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**COST AWARDS IN  
ENVIRONMENTAL ASSESSMENT HEARINGS:  
PRINCIPLES, PRACTICE AND PROCEDURE**

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### APPENDIX

# **COST AWARDS IN ENVIRONMENTAL ASSESSMENT HEARINGS: PRINCIPLES, PRACTICE AND PROCEDURE**

By  
Richard D. Lindgren<sup>1</sup>

## **1.0 INTRODUCTION**

The Environmental Assessment Board ("EA Board") enjoys broad statutory authority to make cost awards to or against parties participating in proceedings before the Board.<sup>2</sup> Significantly, the Environmental Assessment Act ("EAA") expressly provides that when awarding costs, "the Board is not limited to the considerations that govern awards of costs in court".<sup>3</sup> Accordingly, the EA Board has developed cost principles, criteria and guidelines which go well beyond the civil court's traditional cost rule (i.e. "costs follow the event").<sup>4</sup>

In general, the EA Board's predominant cost consideration is whether the party has made a substantial contribution to the proceeding through responsible and informed participation that assisted the Board in understanding and addressing the matters at issue. This is the principal test employed by the EA Board in deciding whether to grant, reduce, or deny costs claimed by the parties.

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<sup>1</sup> Counsel, Canadian Environmental Law Association, and member of the Environmental Assessment Board's Client Advisory Committee.

<sup>2</sup> See Environmental Assessment Act, R.S.O. 1990, c.E.18, subsections 18(18) to (20). The Joint Board, consisting of members of the Environmental Assessment Board and Ontario Municipal Board, enjoys a similar cost power: see Consolidated Hearings Act, R.S.O. 1990, c.C.29, subsections 7(4) to (7).

<sup>3</sup> EAA, section 18(21).

<sup>4</sup> For additional factors that courts take into account when making cost awards, see Rule 57.01 of the Rules of Civil Procedure.

The purpose of this paper is threefold:

- to briefly review the judicial and legislative background regarding the development of the EA Board's cost powers;
- to summarize the key principles arising from the EA Board's recent cost decisions; and
- to discuss the EA Board's new Rules of Procedure and Guideline on Costs Awards, which, among other things, codifies cost principles, specifies which fees and disbursements are recoverable through costs, and describes the procedure for applying for costs.

## 2.0 BACKGROUND

### 2.1 Costs and Intervenor Funding

While the Joint Board has long enjoyed the power to award costs,<sup>5</sup> the EA Board was not given cost powers for hearings under the Environmental Protection Act and Ontario Water Resources Act until June 1988 when the Environmental Statute Law Amendment Act, 1988<sup>6</sup> was enacted. Thereafter, the EA Board acquired cost powers for all matters before it as a

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<sup>5</sup> See f.n. 2, *supra*.

<sup>6</sup> S.O. 1988, c.54, ss.22 and 53.

result of amendments contained in Part II of the Intervenor Funding Project Act (IFPA), which was enacted in 1988 and proclaimed in force on April 1, 1989.<sup>7</sup>

One of the important catalysts in the passage of the IFPA was the Red Hill Creek Expressway case,<sup>8</sup> where the Joint Board had attempted to award "costs in advance" to public interest representatives in order to facilitate their participation in the hearing. The Joint Board's jurisdiction to award "costs in advance" was then challenged by the proponent in an appeal to the Ontario Divisional Court. In its 1985 decision, the Court concluded that while the Joint Board enjoyed a general power to award costs, the Joint Board had no legal authority to award "costs in advance".<sup>9</sup>

This ruling left the Joint Board with no ability to award upfront funds to ensure meaningful public participation throughout the hearing process. The Ontario government attempted to address this problem by providing limited "intervenor funding" through orders-in-council on a case-by-case basis.<sup>10</sup> However, this order-in-council program represented only a modest step forward, and public interest groups identified numerous problems with the government's ad

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<sup>7</sup> Intervenor Funding Project Act, S.O. 1988, c.71 [now R.S.O. 1990, c.I.13, which expired on April 1, 1996]. Generally, see M. Jeffery, Environmental Approvals in Canada, sec.4.34 ff.

<sup>8</sup> EAB File No. CH 82-08.

<sup>9</sup> Re Regional Municipality of Hamilton-Wentworth and Hamilton Wentworth Save the Valley Committee, Inc. (1985), 51 O.R. (2d) 23 (Ont. Div. Ct.).

<sup>10</sup> D. Estrin and J. Swaigen, Environment on Trial (Emond Montgomery, 1993), p.207. See also F. Giorno, "A Brief to Ontario's Minister of the Environment on Intervenor Funding" (CELA, 1984) and T. Vigod, "Submissions on Environmental Reform" (CELA, 1984).

hoc approach.<sup>11</sup>

In light of growing public demands for statutory intervenor funding, and as part of an "access to justice" agenda, the Ontario government enacted the IFPA as a three-year pilot project. An important milestone in environmental reform, the IFPA was particularly noteworthy for establishing a mandatory intervenor funding regime for proceedings before the EA Board, Joint Board, and Ontario Energy Board. Although it did not attract the same amount of public attention as intervenor funding, Part II of the IFPA went on to amend the EAA so as to expressly confer general cost powers upon the EA Board.<sup>12</sup>

Prior to the scheduled expiry of the IFPA's initial three-year term, the Ontario government retained Professors Bogart and Valiante of the University of Windsor to conduct a review of the IFPA experience. This review team consulted widely and received numerous submissions in support of a new and improved IFPA.<sup>13</sup> Significantly, the Bogart and Valiante Report, entitled Access and Impact: An Evaluation of the IFPA, concluded that the legislative intervenor funding program was an important and effective reform that should be retained.

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<sup>11</sup> See, for example, R. Lindgren, "Submissions to the Attorney General of Ontario on the Intervenor Funding Project Act, 1988 (CELA, 1988), at pp.4-7.

<sup>12</sup> See f.n. 3.

<sup>13</sup> See, for example, P. Muldoon, "Submissions by Pollution Probe on the IFPA" (Pollution Probe, 1992); R. Lindgren, Submissions by CELA regarding the IFPA"; and J. Jackson, "Submissions of the Ontario Waste Research Coalition on the IFPA" (OTWRA, 1992).

Similar conclusions have been reached by other major studies of the IFPA.<sup>14</sup>

Acting on this advice, the Ontario government extended the IFPA for a further term expiring on April 1, 1996. In announcing the extension, the then Minister of Environment stated: "The Ministry of the Environment is pleased to support this important piece of legislation which promotes effective public participation in the administrative decision-making process."<sup>15</sup> The Minister further commented:

The IFPA has been valuable in ensuring that environmental concerns are fairly represented at EA Board hearings. Requiring project proponents to provide funds needed by public interest groups has been a real improvement over the previous and ad hoc process of the provincial government granting such funds.<sup>16</sup>

Interestingly, the government's announcement of the IFPA extension included a commitment to develop permanent intervenor funding legislation:

The continuation of the legislation will allow time for the government to review and consider the recommendations contained in the [Bogart and Valiante] report. After consultation, the government will develop proposals for permanent legislation. It is

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<sup>14</sup> See, for example, Canadian Environmental Defence Fund, "Intervenor Funding and the IFPA in Ontario", and Public Interest Advocacy Centre, "The Ontario IFPA 1988: Its Review and a Model to provide for Public Participation in regulatory Proceedings in Canada".

<sup>15</sup> The Hon. Ruth Grier, pers. comm. to R. Lindgren (May 19, 1992).

<sup>16</sup> News Release, "Extension of IFPA Announced" (March 25, 1992).

hoped that new legislation will be tabled and passed before the end of the four-year extension.<sup>17</sup>

However, during the four-year extension of the IFPA, the Ontario government did not develop, table or pass permanent intervenor funding legislation. This governmental inertia on intervenor funding was ironic given that there was broad-based support for the continuation of intervenor funding. In 1995, for example, the EA Board and Ontario Energy Board conducted a survey regarding the future of intervenor funding, and found that an overwhelming majority of respondents supported the continuation of intervenor funding. Support came not only from prospective recipients of intervenor funding, but also from representatives of proponents who pay intervenor funding (i.e. municipalities, public utilities and private sector companies), and who recognize the value of facilitating meaningful public involvement in the hearing process.

In early 1996, the Canadian Environmental Law Association (CELA) filed an Application for Review under section 61(2) of the Environmental Bill of Rights to request the establishment of permanent intervenor legislation and/or a further extension of the existing IFPA.<sup>18</sup> Days before the IFPA was scheduled to expire on April 1, 1996, the Ministry of Environment and Energy (MOEE) responded to CELA's application by announcing that the MOEE had conducted an "internal review" of intervenor funding, and had ultimately concluded that the

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<sup>17</sup> Ibid.

<sup>18</sup> R. Lindgren and P. Muldoon, "EBR Application for Review: Intervenor Funding Legislation" (CELA, 1996).



IFPA would not be renewed or extended.

When the IFPA expired on April 1, 1996, the then Minister of the Environment and Energy indicated that the MOEE would "encourage" proponents to provide pre-hearing "participant funding" on a voluntary basis. Similar comments were made when Bill 76 (Environmental Assessment and Consultation Improvement Act, 1996) was tabled in the Ontario Legislature and debated during public hearings before the Standing Committee on Social Development.

The net result of the IFPA's untimely demise is that the EA Board is now left with only its cost powers to address the issue of financing public participation in Board proceedings. It is clear, however, that cost awards are inadequate substitutes for upfront intervenor funding awards. Cost awards are generally made at the conclusion of proceedings rather than at the beginning, when the need for upfront funding may be of critical importance (i.e. during pre-hearing proceedings to identify, scope or settle issues in dispute). Similarly, costs can only be used to indemnify parties for expenses that have actually been incurred to date, as opposed to prospective expenses that may or will be incurred as the hearing proceeds. This is also true for "interim costs", which the EA Board has properly characterized as not being "a replacement for intervenor funding."<sup>19</sup>

The ex post facto nature of cost awards leaves many hearing parties (particularly public interest representatives) with the unenviable prospect of incurring significant financial debt (i.e. to

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<sup>19</sup> EA Board, Guideline for Cost Awards (September 1996), para.11.

retain counsel or consultants) in the "gamble" that they might be reimbursed for these expenditures through subsequent cost awards. It is fair to expect intervenors to contribute a reasonable percentage of the cost of their interventions. However, relying solely upon cost awards means that intervenors who are unable to carry or "cash-flow" the full cost of intervention may end up limiting or even foregoing their right to participate in proceedings before the EA Board. Indeed, it must be recalled that cost awards are highly discretionary, and there is no guarantee that intervenors will receive favourable cost awards.

In summary, the Board's acquisition of a general cost power was an important and highly desirable reform. However, the availability of EA Board cost awards did not provide a persuasive rationale for terminating intervenor funding in Ontario. Accordingly, EA Board cost awards should have been viewed as a supplement to, not a substitute for, intervenor funding.<sup>20</sup>

### 3.0 RECENT COST DECISIONS

#### 3.1 Jurisdiction to Award Costs

The EA Board's current jurisdiction to award costs is found in subsections 18(18) to (21) of the EAA:

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<sup>20</sup> This is particularly true since the IFPA required the deduction of intervenor funding from any cost awards made to a party: see IFPA, section 12(3).

18. (18) The Board may award the costs of a proceeding before it.
- (19) The Board may order to whom and by whom the costs are to be paid.
- (20) The Board may fix the amount of the costs or direct that the amount be assessed and it may direct the scale according to which they are to be assessed and by whom they are to be assessed.
- (21) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

In exercising its broad discretion regarding costs, the EA Board has developed and applied cost eligibility criteria and principles, as described below.

### **3.2 Overview of Recent Board Decisions on Costs**

A number of important costs principles may be distilled from recent EA Board and Joint Board decisions regarding costs. These principles may be summarized as follows:

1. In assessing cost eligibility, the EA Board will, among other things, consider whether the party substantially contributed to the hearing, and whether the party acted

reasonably, responsibly and cooperatively.<sup>21</sup>

2. The hearing outcome does not determine cost eligibility; however, parties should not assume that they will be fully indemnified for their hearing costs.<sup>22</sup>
3. Where a proponent initiates a hearing but then abruptly terminates the hearing or otherwise abuses the hearing process, the proponent bears responsibility for other parties' legitimate hearing costs, including reasonable and necessary pre-hearing preparations and, where appropriate, solicitor-client costs.<sup>23</sup>
4. Municipalities are eligible to claim costs (i.e. for outside counsel or consultants where appropriate), but may not recover the cost of pursuing normal municipal interests.<sup>24</sup>
5. Costs will not be awarded to municipalities for expert witnesses whose area of expertise reasonably exists within the experience and competence of municipal staff.<sup>25</sup>

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<sup>21</sup> Re Town of Cobourg (October 16, 1989, EAB File EP-89-01); Re Interim Waste Authority Landfills: Costs Decision (1996), 19 C.E.L.R. (N.S.) 103 (Joint Board).

<sup>22</sup> Re Steetley - South Quarry Landfill Site - Costs (1995), 19 C.E.L.R. (N.S.) 212 (Joint Board).

<sup>23</sup> Re Durham P1 Contingency Landfill Site Costs Application (1991, Joint Board File No. CH-90-09) Re Leslie Street Extension and Bayview Avenue Widening - Interim Costs Decision (1994), 14 C.E.L.R. (N.S.) 132 (Joint Board); Re Innisfil Landfill Hearing - Costs Direction (1994), 14 C.E.L.R. 176 (Joint Board); Re Laidlaw Rotary Kiln: Costs Decision (1994), 15 C.E.L.R. (N.S.) 38 (EA Board).

<sup>24</sup> Re Leslie Street Extension and Bayview Avenue Widening - Interim Costs Decision (1994), 14 C.E.L.R. 132 (Joint Board).

<sup>25</sup> Re Steetley - South Quarry Landfill Site - Costs (1995), 19 C.E.L.R. (N.S.) 212 (Joint Board); Interim Waste Authority Landfills - Costs (1996), 19 C.E.L.R. (N.S.) 103 (Joint Board).

6. Costs may be reduced or denied for expert witnesses whose fees are excessive or whose work duplicated evidence from other parties.<sup>26</sup>
7. The Ministry of Environment and Energy is eligible to claim costs and may be liable to pay costs.<sup>27</sup>
8. Costs may awarded for participation in settlement meetings where such meetings are an integral part of the proceedings and each party had a clear and ascertainable interest in the meetings.<sup>28</sup>
9. Costs may be awarded for motions brought before the Board.<sup>29</sup>
10. Costs for related proceedings (i.e. Cabinet appeals or Environmental Appeal Board hearings) are not before the Board and are not recoverable.<sup>30</sup>
11. A failure or refusal by a party to participate in the pre-hearing process or to bring a motion for early dismissal of the proponent's case may reduce the quantum of costs

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<sup>26</sup> Ibid.

<sup>27</sup> Re Innisfil Landfill Hearing - Cost Direction (1994), 14 C.E.L.R. (N.S.) 176 (Joint Board); Re Simcoe (County) Landfill (1995), 16 C.E.L.R. (N.S.) 81 (Joint Board).

<sup>28</sup> Re Innisfil Landfill Hearing - Cost Direction (1994), 14 C.E.L.R. (N.S.) 176 (Joint Board).

<sup>29</sup> Re Interim Waste Authority Ltd. (1995), 16 C.E.L.R. (N.S.) 27 (Joint Board).

<sup>30</sup> Re Innisfil Landfill Site - Costs (1994), 14 C.E.L.R. (N.S.) 176 (Joint Board).

awarded to the party.<sup>31</sup>

12. As a general rule, costs will not be awarded to parties in relation to work for which other parties received participant funding, nor will costs be awarded to cover or "top-up" participant-funded activities.<sup>32</sup>

As described below, many of these principles have been entrenched in the Board's revised Rules of Procedure and new Guideline on Costs Awards.

#### 4.0 THE NEW BOARD RULES AND COSTS GUIDELINE

##### 4.1 New EA Board Rules of Procedure

Rule 12 of the EA Board's recently revised Rules of Procedure (April 1996) sets out the general procedure for applying for costs:

##### RULE 12: COSTS

Any party claiming costs at the conclusion of the hearing shall prepare a written

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<sup>31</sup> Re Steetley - South Quarry Landfill Site - Costs (1995), 19 C.E.L.R. (N.S.) 212 (Joint Board).

<sup>32</sup> Interim Waste Authority Landfills: Costs Decision (1996), 19 C.E.L.R. (N.S.) 103 (Joint Board).

submission setting out all fees and disbursements and indicating the names of the parties from whom the costs are claimed. This submission shall be served on the parties and filed in advance of oral argument, if any. In determining the award of costs to or against a party, the Board will consider, among other things, the factors listed in the Interim Guidelines on Costs.

The "Interim Guidelines" referenced in Rule 12 have recently been replaced by the EA Board's new Guideline on Costs Awards (September 1996), as described below.

In addition to Rule 12, there are several other EA Board Rules that address various cost-related issues. These Rules may be summarized as follows:

Rule 1.6 Where a party, its representative or its consultant fails to comply with the Rules, the Board may, among other things, "order costs to be paid by the party, or where appropriate, its representative or consultant".

Rule 2.5(5) The cost of providing hearing notices shall be borne by the proponent unless the Board determines otherwise.

Rule 3.1(8) A "party" to the proceeding may claim costs or be liable for costs.

Rule 3.2(3) A "participant" in the hearing may not claim costs or be liable for costs.

Rule 4.2(8) The Board may impose costs for late service of documents.

Rule 4.3(4) The Board may impose costs for late filing of documents.

Rule 5.5(2) If a consultant fails or refuses to fully cooperate in mandatory "consultants' meetings", the Board may, among other things, "order that costs be paid forthwith by the party who retained or employed the consultant".

Appended to the EA Board's Rules of Procedure is the "Draft Procedural Direction" (Appendix A), which contains several cost-related provisions. These provisions may be summarized as follows:

- where a party has acted unreasonably or irresponsibly in the interrogatory process, the Board may, among other things, "order the party to forthwith pay costs" (para.9(g));
- where a consultant fails or refuses to cooperate in mandatory "consultants' meetings", the Board may, among other things, "order that costs be forthwith paid by the party represented by that consultant" (para.10(b)); and
- where a party, or its counsel, representatives or consultants, fails to comply with the procedural directions, the Board may, among other things, "order costs to



be paid by the party, or where appropriate, its counsel, representatives, or consultants" (para.12(b)).

It is clear from the foregoing provisions that the EA Board will now consider using cost awards for two distinct purposes: (1) to ensure cost recovery for parties who have made a useful and substantial contribution to the proceedings; and (2) to deter unreasonable or irresponsible conduct by parties or their professional representatives.

#### 4.2 New EA Board Guideline on Costs Awards

With input from its multi-stakeholder "Client Advisory Committee", the EA Board has recently developed and released its new Guideline on Costs Awards (September 1996). A copy of this new Guideline is appended to this paper.

In many respects, the new Guideline closely resembles the "Interim Guideline" and incorporates many of the cost principles and criteria articulated by the Board in its recent jurisprudence. Accordingly, it appears that the EA Board and Joint Board cost decisions described above will still be useful precedents or benchmarks as the EA Board interprets and applies the new Guideline.

The new Guideline is intended for use by any panel of the EA Board or any Joint Board that

has adopted the Guideline for its use.<sup>33</sup> The stated purpose of the Guideline is to provide "consistency and predictability in the awarding of costs by outlining relevant principles and evaluation criteria."<sup>34</sup> However, the Guideline does not limit the EA Board's general discretion to award costs based on the particular circumstances of each proceeding.<sup>35</sup>

(a) What is a "Costs Award"?

The new Guideline defines "costs award" as "the reimbursement of reasonable and eligible expenditures incurred by a party for a proceeding before the Board".<sup>36</sup> As described above, this definition makes it clear that cost awards can only be used to reimburse parties for actual, not prospective, expenses incurred during the proceedings.

It is noteworthy that the new Guideline uses the term "proceeding" rather than "hearing". This presumably allows the Board to consider costs for various proceedings (i.e. motions, consultants' meetings, preliminary hearings, mediation sessions, pre-hearing conferences, etc.) that may occur prior to or during the main hearing on the merits of the proposal before the EA Board. It is likely that the initial Notice of Hearing will continue to serve as the usual cut-off point for pre-hearing costs, although in exceptional circumstances, the EA Board may

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<sup>33</sup> Guideline on Costs Awards, p.1.

<sup>34</sup> Ibid., para.1.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid., para.3.

be persuaded to award some costs for reasonable and necessary work undertaken prior to the Notice of Hearing. Indeed, the new Guideline indicates that in determining the scope of costs, the Board will consider whether "the commencement date for work billed may precede the date of the notice of the hearing".<sup>37</sup>

The Guideline expressly cautions parties that they should not expect to recover all of their eligible expenses through a cost award. The rationale for this caution is that parties are required to make a reasonable contribution to the cost of their participation. However, the Guideline attempts to provide some certainty and predictability by assuring parties that:

... if their participation satisfactorily addresses the principle and criteria established by this Guideline, parties can expect to recover a significant amount of their eligible and reasonable expenses as determined by the Board.<sup>38</sup>

(b) What Types of Expenses are Recoverable through a Costs Award?

The new Guideline lists a number of expenses that may be recovered through a costs award, such as:

- legal, consulting and expert fees;
- travel and related expenses;

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<sup>37</sup> Ibid., para.7.

<sup>38</sup> Ibid.

- transcripts, photocopying, facsimile, delivery costs, applicable taxes; and
- other necessary and reasonable disbursements.<sup>39</sup>

Appendix A of the new Guideline goes on to establish a "fee level", or tariff, for legal and professional services. This tariff, which is based on the Board's experience and practice, sets out varying fee ranges for lawyers and consultants, depending on their years of experience in the relevant field.

For lawyers, the fee range is as follows:

Senior Counsel (> 10 years experience)	\$140-190/hr
Intermediate Counsel (5-10 years experience)	\$120-160/hr
Junior Counsel (<5 years experience)	\$100-140/hr
Paralegal or Articling Student	\$50/hr

For consultants, the fee range is as follows:

Expert/Partner/Principal	\$120-190/hr
Senior Consultant (> 10 years experience)	\$100-160/hr
Intermed. Consultant (5-10 years experience)	\$80-120/hr
Junior Consultant (<5 years experience)	\$60-90/hr
Technician or Analyst	\$50/hr

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<sup>39</sup> Ibid., para.9.1.

Reasonable disbursements which are directly related to a party's participation may be recovered, provided that adequate documentation and receipts are available.<sup>40</sup> Appendix A of the new Guideline prescribes current disbursement rates as follows:

Travel by Automobile	30 cents/km
Meals	\$36.00/day
Photocopy/Facsimile	25 cents/copy

In addition to using the above-noted hourly rates, the EA Board will also be assessing the number of hours that should be allowed for professional representatives. In making this determination, the new Guideline indicates that the Board will consider the following factors:

- the length of the proceeding;
- the complexity of the proceeding;
- the evidence of beneficial results from good preparation;
- the degree of responsibility assumed by the service provider;
- the quality of the service provider's contribution to the proceeding;
- the documentation and verification of the hours billed;
- the argument by opposing parties;
- the general cost criteria in the Guideline; and
- other relevant factors.<sup>41</sup>

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<sup>40</sup> Ibid., para.9.3.

<sup>41</sup> Ibid., para.9.2.

(c) Who Pays Costs Awards?

The new Guideline stipulates that in most cases, costs will be paid by the proponent of the proposed project, plan or program before the EA Board. However, the new Guideline goes on to state that "in exceptional circumstances", a non-proponent party may be ordered to pay costs if that party's participation was "frivolous, vexatious, or without merit". The Guideline, however, goes on to indicate that unreasonable conduct will normally be addressed by reducing or denying costs to the offending party.<sup>42</sup>

The Guideline also admonishes parties to take all reasonable steps to avoid unnecessary motions or other actions which delay proceedings. If a motion, or opposition to a motion, is frivolous, vexatious or without merit, the Guideline states that costs may be awarded, payable forthwith, against the party bringing or opposing the motion.<sup>43</sup>

(d) Who is Eligible for a Costs Award?

The Guideline provides that only parties (i.e. full-time or part-time) are eligible to receive costs. Participants are not liable to pay costs, nor are they eligible to receive costs.<sup>44</sup>

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<sup>42</sup> Ibid., para.5.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid., para.8.

In accordance with Board jurisprudence, the Guideline recognizes that public agencies and municipalities are entitled to request costs. However, costs will not normally be awarded for:

- participation in a proceeding which is within the normal responsibilities and activities carried out by the agency or municipality;
- costs related to in-house staff performing their normal range of duties; and
- outside consultants retained in place of qualified and available in-house staff.<sup>45</sup>

The new Guideline articulates the EA Board's general costs eligibility criteria as follows:

The board awards costs to parties who make a substantial contribution to the conduct of a meaningful public hearing process through responsible and informed participation which helps the board to understand and effectively address the matters at issue.<sup>46</sup>

The Guideline goes on to specify a number of relevant cost eligibility factors:

Regarding the award of costs to a party, the board will consider, among other things, whether the party:

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid., para.3.

- (a) represented a clear and ascertainable interest;
- (b) contributed substantially to a meaningful public hearing process;
- (c) participated in a responsible and informed manner;
- (d) helped the board to understand the matters at issue;
- (e) demonstrated and delineated the purpose for the expenditure of funds;
- (f) coordinated a number of common interests and concerns by forming a group or coalition;
- (g) cooperated with other parties and shared experts where possible to efficiently address issues and provide evidence;
- (h) contributed to a shorter hearing;
- (i) complied with the Rules of Procedure of the Environmental Assessment Board, the hearing schedule, hearing deadlines, and any further board directions;
- (j) made reasonable and timely efforts to share information with other parties,



resolve or scope issues, discuss potential conditions of approval, and explore alternative methods of dispute resolution; or

- (k) received any participant funding.<sup>47</sup>

Absent from this list is "need for financial assistance", which had been identified as a relevant factor by the EA Board in previous costs decisions and guidelines. Thus, the most current view on "need" seems to have been expressed by Joint Board in the Interim Waste Authority Costs Decision:

The Board recognizes that in today's economic climate almost all parties can argue a case for financial need. In the particular circumstances of the IWA hearings, the Board believes that the criterion of need should be applied more to participant and intervenor funding than to costs. Costs are based on the reasonableness of the work, and the necessity for the process that it be done.<sup>48</sup>

As described below, however, "need" remains a relevant factor with respect to interim costs applications.

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<sup>47</sup> Ibid., para.10. "Participant funding" usually refers to pre-hearing funding provided by proponents to assist other parties in obtaining a technical or legal review of the proponent's documentation: generally, see D. Curran, Participant Funding - A Discussion Paper (Canadian Institute of Environmental Law and Policy, 1991).

<sup>48</sup> Re Interim Waste Authority Landfills (1996), 19 C.E.L.R. (N.S.) 103 (Joint Board).

The new Guideline goes on to provide some illustrative examples of unreasonable conduct that may reduce a cost award, including whether the party:

- (a) disputed a fact, issue or opinion when it was unreasonable or unnecessary to do so;
- (b) delayed or lengthened the hearing unnecessarily by its conduct;
- (c) failed to comply with the Rules of Procedure of the Environmental assessment Board, the hearing schedule, hearing deadlines, and any further board directions;  
or
- (d) contributed to duplication of testimony, documentary evidence, or submissions.<sup>49</sup>

(e) What are "Interim Costs"?

In particularly complex, technical or lengthy hearings, some parties with limited resources may be unable to continue to the end of the hearing unless interim costs relief is granted by the EA Board. Accordingly, the new Guideline provides that:

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<sup>49</sup> Guideline, para.10.

A party of modest means may apply before the end of a hearing process to recover legitimate expenditures, and the board may award interim costs for a portion of the expenditures already incurred by a party.<sup>50</sup>

The Guideline, however, stipulates that prior to filing an interim costs application, an applicant must demonstrate financial need and obtain the board's permission (leave). The relevant cost principles (i.e. negotiate first) and criteria in the Guideline apply to the consideration of an interim cost award. Moreover, the Guideline declares that "interim costs are not a replacement for intervenor funding", and that an "interim costs award will not include projected expenditures for hearing participation."<sup>51</sup>

While interim costs have been awarded by the Board in the past,<sup>52</sup> there will likely be renewed interest in using interim costs awards to ensure that parties are not disenfranchised from further participation in Board proceedings for fiscal reasons. It is submitted that the EA Board should take a liberal approach to the granting of interim costs, and should not develop or apply overly stringent tests for obtaining leave to bring an interim cost application. Having regard for the public interest nature of the proceedings, an interim cost applicant should only be required to demonstrate a prima facie case of need in order to obtain leave. Once leave is

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<sup>50</sup> Ibid., para.11.

<sup>51</sup> Ibid.

<sup>52</sup> See, for example, Innisfil Landfill Corporation - Order on Interim Costs (February 26, 1992, Joint Board File No. CH-91-01), where the Board awarded significant interim costs to intervenors due to the proponent's delays and adjournment requests.

granted, it is fair and appropriate to require the interim cost applicant to prove, on a balance of probabilities, that his or her claim satisfies the relevant costs principles and criteria in the Guideline.

(f) What are the Procedural Requirements for Costs Applications?

The new Guideline requires parties to make every reasonable effort to negotiate a costs settlement before applying to the EA Board for a costs award. In fact, the Guideline provides that:

Applications for a costs award can be submitted to the board only when a negotiated settlement cannot be reached.<sup>53</sup>

Negotiated costs settlements do not require EA Board review or approval.<sup>54</sup>

The Guideline indicates that the EA Board will generally not decide the issue of costs until its decision on the merits of the proceeding has been released, and the parties have made reasonable efforts to negotiate a settlement.<sup>55</sup>

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<sup>53</sup> Ibid., para.6.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., para.13.

Where a costs application has been submitted, the Guideline stipulates that the costs applicant bears the burden of proof (presumably on a balance of probabilities), and must demonstrate that any requested costs are:

- (a) directly and necessarily incurred in relation to the proceeding before the board;
- (b) reasonable in the circumstances;
- (c) properly documented and verified; and
- (d) consistent with the principles and criteria outlined in the Guideline.<sup>56</sup>

If this onus is not discharged by the applicant, the EA Board may disallow the costs in question.

The Guideline also specifies the content requirements for cost applications. In particular, when filing a costs claim, the applicant must provide:

- (i) an explanation of how the requirements in (a), (b) and (d) described above have been met;

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<sup>56</sup> Ibid., para.12.

- (ii) a summary statement of hours and fees for each lawyer and consultant, supported by time docket, invoices, and a detailed description of the activity; and
- (iii) a summary statement of disbursements for each lawyer or consultant or group supported by corresponding invoices or receipts. Where invoices or receipts are not obtainable for good reasons, the board may accept a written record of individual disbursements and associated dates.<sup>57</sup>

If a cost claim has been filed, and if a party, against whom costs are sought, objects to another party's application for costs on the basis of eligibility or quantum, the objection and any associated argument must be filed with the Board and the parties within fourteen days after the filing of the costs claim (unless the Board directs otherwise). The cost applicant then has fourteen days to file any relevant reply.<sup>58</sup>

Once this documentation has been exchanged, the Board may decide the issue of costs based solely on the written applications and submissions. Alternatively, the Board may convene a brief oral hearing to clarify matters. In its costs decision, the Board may order to whom and by whom the costs are to be paid and fix the amount of costs. The Board also has the discretion to direct the scale at which the costs are to be assessed and assign the actual

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid., para.13.

assessment, subject to confirmation by the Board, to a designated person.<sup>59</sup>

The costs of preparing and presenting the cost application may be allowed, but only where the applicant's costs claim is reasonable.<sup>60</sup>

## 5. CONCLUSION

Since acquiring its cost powers in the late 1980's, the EA Board has developed and refined various cost principles and eligibility criteria. These principles and criteria have recently been incorporated into the EA Board's revised Rules of Procedure and new Guideline on Costs Awards. Given the loss of statutory intervenor funding and the uncertain nature of voluntary participant funding, the Board's cost powers will become an increasingly important mechanism for addressing the fiscal barriers to meaningful public participation in Board proceedings.

In light of Board jurisprudence on costs, it appears that the Board has traditionally been prepared to utilize its cost powers to encourage responsible hearing conduct by the parties. In the future, however, it also appears that the EA Board will be increasingly prepared to deny or reduce costs (or, alternatively, to make adverse cost awards) in order to discourage frivolous or vexatious conduct that results in unnecessarily lengthy or costly hearings.

October 1996

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid., para.9.2.



## ENVIRONMENTAL ASSESSMENT BOARD GUIDELINE ON COSTS AWARDS

*This Guideline uses the word "board" to mean any panel of the Environmental Assessment Board or any Joint Board that has adopted this guideline for its use.*

### 1. What is the purpose of this Guideline?

This Guideline aims for consistency and predictability in the awarding of costs by outlining relevant principles and evaluation criteria. This Guideline does not limit the board's general discretion to award costs based on the particular circumstances of each proceeding.

### 2. What is a costs award?

A costs award refers to the reimbursement of reasonable and eligible expenditures incurred by a party for participation in a proceeding before the board.

### 3. What is the general principle behind costs awards?

The board awards costs to parties who make a substantial contribution to the conduct of a meaningful public hearing process through responsible and informed participation which helps the board to understand and effectively address the matters at issue.

### 4. Where does the board get its Jurisdiction to award costs?

Costs may be awarded for proceedings before the Environmental Assessment Board under section 18 of the *Environmental Assessment Act*. Similarly, costs may be awarded for a proceeding before a joint board under section 7 of the *Consolidated Hearings Act*. These sections provide that the board:

- a) may award the costs of a proceeding before the board;
- b) may order to whom and by whom the costs are to be paid;
- c) is not limited to the considerations that govern awards of costs in any court;
- d) may fix the amount of the costs or direct that the amount be assessed; and
- e) may direct the scale according to which costs are to be assessed and by whom they are to be assessed.



**5. Who pays costs?**

In most cases, costs are paid by the proponent of the proposed project, plan or program. In exceptional circumstances, costs may be imposed on a non-proponent party, if that party's participation was frivolous, vexatious, or without merit. However, negative participation by a non-proponent party will normally be addressed by a denial or reduction of costs.

Parties must take all reasonable steps to avoid unnecessary motions and other actions which delay the proceeding. If a motion, or the opposition to a motion, is frivolous, vexatious or without merit, costs may be awarded, payable forthwith, against the party bringing or opposing the motion.

**6. What steps must be taken before applying to the board for a costs award?**

Parties are required to make every reasonable effort to negotiate a costs settlement. Applications for a costs award can be submitted to the board only when a negotiated settlement cannot be reached. Negotiated settlements do not require board review or approval.

**7. What proportion of eligible expenses may be recovered in a costs award?**

Parties should not assume they will recover all of their eligible expenses through a costs award. All parties are required to make a reasonable contribution to the cost of their participation. However, if their participation satisfactorily addresses the principles and criteria established by this Guideline, parties can expect to recover a significant amount of their eligible and reasonable expenses as determined by the board.

Based on the circumstances of each case, the hearing panel will determine the scope of the costs and whether the commencement date for work billed may precede the date of the notice of hearing.

**8. Who is eligible for costs?**

Only hearing parties (full-time and part-time) are eligible to receive costs. Participants are not liable to pay costs and they are not eligible to receive costs. Public agencies and municipalities are entitled to request an award of costs. However, costs will not normally be awarded for: participation in a proceeding which is within the normal responsibilities and activities carried out by the agency or municipality; costs related to in-house staff performing their normal range of duties; and outside consultants retained in place of qualified and available in-house staff.

**9. What types of expenses are normally eligible for a costs award?**

**9.1 Eligible expenses which may be recovered through costs include:**

- a) legal, consulting and expert fees;

- b) travel and related expenses;
- c) transcripts, photocopying, facsimile, delivery costs, applicable taxes; and
- e) other necessary and reasonable disbursements.

## 9.2 Legal, Consulting and Expert Fees and Hours

The board has established fee levels for legal and professional services based on board experience and practice, and the need to establish reasonable limits to hearing costs. Fee rates for legal, expert and consulting services are outlined in Appendix A. Within each experience category, the fee range allows adjustments based on the contribution of the service provider with respect to the criteria outlined in section 10 of this Guideline.

The number of hours awarded will be based on: the length of the proceeding; the complexity of the proceeding; the evidence of beneficial results from good preparation; the degree of responsibility assumed by the service provider; the quality of the service provider's contribution to the proceeding; the documentation and verification of the hours billed; argument by opposing parties; the criteria outlined in section 10 of this Guideline and Appendix A; and other relevant factors.

Costs for preparing and presenting the actual costs application are available only where the applicant's costs claim is reasonable.

## 9.3 Disbursements

Reasonable disbursements which are directly related to a party's participation in the proceeding may be recovered. Expense documentation and receipts are normally required. Appendix A contains further details on eligible disbursements.

## 10. What criteria does the Board apply when evaluating costs?

Regarding the award of costs to a party, the board will consider, among other things, whether the party:

- (a) represented a clear and ascertainable interest;
- (b) contributed substantially to a meaningful public hearing process;
- (c) participated in a responsible and informed manner;
- (d) helped the board to understand the matters at issue;
- (e) demonstrated and delineated the purpose for the expenditure of funds;
- (f) coordinated a number of common interests and concerns by forming a group or coalition;
- (g) cooperated with other parties and shared experts where possible to efficiently address issues and provide evidence;
- (h) contributed to a more efficient (shorter) hearing;

- (i) complied with the Rules of Procedure of the Environmental Assessment Board, the hearing schedule, hearing deadlines, and any further board directions;
- (j) made reasonable and timely efforts to share information with other parties, resolve or scope issues, discuss potential conditions of approval, and explore alternative methods of dispute resolution;
- (k) received any participant funding.

Factors that may reduce the costs awarded include, among other things, whether the party:

- (a) disputed a fact, issue or opinion when it was unreasonable or unnecessary to have done so;
- (b) delayed or lengthened the hearing unnecessarily by its conduct;
- (c) failed to comply with the Rules of Procedure of the Environmental Assessment Board, the hearing schedule, hearing deadlines, and any further board directions;
- (d) contributed to duplication of testimony, documentary evidence or submissions.

#### 11. What is the role of interim costs?

A party of modest means may apply before the end of a hearing process to recover legitimate expenditures and the board may award interim costs for a portion of the expenditures already incurred by a party. Prior to the filing of an interim costs application, an applicant must demonstrate financial need and obtain the board's permission (leave).

The relevant principles (e.g. negotiation first) and criteria listed elsewhere in this Guideline also apply to the consideration of an interim costs award. Interim costs are not a replacement for intervenor funding. An interim costs award will not include projected expenditures for hearing participation.

#### 12. What are the content requirements of a costs application?

The costs applicant bears the burden of proof and must demonstrate that any requested costs are:

- a) directly and necessarily incurred in relation to the proceeding before the board;
- b) reasonable in the circumstances;
- c) properly documented and verified; and
- d) consistent with the principles and criteria outlined in this Guideline on Costs.

If the aforementioned onus is not discharged, the board may disallow the costs in question. When filing a costs claim application with the board, the claimant must provide:

- (i) an *explanation* of how the requirements in a), b), and d) described above have been met;

- (i) complied with the Rules of Procedure of the Environmental Assessment Board, the hearing schedule, hearing deadlines, and any further board directions;
- (j) made reasonable and timely efforts to share information with other parties, resolve or scope issues, discuss potential conditions of approval, and explore alternative methods of dispute resolution;
- (k) received any participant funding.

Factors that may reduce the costs awarded include, among other things, whether the party:

- (a) disputed a fact, issue or opinion when it was unreasonable or unnecessary to have done so;
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- (i) an *explanation* of how the requirements in a), b), and d) described above have been met;

- (ii) 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
- (iii) a *summary statement of disbursements* for each lawyer or consultant (or group) supported by corresponding invoices or receipts. Where invoices or receipts are not obtainable for good reasons, the board may accept a written record of individual disbursements and associated dates.

### 13. Timing of the Process

In most cases, the Board will not decide issues of costs until the decision on the overall substance of the proceeding is released and the parties have made reasonable efforts to negotiate a settlement. If a party, against whom costs are sought, objects to another party's application for costs on the basis of eligibility or quantum, the objection and any associated argument must be filed with the board and the parties within fourteen days after the filing of the costs claim (or as directed by the board). The costs applicant(s) then has fourteen days to file any relevant reply.

Once this process is complete, the board may decide the issues of costs based on the written applications and submissions, or the board may allow a brief oral hearing to clarify matters. In its costs decision, the board may order to whom and by whom the costs are to be paid and fix the amount of the costs. The board also has the discretion to direct the scale at which the costs are to be assessed and assign the actual assessment, subject to confirmation by the board, to a designated person.

September, 1996

Further information is available from:  
The Board Secretary, Environmental Assessment Board  
P.O.Box 2382, 2300 Yonge Street, Suite 1201, Toronto, Ontario M4P 1E4  
Tel: (416) 484-7800

Appendix A

Cost Award Rates

Cost Award Component Rates (as of August 1, 1996)		
<b>Legal Fees</b>		<b>range</b>
	Senior Counsel (> 10 yrs experience <sup>1</sup> )	\$140 - \$190 /hr
	Intermediate Counsel (5-10 yrs exp.)	\$120 - \$160 /hr
	Junior Counsel (<5 yrs exp.)	\$100 - \$140 /hr
	Paralegal or Articling Student	\$50 /hr
<b>Consulting Fees</b>		
	Expert/Partner/Principal	\$120 - \$190 /hr
	Senior Consultant (> 10 yrs. experience <sup>1</sup> )	\$100 - \$ 160 /hr
	Intermediate Consultant (5-10 yrs exp.)	\$ 80 - \$120 /hr
	Junior Consultant (<5 yrs exp.)	\$ 60 - \$ 90 /hr
	Technician or Analyst	\$ 50 /hr
<b>Disbursements<sup>2</sup></b>		<b>current rates</b>
	Travel by Automobile	30¢/km
	Meals	\$36.00/day
	Photocopies/facsimile	25¢/copy

1 - Years of experience in the relevant field

2 - The cost of meals, up to a maximum of \$36/day or the applicable Ontario government rate at the time the expense was incurred, will normally be allowed when the claimant is located more than 99 kilometres from the hearing site. Hotel accommodation will normally be allowed when the claimant is located more than 99 kilometres from the hearing site and the hearing lasts for more than one day. Reimbursement for hotel accommodation may not exceed \$100 per night. Reasonable claims for public transit, taxi or airport limousine travel are acceptable. Reimbursements for air and rail travel will be limited to "economy" fare rates. Reasonable compensation for travel time will be considered when the claimant is located more than 99 kilometres from the site of the proceeding and the attendance of the claimant is necessary. Updates to Ontario government disbursement rates are available from the board.

