts that Rule 157 and the Confidentiality Undertaking given by the Parties make it clear that all documentation submitted and statements made during the mediation are confidential. WMC states that the mediation was conducted on a confidential, privileged and without prejudice basis, and the MBQ agreed to participate in mediation and signed a Confidentiality Agreement in which they agreed that: there would be no communication to outside parties of any information received during mediation; oral communications during mediation were

confidential, privileged and without prejudice; and oral and written communications during mediation would not be admissible in any current or future proceedings.

[85] WMC further asserts that, even if the Tribunal did have such jurisdiction, it lacks the factual basis upon which to make a finding as to whether WMC's conduct during the mediation was unreasonable. WMC submits that there is no evidence before the Tribunal as to what was said or discussed during the mediation, other than that which resulted in the signed Agreements among the Parties to the hearing and, therefore, there is no evidentiary basis for the Tribunal to award costs in connection with the mediation. Citing *Saltsov v. Rolnick*, 2010 ONSC 6645 ("*Saltsov*"), at para. 18, WMC states that the courts have found that it is neither possible nor desirable to attempt to assess the conduct of either party at mediation and that their behaviour during mediation is not properly the subject of a costs order. Therefore, WMC says that there is no basis for an allegation of improper or unreasonable conduct by WMC during the mediation.

[86] WMC submits that the Tribunal can only consider whether it should exercise its discretion to award costs in the circumstances if the Tribunal finds that WMC has acted unreasonably, and further submits that there is no basis for such a finding in this instance. WMC submits that s. 17.1 of the *SPPA* provides that a costs award is discretionary rather than mandatory and that, even if WMC is found to have acted unreasonably, it is not mandatory for the Tribunal to award costs. WMC notes that in *Baker*, at para. 70, although the proponent conceded that it had failed to comply with procedural directions in a Tribunal order, the Tribunal in that matter found the non-compliance to be a narrow incident of unreasonable conduct and concluded that the applicants for costs had not shown that they were sufficiently prejudiced by the non-compliance for the Tribunal to conclude that this conduct interfered with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of the proceeding. Similarly, WMC asserts that, even if there was improper conduct on the part of WMC in this instance, the impact of that conduct was negligible and does not rise above the high threshold necessary to merit the exercise of the Tribunal's discretion to award costs.

[87] WMC asserts that the status of the MBQ as a First Nation is irrelevant to the Tribunal's determination of costs, stating that neither advancing a First Nation's rights nor funding of a First Nation's participation trigger the limited power provided to the Tribunal to award costs under s. 17.1 of the *SPPA*. WMC submits that First Nations do not have a constitutional right to publicly funded litigation and that neither courts nor tribunals have the jurisdiction to grant such an order, citing *Xeni Gwet'in* at paras. 23-24. WMC states that the Tribunal does not have the authority to award costs for the purposes of protecting Aboriginal or First Nations rights, and goes on to cite *Preserve Mapleton Inc.*, at para. 40, as authority for the proposition that the Tribunal cannot override the requirement to find improper conduct under s. 17.1 of the *SPPA* in order to reduce barriers to participation.

[88] WMC notes that the Tribunal's decision in *Baker*, at para. 43, made clear that consideration of barriers to access to justice and public participation "may not result in an award of costs for an entire proceeding, where there is only a narrow incident of unreasonable conduct which has had a limited impact on the Tribunal's ability to secure the just, expeditious and cost-effective determination of the proceeding." WMC characterizes the MBQ's request for all of their costs as a request for third party funding of their entire participation in matters related to the Landfill, and says that to award costs simply on that basis would render the Tribunal's specific direction that costs should be awarded in only "rare" cases meaningless.

[89] WMC refers to the Tribunal's June 2015 Order in this proceeding, at paras. 57-59, stating that the Tribunal found that it did not have the jurisdiction to address the MBQ's concerns regarding their participation in the hearing as necessary to ensure that the Honour of the Crown is upheld. WMC, therefore, submits that the Tribunal cannot use the MBQ's submissions with respect to the Honour of the Crown as a basis to award costs in this application.

[90] Regarding Chief Maracle's evidence about the MBQ's financial status, WMC observes that the MBQ have failed to provide financial statements for 2013, 2015 and

2016, and asserts that the Tribunal is therefore unable to assess the veracity of Chief Maracle's evidence in respect of the MBQ's finances.

[91] WMC submits that the MBQ have put forward the potential for leachate from the Landfill's prior operations to adversely impact their Territory or potential land claims as the fundamental reason for their participation in the hearing. WMC submits that this is an insufficient reason to merit the exercise of the Tribunal's discretion to award costs, stating that it is not a ground for the awarding of costs pursuant to s. 17.1 of the *SPPA* and that there is an insufficient evidentiary basis to substantiate these allegations.

[92] In support of its submission that there is an insufficient evidentiary basis, WMC asserts that: the MBQ have provided insufficient evidence regarding the basis of their land claim and potential land claim, noting that while Chief Maracle gave evidence about active and potential land claims at the hearing, the Tribunal found this issue to be outside of its jurisdiction in its reasons on the MBQ's earlier costs application, in its June 2015 Order; there has been no expert evidence provided of actual impact in this instance, neither at the hearing nor on this application, and a speculative and potential impact is insufficient to merit the exercise of the Tribunal's discretion to award costs; and there is no basis to suggest that the drinking water advisory described in Chief Maracle's affidavit is in any way related to the matters at issue in the hearing and, therefore, the Tribunal should not consider the drinking water advisory as a reason to exercise its discretion to award costs in this instance.

[93] Citing *Johnson v. Ontario (Ministry of the Environment)*, [2006] O.E.R.T.D. No. 20 ("*Johnson*"), at para. 23, WMC asserts that, in considering whether to exercise its discretion to award costs, the Tribunal may consider the conduct of the party requesting costs. On this basis, WMC submits that the conduct of the MBQ during the time leading up to, and during the course of, the hearing is a relevant consideration in this application. WMC states that the MBQ's conduct supports WMC's submission that the Tribunal's discretion to award costs should not be exercised in this case, saying that the MBQ have shown a disregard for the Tribunal's specific directions as well as their obligations arising from agreements with the other parties.

[94] WMC points to a number of instances in which it says the MBQ failed to comply with the Tribunal's procedural orders or otherwise acted unreasonably. WMC includes, among these examples: the late service of materials that the MBQ intended to rely on at the hearing, over one month after the agreed-upon filing date and shortly before the start of the hearing; and failing to be transparent by producing evidence that they intended to rely on hours before its use despite being in possession of it for more than 11 days. WMC asserts that the late service was not agreed to by the Parties and not disclosed to the Parties in advance by counsel for the MBQ. WMC notes, in its surreply submissions, that it ultimately did not object to the filing of these materials, on the basis of terms and conditions set out by counsel for the Director. However, WMC submits that this does not derogate from its assertion that the MBQ failed to comply with the Tribunal's procedural orders and acted unreasonably, and that these actions of the MBQ should be considered by the Tribunal in assessing their costs request. WMC notes that these types of conduct are identified by the Tribunal in Rules 225(b) and (c) as worthy of consideration in making a costs determination, and submits that the MBQ's conduct weighs against the exercise of the Tribunal's discretion to award costs in this case.

[95] WMC submits that, in the event that the Tribunal decides to exercise its discretion to award costs, the MBQ are not entitled to recover their costs on a full indemnity basis and the costs awarded must be limited to only those costs that are linked with the improper conduct. While denying that it acted unreasonably in this instance, WMC asserts that, even if it did, the MBQ have failed to provide sufficient evidence to link the alleged unreasonable conduct to all of the costs it incurred in this proceeding. WMC further asserts that the MBQ have provided no such evidence aside from stating that the MBQ's continued participation in the hearing was required due to WMC's alleged failure to yield to the MBQ's position on matters at issue before the Tribunal. WMC submits that, in the absence of evidence linking WMC's conduct to any of the costs incurred by the MBQ, the Tribunal cannot award the MBQ any costs on this application.

[96] Finally, in response to the MBQ's submission that they reserve the right to seek additional funding as required as the proceeding continues, WMC submits that the Tribunal has no jurisdiction to award any additional costs in respect of this matter since the proceeding before the Tribunal has concluded.

Analysis and Findings

[97] The Tribunal must first consider the question of whether WMC engaged in unreasonable, frivolous, or vexatious conduct or acted in bad faith. The MBQ asserts that WMC's conduct and/or course of conduct was unreasonable. The MBQ made no submissions alleging that WMC had engaged in conduct that was frivolous or vexatious, or that WMC acted in bad faith. As a result, the Tribunal's analysis focuses on whether or not WMC engaged in unreasonable conduct.

[98] In *Baker*, at para. 28, the Tribunal concluded that "unreasonable" conduct is restricted to situations of improper conduct. At para. 34, the Tribunal in *Baker* further concluded that, in light of the objectives of the Tribunal's costs Rules to provide consistency and predictability in the awarding of costs and to discourage unreasonable conduct, the standard to determine whether conduct or a course of conduct is unreasonable is whether the conduct or course of conduct interferes with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of the proceeding. The Tribunal in *Baker* went on to identify the following three corollaries to this conclusion, at para. 34:

> …First, it is the adjudicator who must measure the actual impact of the impugned conduct, or course of conduct, on the course of the proceeding, which includes consideration of the impact of the conduct on other parties. Secondly, "unreasonableness" must be assessed in terms of the circumstances which were known at the time the impugned conduct occurred, or the time period over which an impugned course of conduct transpired. For conduct to be unreasonable, a party must make an improper decision to act, or fail to act, during the course of the proceeding. A decision can only be improper if the impropriety was clear in the circumstances at the time the decision was made. Thirdly, an assessment as to whether conduct is unreasonable does not turn solely on whether the impugned conduct negatively affected another party. Similarly, the Tribunal may objectively find a party's conduct to be

> unreasonable, even though the party perceived it to be reasonable because it served the party's individual interests at the time.

[99] The Tribunal adopts the conclusion of the Tribunal in *Baker* that it must consider whether WMC's conduct or course of conduct interfered with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of this proceeding. This analysis is consistent with the objectives of the Rules concerning costs, set out in Rule 212, and is therefore appropriate and useful to apply in determining whether WMC's conduct or course of conduct was unreasonable. Similarly, the Tribunal adopts the reasoning in *Baker* concerning the three corollaries, noting particularly, the principle that for conduct to be unreasonable, a party must have made an improper decision to act, or fail to act, during the course of the proceeding.

[100] As summarized above in para. 61, the MBQ asserts that WMC's conduct or course of conduct was unreasonable in that it interfered with the Tribunal's ability to secure the most expeditious, cost-effective and just determination of the proceeding because, for example: WMC failed to address their concerns in a timely manner; it was unreasonable for WMC to require the MBQ to engage in a lengthy, expensive proceeding; and WMC exacerbated the MBQ's vulnerable position by forcing them to go through the hearing rather than addressing their issues at the outset. The Tribunal observes that the basis for these submissions by the MBQ is Chief Maracle's affidavit evidence. The pertinent paragraphs of Chief Maracle's affidavit are as follows:

> 41. The conduct and/or course of conduct of Waste Management in relation to the Richmond Landfill has been unreasonable. Waste Management was fully aware of MBQ's requests for further offsite investigations and XCG's scientific reports prior to the commencement process. Waste Management failed to agree to MBQ's recommendations and forced them into litigation.
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> 42. For many years MBQ has requested Waste Management to pursue meaningful and long-term off-site investigation of leachate impacts in order to protect its Community, but it has been met with resistance and a lack of cooperation from Waste Management. For example, as I state in my Supplementary Witness Statement dated April 7, 2015, there have been multiple occasions, including on August 12, 2013 when monitoring wells have indicated that leachate has exceeded the Reasonable Use Limit and there has been no public notification despite the parties having agreed to a Public Notification Plan finalized in February 2013. This kind

> of behaviour is not cooperative and does not put trust in Waste Management's actions towards MBQ.
>
> 43. The interim and final decision of the Tribunal to add monitoring wells, increase the frequency in testing monitoring wells and increase surface water monitoring are consistent with the recommendations that MBQ and their experts have been making to Waste Management for a number of years and ultimately made by MBQ to the Tribunal. If Waste Management had agreed to resolve the matter with MBQ outside of the hearing process, most or all matters of MBQ's appeal could have been resolved. Both Waste Management and MBQ could have avoided the cost of litigation, experts, expenditure of resources and time for this hearing. Tribunal would have been able to secure a more expeditious and cost effective determination of the proceeding. Waste Management's long history of denials amounts to unreasonable conduct.

[101] According to Chief Maracle, WMC did not agree with the MBQ's recommendations relating to offsite investigations in connection with the Landfill, thus requiring a hearing in this matter. He states that, if WMC had resolved the MBQ's concerns, their costs relating to the hearing would have been avoided. Chief Maracle characterizes WMC's "long history of denials" as unreasonable conduct. On this evidentiary basis, the MBQ submit that WMC was unreasonable in forcing the MBQ to engage in a lengthy and expensive proceeding, given the MBQ's status as a First Nation and their vulnerable position as a historically disadvantaged group with environmental, health and financial difficulties. The MBQ submit that WMC therefore interfered with the Tribunal's ability to secure the most just, expeditious and cost-effective determination of the proceeding, suggesting that it was unreasonable conduct on the part of WMC to not simply address their issues relating to potential contamination from the Landfill at the outset.

[102] Rule 225 provides examples of the types of conduct the Tribunal may consider in making a determination on a costs application. This list of examples of conduct for which costs may be awarded includes: failing to attend a hearing; failing to co-operate; changing a position without notice; introducing an issue or evidence not previously mentioned; failing to act in a timely manner; failing to comply with the Rules or procedural orders; causing unnecessary adjournments or delays; failing to prepare adequately for hearings; failing to present evidence; continuing to deal with irrelevant issues; asking questions or acting in a manner that the Tribunal determined to be

improper; failing to make reasonable efforts to combine submissions with parties of similar interest; acting disrespectfully or maligning the character of another party; and knowingly presenting false or misleading evidence.

[103] It is important to note that Rule 226 makes clear that the Tribunal is not bound to order costs when any of the instances listed in Rule 225 occurs, nor does the Tribunal have to find that one of the instances occurred in order to conclude that the conduct of a party has been unreasonable, frivolous or vexatious or that a party has acted in bad faith. The list of examples of improper conduct in Rule 225 is not intended to be exhaustive. However, the types of conduct included in this list provide an indication of the nature of the conduct that would generally attract an award of costs. The Tribunal observes that all of the types of conduct listed relate to a party's conduct in relation to the Tribunal hearing process and the procedural steps accompanying that process. The Rules governing costs are clear that costs must relate to a "proceeding" before the Tribunal, which is defined in Rule 3 as including a hearing and referring to all matters before the Tribunal in respect of an appeal, application or referral.

[104] In the MBQ's affidavit evidence and submissions, there is no indication that WMC engaged in any of the types of conduct listed, or in any other conduct that could be considered unreasonable. The Tribunal received no evidence of any unreasonable conduct by WMC. The conduct on the part of the WMC identified by the MBQ is not the type of conduct contemplated in Rule 225. Instead, the MBQ have raised conduct by WMC that relates to the substance of the issues that were before the Tribunal at the hearing, specifically the different views held by the MBQ and WMC regarding the proper measures to be taken in investigating and monitoring any off-site impacts of leachate from the Landfill. The MBQ suggest that it was unreasonable conduct on the part of WMC to defend itself in this appeal proceeding and/or to not reach a resolution with the other parties through the mediation process.

[105] As noted in *Baker*, for conduct to be unreasonable, a party must have made an improper decision to act, or fail to act, during the course of the proceeding. The Tribunal in this instance agrees with this expression of what constitutes unreasonable

conduct under Rule 225. The Tribunal finds that WMC did not engage in any unreasonable conduct that interfered with the Tribunal's ability to secure the just, most expeditious and cost-effective determination of this proceeding.

[106] In seeking costs, the MBQ specifically reference the mediation in which the parties to this matter participated, submitting that, at the time of the mediation, WMC knew or ought to have known the MBQ's views and expert opinions on the Landfill, and how pursuing the hearing would affect the MBQ. WMC states that the mediation in this matter was conducted subject to a Confidentiality Undertaking. The MBQ appear to assert that WMC's conduct was unreasonable in not accepting the MBQ's position within the context of the mediation.

[107] In making this assertion, the MBQ cites the OMB's decision in *Wright* as authority for the proposition that where mediation suggests the ultimate answers, failing to observe such suggestions without valid reason should be penalized through costs. The matter in *Wright* went to an OMB hearing following a mediation conference, by which point the appellant in the matter no longer opposed the proposed planning applications, subject to certain clarifications being made. However, the applicant sought costs against the appellant on the basis that "the appellant through his conduct has caused this hearing and its attendant costs which otherwise could have been avoided through the efforts of mediation." It is necessary to address the portion of the *Wright* decision cited by the MBQ within its context, at p. 3 of the decision:

> To the Board's knowledge this is the first case in which costs have been sought based upon what was disclosed during mediation. While observance should be paid to the mediation process there is no precedent to guide the parties as to the potential consequences flowing from such process.
>
> If mediation not only clarifies the issues but also suggests the ultimate answers then failure to observe such suggestions without valid reason should be penalized by way of costs.
>
> Here though the appellant had no guidance as to the thinking of the Board vis a vis the mediation process and costs, and as well, he had no clear indication that his concern for fencing had been addressed. Accordingly the Board rejects the requests for costs by the Township and the applicant.

[108] Notwithstanding the statement in *Wright* that failure to observe suggestions of the ultimate answers in mediation should be penalized, that Board denied the request for costs given the circumstances in that matter. Noting those specific circumstances in *Wright*, the Tribunal finds that this decision is of no assistance in determining the matter before it. Instead, the Tribunal is guided by *Saltsov*, at para. 18, where the Ontario Superior Court of Justice (Divisional Court) held that:

> … Without probing into without prejudice discussions, it is […] neither possible nor desirable to assess the reasonableness of positions taken by the parties or whether the time spent in attempting to find resolution was reasonable. In short, the mediation process is neither subject to nor amenable to supervision by the Court.

[109] In this case, there is no question that the discussion of the issues in mediation is intended to be confidential. Rule 157 provides that all documents submitted and all statements made at a Tribunal-assisted mediation are confidential and without prejudice. Rule 158 further provides that, if the parties to mediation do not settle a matter in its entirety, the hearing will take place without reference to the information disclosed during the mediation, except with the prior consent of all parties. Parties to mediation, while attempting to reach agreement, may ultimately take different views, and proceed to a hearing. This is common in litigation, and the Tribunal finds that it is not indicative of unreasonable conduct.

[110] In summary, it is the Tribunal's determination that WMC has not engaged in unreasonable conduct. It is not unreasonable (or unusual) for a responding party to an appeal before the Tribunal to mount a defence to the appeal. In this case, WMC and the other parties appear to have entered, voluntarily and in good faith, into a Tribunal-led mediation process. Through this process, the parties were able to resolve certain issues resulting in settlement agreements and the withdrawal of portions of the appeal, as set out in the Tribunal's order issued on April 26, 2013.

[111] The MBQ appear to submit that WMC should not have defended itself in these proceedings, and instead should have agreed to the MBQ's requests from the

beginning. The Tribunal rejects this argument, however, and finds that it was not unreasonable conduct for WMC to respond in this appeal by defending its position, engaging in mediation and ultimately proceeding to a hearing on the outstanding issues. The MBQ did not provide the Tribunal with any case law in support of finding such conduct to be unreasonable.

[112] To conclude, therefore, the Tribunal finds that WMC has not engaged in unreasonable, frivolous, or vexatious conduct, or acted in bad faith.

[113] Given the Tribunal's determination that WMC has not engaged in unreasonable, frivolous or vexatious conduct, or acted in bad faith, there is no need for the Tribunal to proceed to the second and third stages in the three-stage analysis – the consideration of whether to exercise its discretion to award costs, or its further discretion to determine the appropriate amount of costs.

[114] However, the Tribunal wishes to address the extensive submissions provided by the MBQ relating to their status as a First Nation. As noted above, the MBQ submit that the Tribunal should recognize the unique and exceptional circumstances of the MBQ, and interpret s. 17.1 of the *SPPA* and the Rules within an Aboriginal context. They submit that costs should be awarded as a matter of public interest and access to justice, and the importance of Aboriginal groups being able to fully and fairly participate in litigation that directly affects their interests. The MBQ note that Aboriginal peoples are historically highly disadvantaged in Canada, citing the First Nations water crisis and the Truth and Reconciliation Commission report. They submit that, in deciding costs, the Tribunal must consider that First Nations, including the MBQ, continue to face a heavy burden of disadvantages.

[115] Had the Tribunal made a determination that there was unreasonable, frivolous, or vexatious conduct or bad faith by WMC in relation to this matter, the appropriate point to fully consider the MBQ's submissions relating to their status as a First Nation would have been at the second stage of analysis, regarding whether the Tribunal should exercise its discretion to award costs. An administrative tribunal has no inherent

powers, but only those powers given to it by statute. As discussed above, the Tribunal's authority under s. 17.1 of the *SPPA* to award costs is limited, and the Tribunal is prohibited from ordering a party to pay costs unless its conduct has been unreasonable, frivolous or vexatious, or in bad faith. At this first stage of analysis, a First Nation is in no different position than any other party. The Tribunal must determine that it has the authority to award costs before proceeding to a decision as to whether or not to exercise its discretion. As the Tribunal held in *Johnson*, at para. 23, with respect to the Tribunal's discretion at the second stage of its costs analysis:

> …In exercising its discretion in this regard, it may consider the conduct of the requesting party and any other relevant factor. The other relevant factors may include many of the same factors courts or tribunals consider in a standard costs application but the key difference is that, under the narrow costs power in section 17.1 of the SPPA, the Tribunal can only proceed to this discretionary stage if it first finds that a party engaged in at least one of the types of improper conduct listed in section 17.1(2)(a).

[116] In conclusion, the Tribunal finds that WMC has not engaged in unreasonable, frivolous, or vexatious conduct or acted in bad faith. As a result, there is no authority under s. 17.1 of the *SPPA* for the Tribunal to exercise its discretion to consider whether to award costs in this matter.

ORDER

[117] The Tribunal orders that:

1. Paras. 7 to 9 of the MBQ's reply submissions are allowed, and paras. 2 to 6, 10 to 12, 18, 21 and 22 of those submissions, as well as paras. 3 to 7 of Chief Maracle's reply affidavit and the attached exhibits, are struck.

2. WMC is granted leave to file surreply to address para. 14 of the MBQ's reply submissions.

3. The MBQ's application for costs is dismissed.

Application for Costs Dismissed

"Maureen Carter-Whitney"

MAUREEN CARTER-WHITNEY
VICE-CHAIR

If there is an attachment referred to in this document,
please visit www.elto.gov.on.ca to view the attachment in PDF format.