

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 19, 2013

IN THE MATTER OF sections 91, 92, 95, and 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Walter Hohloch with respect to *Water Act* Licence Amendment No. 00071066-00-01 issued to the Eastern Irrigation District by the Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development.

Cite as: Costs Decision: *Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development, re: Eastern Irrigation District* (19 July 2013), Appeal No. 10-043-CD (A.E.A.B.).

BEFORE:

Justice Delmar W. Perras (ret.), Chair;
Mr. Jim Barlishen, Board Member; and
Mr. Eric O. McAvity, Q.C., Board Member.

SUBMISSIONS BY:

Appellant: Mr. Walter Hohloch, represented by Mr. Barry Robinson, Ecojustice.

Director: Mr. Kevin Wilkinson, Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development, represented by Ms. Charlene Graham and Ms. Alison Altmiks, Alberta Justice and Solicitor General.

Licence Holder: Eastern Irrigation District, represented by Mr. C. Richard Jones and Mr. Wilson McCutchan, Vipond Jones LLP.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development issued a Licence Amendment to the Eastern Irrigation District (EID) authorizing the provision of water for municipal, agricultural, commercial, industrial, habitat enhancement, and recreational purposes.

The Board received a Notice of Appeal from Mr. Walter Hohloch. After finding Mr. Hohloch directly affected, the Board set two issues for the hearing. The issue as to whether the Licence Amendment would impact Mr. Hohloch's water supply was resolved through mediation. The Board held a hearing to hear submissions on whether the Licence Amendment was issued in accordance with the *Water Act* and applicable policies. Following the hearing, based on the recommendations of the Board, the Minister issued an order confirming the Licence.

Mr. Hohloch and the EID applied for costs. Mr. Hohloch applied for costs totalling \$63,036.87, and the EID requested costs totalling \$40,773.24.

After reviewing the costs applications and responses, the Board denied the costs applications of both Mr. Hohloch and the EID. Ecojustice, a non-profit organization that litigates environmental cases in the public interest, represented Mr. Hohloch. Ecojustice obtains donations to fund its litigation purposes. As Mr. Hohloch was not responsible for paying the legal costs, other than a small portion of the disbursement costs, the Board determined that, as Mr. Hohloch did not require funding to prepare for and present his arguments at the hearing, he would not receive any costs.

The Board did not award costs to the EID because participation in the appeal process is a cost of doing business in Alberta and part of the regulatory system that offers an appeal mechanism. There was no indication costs were required in order for the EID to prepare for and present its arguments at the hearing.

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I. INTRODUCTION

[1] Alberta Environment and Sustainable Resource Development (“AESRD”)¹ issued an amendment to a licence held by the Eastern Irrigation District (the “Licence Holder” or “EID”) for a change in purpose. The amendment allowed the Eastern Irrigation District to supply 5,000 acre-feet of water for non-irrigation purposes, including municipal, agricultural, commercial, industrial, habitat enhancement, and recreational purposes. Mr. Walter Hohloch (the “Appellant”) argued the decision to amend the licence contravened the *Water Act* and other policies. The Environmental Appeals Board (the “Board”) held a hearing to determine the issue: Did the Director, in issuing the Licence Amendment, act in accordance with the *Water Act* and the applicable AESRD policies, including the South Saskatchewan River Basin Water Management Plan and the Water Licence Change of Purpose: Administrative Licencing Criteria?

[2] The Board provided the Minister of Environment and Sustainable Resource Development with a Report and Recommendations confirming the Licence Amendment. The Board found the Licence Amendment was issued in accordance with current applicable legislation and policies. The Minister accepted the Board’s recommendations and issued a Ministerial Order confirming the Licence Amendment.

[3] At the hearing, the Appellant and EID reserved their right to claim for costs. After the Minister’s decision was released, the Board received costs applications from the Appellant and the EID.

[4] The Board denied the costs applications. These are the Board’s reasons.

II. BACKGROUND

[5] On November 18, 2010, the Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development (the “Director”), issued Licence Amendment No. 00071066-00-01 (the “Licence Amendment”) under the *Water*

¹ At the time the Approval was issued, the Department was named Alberta Environment. However, as of May 8, 2012, the Department was renamed Alberta Environment and Sustainable Resource Development.

Act, R.S.A. 2000, c. W-3, to the EID authorizing the provision of water for municipal, agricultural, commercial, industrial, habitat enhancement, and recreational purposes. The Licence Amendment amends the original licence issued to the EID which was for the limited purposes of irrigation and agricultural (stockwatering).

[6] On December 17, 2010, the Board received a Notice of Appeal from the Appellant appealing the Licence Amendment. The Board also received appeals from the Alberta Wilderness Association, Trout Unlimited Canada, Water Matters Society of Alberta, Ms. Cheryl Bradley, and Mr. Lorne Fitch. These appeals, with the exception of the appeal filed by Mr. Hohloch, were dismissed.²

[7] On January 26, 2011, the Director raised preliminary motions to dismiss the appeals. The Board responded on February 2, 2011, indicating the preliminary motions hearing would be through written submissions. On February 11, 2011, the Board asked the participants to provide written submissions on a number of preliminary matters. On February 17, 2011, the Appellant requested an extension to provide his submission. The Board granted the request on February 18, 2011. The Board received written submissions from the Appellant, Licence Holder, and Director (collectively, the “Parties”) between March 8, 2011, and April 19, 2011.

[8] On June 1, 2011, the Board notified the Parties that the Appellant was directly affected. In its decision on the preliminary matters,³ the Board stated the issues for the hearing were:

1. Did the Director, in issuing the Licence Amendment, act in accordance with the *Water Act* and the applicable Alberta Environment [and Sustainable Resource Development] policies, including the South Saskatchewan River Basin Water Management Plan and the Water Licence Change of Purpose: Administrative Licencing Criteria?
2. What effect will the Licence Amendment have on Mr. Hohloch’s water supply for his cattle?

² See: *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

³ See: *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

[9] On June 9, 2011, the Director requested a mediation meeting be held to resolve the issues. The Appellant indicated he wished to proceed to a hearing.

[10] After canvassing the Parties for available dates, the Board notified the Parties on January 20, 2012, that the hearing would be held on April 24, 2012. In response to the Appellant's request for additional time for closing comments, the Board rescheduled the hearing to April 23 and 24, 2012.

[11] On March 28, 2012, counsel for the Licence Holder requested the hearing be re-scheduled. The Appellant and Director were in agreement with the request. On March 29, 2012, the Board postponed the hearing.

[12] On April 5, 2012, the Director recommended a meeting of the Parties, with or without counsel. He also recommended the hearing be held through written submissions. The Licence Holder agreed to hold the hearing through written submissions. The Appellant asked the issues be heard at an oral hearing.

[13] On April 25, 2012, the Board wrote to the Parties suggesting a mediation meeting might be useful in addressing the second issue. The Parties agreed and a mediation meeting was held on May 10, 2012, in Calgary. As a result of the mediation, the second issue, whether the Appellant's water supply would be affected by the Licence Amendment, was resolved. The Board proceeded to schedule the hearing to hear submissions on the first issue only.

[14] On May 11, 2012, the Director again requested the remaining issue be determined through written submissions only, and the Licence Holder agreed with this request. The Appellant requested an oral hearing. In response to the Appellant's request, the Board held an oral hearing.

[15] The hearing was held on September 18, 2012, in Calgary.

[16] The Appellant and Licence Holder reserved their right to ask for costs at the hearing.

[17] On February 7, 2013, the Board provided its Report and Recommendations and the Minister's decision to the Parties.⁴ The Minister accepted the Board's recommendations and issued a Ministerial Order confirming the Director's decision to issue the Licence Amendment.

[18] On February 21 and 22, 2013, the Board received costs application from the Appellant and Licence Holder, respectively. Response submissions were received on March 7, 2013, from the Licence Holder and March 8, 2013, from the Appellant and Director.

III. LEGAL BASIS FOR COSTS

A. Statutory Basis for Costs

[19] The legislative authority giving the Board jurisdiction to award costs is section 96 of EPEA which provides: "The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid." This section gives the Board broad discretion in awarding costs. As stated by Mr. Justice Fraser of the Court of Queen's Bench in *Cabre*:

"Under s. 88 [(now section 96)] of the Act, however, the Board has final jurisdiction to order costs 'of and incidental to any proceedings before it...'. The legislation gives the Board broad discretion in deciding whether and how to award costs."⁵

Further, Mr. Justice Fraser stated:

"I note that the legislation does not limit the factors that may be considered by the Board in awarding costs. Section 88 [(now section 96)] of the Act states that the Board 'may award costs ... and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid....'" (Emphasis in the original.)⁶

⁴ See: *Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development*, re: *Eastern Irrigation District* (18 October 2012), Appeal No. 10-043-R (A.E.A.B.).

⁵ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraph 23 (Alta. Q.B.).

⁶ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

[20] The sections of the *Environmental Appeal Board Regulation*,⁷ (the “Regulation”) concerning final costs provide:

“18(1) Any party to a proceeding before the Board may make an application to the Board for an award of costs on an interim or final basis.

(2) A party may make an application for all costs that are reasonable and that are directly and primarily related to

- (a) the matters contained in the notice of appeal, and
- (b) the preparation and presentation of the party’s submission.

...

20(1) Where an application for an award of final costs is made by a party, it shall be made at the conclusion of the hearing of the appeal at a time determined by the Board.

(2) In deciding whether to grant an application for an award of final costs in whole or in part, the Board may consider the following:

- (a) whether there was a meeting under section 11 or 13(a);
- (b) whether interim costs were awarded;
- (c) whether an oral hearing was held in the course of the appeal;
- (d) whether the application for costs was filed with the appropriate information;
- (e) whether the party applying for costs required financial resources to make an adequate submission;
- (f) whether the submission of the party made a substantial contribution to the appeal;
- (g) whether the costs were directly related to the matters contained in the notice of appeal and the preparation and presentation of the party’s submission;
- (h) any further criteria the Board considers appropriate.

(3) In an award of final costs the Board may order the costs to be paid in whole or in part by either or both of

- (a) any other party to the appeal that the Board may direct;
- (b) the Board.

(4) The Board may make an award of final costs subject to any terms and conditions it considers appropriate.”

⁷ *Environmental Appeal Board Regulation*, A.R. 114/93.

[21] When applying these criteria to the specific facts of the appeal, the Board must remain cognizant of the purposes of the *Water Act* as stated in section 2.⁸

[22] However, the Board stated in other decisions that it has the discretion to decide which of the criteria listed in the *Water Act* and the Regulation should apply to a particular claim for costs.⁹ The Board also determines the relevant weight to be given to each criterion, depending on the specific circumstances of each appeal.¹⁰ In *Cabre*, Mr. Justice Fraser noted that section "...20(2) of the Regulation sets out several factors that the Board 'may' consider in deciding whether to award costs..." and concluded "...that the Legislature has given the Board a wide discretion to set its own criteria for awarding costs for or against different parties to an appeal."¹¹

[23] As stated in previous appeals, the Board evaluates each costs application against the criteria in the *Water Act* and the Regulation and the following:

“To arrive at a reasonable assessment of costs, the Board must first ask whether the Parties presented valuable evidence and contributory arguments, and presented suitable witnesses and skilled experts that:

- (a) substantially contributed to the hearing;

⁸ Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta’s economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

⁹ *Zon* (1998), 26 C.E.L.R. (N.S.) 309 (Alta. Env. App. Bd.), (*sub nom. Costs Decision re: Zon et al.*) (22 December 1997), Appeal Nos. 97-005 to 97-015 (A.E.A.B.).

¹⁰ *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.) (“*Paron*”).

¹¹ *Cabre Exploration Ltd. v. Alberta (Environmental Appeal Board)* (2000), 33 Admin. L.R. (3d) 140 at paragraphs 31 and 32 (Alta. Q.B.).

- (b) directly related to the matters contained in the Notice of Appeal; and
- (c) made a significant and noteworthy contribution to the goals of the Act.

If a Party meets these criteria, the Board may award costs for reasonable and relevant expenses such as out-of-pocket expenses, expert reports and testimony or lost time from work. A costs award may also include amounts for retaining legal counsel or other advisors to prepare for and make presentations at the Board's hearing."¹²

[24] Under section 18(2) of the Regulation, costs awarded by the Board must be "directly and primarily related to ... (a) the matters contained in the notice of appeal, and (b) the preparation and presentation of the party's submission." These elements are not discretionary.¹³

B. Courts vs. Administrative Tribunals

[25] In applying these costs provisions, it is important to remember there is a distinct difference between costs associated with civil litigation and costs awarded in quasi-judicial forums such as board hearings or proceedings. As the public interest is part of all hearings before the Board, it must take the public interest into consideration when making its final decision or recommendation. The outcome is not simply making a determination of a dispute between parties. Therefore, the Board is not bound by the "loser-pays" principle used in civil litigation. The Board will determine whether an award of costs is appropriate considering the public interest generally and the overall purposes listed in section 2 of the *Water Act*.

¹² Costs Decision re: *Cabre Exploration Ltd.* (26 January 2000), Appeal No. 98-251-C (A.E.A.B.) at paragraph 9.

¹³ *New Dale Hutterian Brethren* (2001), 36 C.E.L.R. (N.S.) 33 at paragraph 25 (Alta. Env. App. Bd.), (*sub nom. Cost Decision re: Monner*) (17 October 2000), Appeal No. 99-166-CD (A.E.A.B.).

IV. APPELLANT COSTS APPLICATION

A. Submissions

1. Appellant

[26] The Appellant requested costs totaling \$63,036.87.

[27] The Appellant noted the Director requested the Board hold a preliminary motions hearing and raised preliminary motions to dismiss the appeals on the grounds the appellants were not directly affected.¹⁴ The Appellant stated the Director's position that the Appellant was not directly affected was contrary to the Director's own previous finding that he was directly affected and that he had filed a valid Statement of Concern. The Appellant argued this challenge was unnecessary, unduly delayed the proceedings, and resulted in additional costs. He stated the other appellants may have voluntarily withdrawn their appeals if they knew the hearing would proceed based on the Appellant's directly affected status.

[28] The Appellant acknowledged one of the issues, regarding the impact the Licence Amendment would have on his water supply, was resolved at the mediation meeting.

[29] The Appellant stated his legal counsel attended the hearing and provided legal argument, and two witnesses appeared on his behalf.

[30] The Appellant stated the costs claimed relate only to the preparation and presentation of his submissions on the preliminary matters and for the hearing. The Appellant stated his written submissions on the preliminary matters dealt only with the issues raised in the Director's motion, and his submission and argument for the oral hearing dealt only with the issue identified by the Board that was not resolved through mediation.

[31] The Appellant explained that, even though his concern regarding the impact of the Licence Amendment on his water supply was dealt with in mediation, he shared the broader

¹⁴ See: *See: Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Eastern Irrigation District* (30 August 2011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

public interest concerns about the legality of the Licence Amendment and the delegation of powers from the Director to the Licence Holder.

[32] The Appellant stated the preliminary matters and the issue for the hearing raised complex and novel issues of law requiring considerable research and advice regarding standing, provisions of the *Water Act*, and policies of AESRD. The Appellant said he required legal assistance throughout the process.

[33] The Appellant said his submissions and arguments made a substantial contribution to the hearing, to the legal interpretation of the issue before the Board, and to the goals of the *Water Act*. The Appellant stated his submissions and arguments were concise and efficient.

[34] The Appellant stated the hearing and subsequent decision provided clarity on a complex and previously untested question of law. The Appellant noted the Board made a number of general recommendations that would provide further clarity with respect to licence amendments and the restoration of water flows in the Bow River.

[35] The Appellant explained he is a retired rancher with limited means and could not have proceeded with the appeal on his own financial resources. The Appellant stated disbursement costs were shared equally between him and the other appellants.

[36] The Appellant said funding for his legal counsel was provided by Ecojustice Canada Society (“Ecojustice”), which recognized this was a matter of significant public interest. The Appellant explained any costs awarded would be used to reimburse his disbursement costs and defray costs incurred by Ecojustice. According to the Appellant, Ecojustice is similar to legal aid services, and it will use any costs obtained to continue to provide free legal services to parties bringing significant legal cases in the public interest with a goal of protecting the environment. The Appellant stated the Courts have determined cost awards are appropriate in such circumstances.

[37] The Appellant stated total disbursement costs was \$983.70, but as these costs were shared equally between him and the other individuals who filed appeals, the Appellant’s claim for disbursements was \$163.95.

[38] The Appellant explained his legal counsel represented him and the others who filed Notices of Appeal until the release of the Board's preliminary decision. Legal fees up to August 30, 2011, were \$39,737.50, and as the fees were shared, his claim for legal costs up to August 30, 2011, was \$6,622.92. The Appellant stated these fees were funded by Ecojustice.

[39] The Appellant stated that after August 30, 2011, legal counsel only represented the Appellant, and the subsequent legal fees were \$56,250.00. Again, the Appellant said these fees were funded by Ecojustice.

[40] The Appellant asked the Board to use its discretion to determine which party should pay its costs.

[41] The Appellant asked the Board to consider: (1) the appeal addressed an issue of broad public interest and provided clarity to an important legal question; (2) the preliminary motion and argument on whether he was directly affected was contrary to the Director's own prior determination, was unnecessary, unduly delayed the proceedings, and resulted in additional costs; and (3) an appeal is a cost of doing business in Alberta.

2. Licence Holder

[42] The Licence Holder stated Ecojustice is not like a legal aid service since legal aid services provide legal services to Albertans in need, without a fixed agenda, and not for the sake of advancing its own aims. The Licence Holder stated Ecojustice funds litigation and frequently acts as a party itself to promote its own aims of protecting the environment.

[43] The Licence Holder submitted the Appellant is not indigent or in need and owns significant lands within the EID boundaries. The Licence Holder noted the Appellant did not attend the hearing, and he never met the witnesses who attended on his behalf.

[44] The Licence Holder acknowledged the principles governing costs awards in the Courts generally do not apply to administrative proceedings except the general principle that costs are to be awarded as compensation or reimbursement, not as a source of gain or profit.

[45] The Licence Holder argued awarding legal costs to the Appellant for costs he did not incur and is not liable for would violate the fundamental principle that costs are not an indemnity.

[46] The Licence Holder noted section 20(2) of the Regulation sets out the factors the Board may consider in awarding costs, including whether the party required financial resources to make an adequate submission. The Licence Holder argued the Appellant required almost no financial resources other than the payment of disbursements. The Licence Holder stated the Appellant was not required to use his own financial resources for the appeal.

[47] The Licence Holder argued the legal costs asked for by the Appellant are not actual expenditures incurred.

[48] The Licence Holder asked that no legal costs be awarded to the Appellant.

3. Director

[49] The Director submitted he should not be responsible for paying any of the costs claimed by the Appellant.

[50] The Director noted the Board did not find the Director acted in bad faith in his actions or interpretations. The Director stated there are no special circumstances that should attract an award of costs against him.

[51] The Director argued the Appellant's submission that the Director added to delays and costs through the preliminary motions failed to recognize: (1) the determination of directly affected by the Director to accept a Statement of Concern is not the same as a determination by the Board for the purposes of an appeal, as confirmed by the Court of Queen's Bench;¹⁵ (2) the

¹⁵ See: *Westridge Utilities Inc. v. Alberta (Director of Environment, Southern Region)*, 2012 ABQB 681.

Director suggested and supported steps to narrow and resolve the issues, including participating in a mediation meeting; and (3) the Director sought to have the hearing determined by written submission, which would have minimized costs and time for all the Parties.

B. Analysis

[52] The Appellant is asking costs of \$163.95 for disbursements and \$62,872.92 for legal costs.

[53] The Appellant resolved the issue that was most important to him through mediation. Although the second issue heard at the hearing was of concern to him, it was a legal issue regarding the legislation and policy around the amendment of a water licence allowing other users to access the EID's water supply and not requiring a water transfer application. It was an important issue that was brought forward given the requests for amendments the Director has received from the other irrigation districts.

[54] As the Board only heard legal arguments at the hearing, the Appellant did not participate or attend the hearing.

[55] The Appellant was represented by Ecojustice, a non-profit organization that "...provides legal services free-of-charge to charities and citizens..."¹⁶ It is clear the Appellant did not have to pay the costs associated with the hearing. The Appellant claimed \$163.70 for his share of the disbursements.

[56] The Board has generally accepted the starting point is that costs incurred in an appeal are the responsibility of the individual parties.¹⁷ There is an obligation for each member of the public to accept some responsibility for bringing environmental issues to the forefront.¹⁸

¹⁶ Ecojustice website: <<http://www.ecojustice.ca/about>>.

¹⁷ *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8 February 2002), Appeal Nos. 01-002, 01-003 and 01-005-CD (A.E.A.B.).

[57] The Appellant had concerns with access to water for his agricultural operations. The issue was resolved through mediation. The Appellant was able to bring his issues forward to the Board. He incurred little costs in his appeal since disbursements were shared with others who appealed and he did not have to pay the costs to have Ecojustice represent him. Therefore, the Board considers the disbursement costs incurred by the Appellant are part of the costs associated with bringing environmental issues to the forefront.

[58] Costs are meant solely to offset the costs an appellant is required to pay for the preparation and presentation of their arguments before the Board. The Appellant retained Ecojustice to represent him throughout the appeal process. The Board appreciates the assistance Ecojustice gave the Board in arguing the Appellant's position. However, the Appellant was not out-of-pocket for retaining Ecojustice. The Board realizes Ecojustice relies on donations and costs awards to continue its work, but these costs were not incurred by the Appellant himself. The costs awarded by the Board are meant to recognize the value of the parties' participation in the hearing and the level of assistance the party provided to the Board in determining the recommendations. If the costs were not actually incurred by the Appellant, the Board cannot justify awarding costs.

[59] Ecojustice argued it is similar to legal aid. With respect, the Board cannot agree. Legal aid generally assists those who cannot afford their own legal counsel, and there is an expectation that clients of legal aid pay back at least some portion of the payments.¹⁹ No indication was made to demonstrate the Appellant was unable to pay for his own legal representation. Further, there was no suggestion the Appellant is expected to pay Ecojustice back for the cost of representing him.

¹⁸ Section 2 of EPEA states:

“(2) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following: ... (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions....”

¹⁹ See: <www.legalaid.ab.ca/clients/Pages/mybill.aspx> which provides:

“A common misconception about legal aid is that it is a free service. Legal aid in the province of Alberta is not free. LAA expects clients to repay the costs of their legal representation. Any services requiring full representation by a lawyer are not free.”

[60] In this case, legal counsel for all Parties equally presented their positions effectively. The Board has determined in previous decisions that, if counsel or experts are equally effective in presenting their positions, the Board considers it a draw and does not award costs because any costs awarded would be offset equally by the opposing counsel's costs award.²⁰

[61] Based on the above, the Board does not award any costs to the Appellant.

V. LICENCE HOLDER COSTS APPLICATION

A. Submissions

1. Licence Holder

[62] The Licence Holder said the Board relied on evidence the Licence Holder provided in reaching its recommendations.

[63] The Licence Holder stated it incurred legal costs of \$36,431.20. This amount was after its counsel voluntarily reduced the costs by \$18,000.00. The Licence Holder stated it also incurred consultant costs of \$4,342.04, which involved providing assistance to legal counsel and preparation to give evidence at and attend the hearing.

[64] The Licence Holder noted the Board is not bound by the "polluter pays" principle, but where a party makes a significant contribution to a hearing that leads, in part, to the appeal being dismissed, the party ought to be awarded costs payable by the appellant.

[65] The Licence Holder stated it provided evidence and submissions that substantially contributed to the hearing and pre-hearing matters. The Licence Holder noted it participated in the mediation meeting that resolved one of the issues, resulting in a costs saving to the Parties and Board by reducing the number of issues that had to be heard and the time preparing

²⁰ See: Costs Decision: *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (02 July 2010), Appeal No. 08-037-

submissions and arguments. The Licence Holder stated its contribution materially assisted the Board in making/developing its recommendations.

[66] The Licence Holder stated it provided appropriate, succinct written submissions prior to the hearing that assisted in narrowing the scope of the oral submissions and examination of the witnesses. It stated its witnesses' evidence was relied on by the Board in its Report and Recommendations. The Licence Holder explained that it was prepared to have the issue determined through written submissions, but the Appellant asked for the oral hearing in addition to the written submissions.

[67] The Licence Holder asked for reimbursement of costs incurred for its legal counsel and consultant. The Licence Holder stated its legal counsel, Mr. Richard Jones, ensured the work was performed cost effectively. Mr. Jones has practiced law for over 20 years and Mr. Wilson McCutchan has practiced law for two years. The Approval Holder's consultant, Mr. Len Ring, is an expert on irrigation and water use in Southern Alberta and has a unique knowledge of the EID.

[68] The Licence Holder stated its costs were reasonable and directly and primarily reflected only the actual expenses incurred in the preparation and presentation of its submission of evidence and arguments.

[69] The Licence Holder stated it acted in good faith, did not bring any spurious preliminary motions, complied with all timelines, attended the mediation meeting, and was respectful to the Board and the other Parties.

[70] The Licence Holder said its claimed costs were reasonable and directly related to the appeal, and its legal counsel and consultant assisted the Board and the Parties, leading to a significant contribution to the appeal process.

[71] The Licence Holder requested its final costs be payable by the Appellant.

2. Appellant

[72] The Appellant noted that even though the Licence Holder acknowledged the Board is not bound by the polluter pays principle, it referred to another Board decision, *Paron*,²¹ in which the Board determined a party ought to be awarded costs payable by the appellant when a party makes a significant contribution that, in part, leads to an appeal being dismissed. The Appellant stated this appears the Licence Holder is suggesting success in the appeal is a factor to be considered by the Board in making a costs award. The Appellant submitted the Licence Holder's interpretation of *Paron* was incorrect, and noted none of the parties in *Paron* were awarded costs.

[73] The Appellant said the Licence Holder did not address whether it needed financial resources to make an adequate submission. The Appellant noted the financial statements for the Licence Holder for the year ending September 30, 2011, indicated the Licence Holder had revenue in that year of \$36,075,673.00 and expenses of \$20,470,624.00, and an excess of revenue over expenses, after allowances for special projects, of \$14,598,677.00, and the Licence Holder had fund balances of \$274,995,477.00 as of September 30, 2011.

[74] The Appellant submitted the Licence Holder failed to demonstrate that it required a costs award in order to make an adequate submission.

B. Analysis

[75] The Licence Holder requested costs of \$36,431.20 for legal fees and \$4,342.04 for consultant fees.

[76] The Board has generally taken the position that requiring a project proponent to participate in the hearing process is a cost of doing business in Alberta. Whenever an application is filed with the Director, there is a possibility the decision will be appealed. It is a part of the regulatory process. Reasonable costs associated with an appeal are a cost of carrying out a regulated business.

²¹ *Paron* (2002), 44 C.E.L.R. (N.S.) 133 (Alta. Env. App. Bd.), (*sub nom. Costs Decision: Paron et al.*) (8

[77] The consultant for the Licence Holder provided a brief overview of irrigation districts, their purposes, and his interpretation on whether the Director could amend the Licence. Although he provided information to put the issue into perspective, most of the information was prepared by the Licence Holder's staff at no additional cost to the Licence Holder. Therefore, the Board will not award costs related to the participation of the Licence Holder's consultant.

[78] The Licence Holder did not provide any evidence to indicate it needed financial assistance in order to properly prepare written submissions or to prepare for and present arguments at the hearing.

[79] Legal counsel for the Licence Holder made a valuable contribution to the hearing process by presenting well-reasoned arguments. His contribution to the hearing was as valuable as counsel for the Appellant. As stated above, since both counsels' contributions to the hearing were equal, costs for legal counsel are offset by each other. Therefore, the Board does not award costs to the Licence Holder.

VI. DECISION

[80] The Board denies the costs application of the Appellant and Licence Holder. Both of these Parties did not require financial assistance to prepare and present their arguments. The assistance counsel provided to the Board was of equal value so any costs claimed would offset each other.

Dated on July 19, 2013, at Edmonton, Alberta.

"original signed by"

D.W. Perras
Chair

“original signed by”

Jim Barlishen
Board Member

“original signed by”
Eric O. McAvity, Q.C.
Board Member