

M E M O R A N D U M

TO: Toby Vigod
FROM: Joe Kary
DATE: March 16, 1988
RE: Halton Landfill Costs

You have asked me for:

- a list of all consolidated hearings held to date;
- a list of cost awards given - to whom, paid by whom and how much;
- rationales of the Board in giving costs;
- copies of all decisions made by funding panels under the CHA;
- and, any recent cases that update the Bell Canada case.

1) List of all consolidated hearings held to date

- attached.

2) Cost awards

a) County of Oxford landfill site, December 22, 1982

\$75,000.00, paid by the County of Oxford to the Township of South-West Oxford.

Considerations

The Board mentioned the following factors:

- Submissions of both sides were excellent and helpful; but South-West Oxford "proved their case to the satisfaction of the Board, while the County did not".
- South-West Oxford's resources were limited in comparison to the County.

b) Victoria Hospital EFW Facility, August 30, 1983

\$62,187.00 paid by Victoria Hospital to the Citizen's Coalition to Maintain the Environment (includes \$1,500.00 previously awarded).

The bill that had been submitted by the coalition was higher - \$88,923.00. The Board deducted from this figure the amount of money collected from the membership to support its participation in the hearing, and lowered the counsel fees to \$550/day.

Considerations (cited from the South-West Hydro hearing) *→ see (f) below*

The Board listed the following factors:

a) The characteristics of the proponent.

[The Board noted that the proponent, Victoria Hospital, was supported by public funds, and had received substantial funding from the MOE to participate in the hearing.]

- b) Whether there is a clear ascertainable interest to be represented and a specific purpose for the assistance.
- c) Whether a separate and adequate representation of a particular interest assisted and substantially contributed to the hearing.
- d) Whether there is a need.
- e) Whether there was demonstrated a delineated purpose for the expenditure of funds.
- f) Whether there is accountability for the expenditure.
- g) Whether there has been a co-ordinated effort to bring a number of interests within one representative group; whether the particular interest has established a record of concern and a demonstrated commitment in a responsible way to that concern.
- h) Whether there has been a better understanding of the issues.
- i) Whether the costs address an economic imbalance among the parties.

The Board gave "an unqualified affirmative answer" to questions (b) through (i).

Another motion for costs, brought by an individual who participated in the hearings without representation by counsel, was denied without reasons.

c) Seymour/Northumberland landfill site, November 28, 1983

\$15,000.00, paid by Northumberland to H.E.L.P. for expert witness fees; because H.E.L.P. was represented by a legal aid clinic lawyer, no counsel fees were awarded.

H.E.L.P. had billed for \$26,000.00 in expert witness fees.

Considerations

Although the conclusions of H.E.L.P.'s expert were ultimately rejected, the Board was of the opinion that the debate his submissions had generated had led to further clarification of the facts.

There was some discussion of whether costs should be awarded to clients represented by legal aid. The Board was of the opinion that only the client's personal financial liabilities should be compensated.

A submission that costs should be awarded against the Ministry (of Environment? of Energy? - not specified) because it had the most financial resources was rejected; the Board would make such an award only "in very clear circumstances where by not doing so it would create an unjustified burden on others".

A request for costs by the Township of Westminster was rejected because the Township would receive the "benefit" of the use of the EFW facility, and because its roads affected by the site would be upgraded.

d) Hamilton-Wentworth/Redhill Creek Expressway, Oct. 24/85

\$252,702.00 - legal fees and disbursements;
\$68,267.00 - expert witness fees and disbursements.

(These figures include monies paid to satisfy a cost order made in advance of the hearings. The order had been quashed, but the monies paid out under it had neither been returned or demanded.)

Paid by the Regional Municipality of Hamilton-Wentworth, to the Save the Valley Committee Inc. and the Limeridge Property Owners Interest Group Inc.

Considerations

The Board discussed the need for, and value of, public participation at hearings.

One issue raised was whether costs before the Board should be awarded on a party-to-party basis, a solicitor-client basis, or on some other scale. The Board did not consider itself bound by common law approaches to costs - in part because the goal of the Board is to encourage participation, not to discourage litigation. It declined to lay down any principles that would bind its discretionary powers to order costs. The award given was "in an amount sufficient to cover a substantial portion of expenses incurred by those parties" (p. 324).

The Board attached importance to the fact that the intervenors "have underlined their concern by raising some monies on their own for the purpose of financing participation . . . [T]his has, in the past, been one of the criteria considered by joint boards in awarding costs".

It also took into consideration financial constraints imposed on community groups relative to a public sector proponent.

e) Tricil waste disposal site expansion, April 7, 1986

\$51,213.00 to Lambton Anti-Pollution Association;
\$19,969.00 to Pollution Probe;
\$20,573.00 to Township of Moore;

paid by Tricil (Sarnia) Ltd.

Considerations

Costs were awarded to LAPA for counsel fees even though these costs were covered by Legal Aid, contrary to the Northumberland Board's decision.

Perhaps one reason for the change was that in this case LAPA and Probe had received intervenor funding, which had to be repaid in the event of a favourable cost award. It would have been inconsistent to say that government funding channelled via a different route - Legal Aid - could not be recovered through a cost award. Another consideration, not mentioned in the Board's report: in Northumberland, the proponent was a public body, and a cost award covering legal fees would have only meant shifting monies from one public body to another. Here, the proponent is a private corporation.

The Board placed importance on the quality of submissions and the extent to which they assisted the Board in rendering a decision. Also; "in this instance, the potential financial gain from the approvals process will accrue to [Tricil] whereas [the intervenors] were present at the hearing to withstand any threat to their right to a safe and clean environment. Therefore it seems fair to the Board that Tricil and those private industries who avail themselves of Tricil's facility should bear the cost of the proceedings for these intervenor groups" (p. 78).

The Board noted that "the parties worked with one another and coalesced their efforts so that there was little duplication and the hearing moved along expeditiously" (p. 77).

S. Western

f) Ontario Hydro/Transmission System Expansion, Feb. 20/87

Costs paid to 17 participants; the Board's cost awards are given as percentages of expenses rather than dollar amounts: see 1 CELR (NS) 334-38 (attached). Most fees ranged between 50 and 90 per cent. (Most disputes concerning how to assess the dollar value of expenses actually incurred had been settled through mediation: supra, p. 331.)

Considerations

The Board stated the following criteria for awards of costs:

- a) whether there was a clear, ascertainable interest represented;
- b) was there a specific purpose for the assistance obtained;
- c) whether the representation assisted and substantially contributed to the hearing;
- d) whether there was a need for moneys;
- e) whether there was a demonstrated and delineated purpose for the expenditure of the funds;
- f) whether there was a co-ordinated effort to bring a number of interests together as a group where they had common concerns;
- g) whether there has been a better understanding of the issues because of the party's attendance;
- h) whether the costs address an economic imbalance among the parties;
- i) whether the party requesting costs has tried and has been successful in raising some funds through its own efforts and how much has been raised;
- j) whether parties co-operated with one another in retaining common experts for the purpose of giving evidence before the joint board.

The Board also stated that they did not consider an award of 100% of anyone's costs to be reasonable.

3) Funding Panels

I have attached copies of several orders issued pursuant to funding panels, and a listing of all funding awards made to November, 1987.

4) Cases on Costs

I have attached a copy of the Supreme Court decision in Bell Canada v. Consumers' Association of Canada (1986), 26 D.L.R. (4th) 573. Cases that have referred to it are:

- Re City of Edmonton and Public Utilities Board (1985), 16 D.L.R. (4th) 459 (Alta. C.A.).

- Ref Re National Energy Board Act (1985), 19 Admin L.R. 301 (F.C.A.).

(also attached.)