Appeal No. 97-026-CD

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Cost Decision

Date of Cost Decision: March 6, 2000

IN THE MATTER OF Sections 84 and 88 of the *Environmental Protection and Enhancement Act* (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an application for costs related to an appeal filed by Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani, with respect to the refusal of Application No. BC 97-0003 for a Universal Beverage Container Depot by the Director of Action on Waste, Alberta Environmental Protection.

Cite as: Cost Decision *re: Nurani and Virji-Nurani.*

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BACKGROUND

[1] The Applicants, Mr. Nazmin Nurani and Ms. Zeini Virji-Nurani, seek costs arising out of an appeal to the Environmental Appeal Board (Board). The path those proceedings took is described below. The request for costs relates solely to two aspects; a successful reconsideration hearing and the consequent rehearing of the appeal on the merits.

[2] The Applicants seek costs against the Director of Action on Waste, Alberta Environmental Protection (Department) and the various Intervenors in the proceedings; 338802 Alberta Ltd., operating as Millwoods Bottle Depot and the Strathcona Bottle Depot, 425167 Alberta Limited, operating as Bottle Bin Bottle Depot, Y & S Recycling Ltd., operating as Capilano Bottle Depot, and the Alberta Bottle Depot Association (Respondents). The Respondents all take the position that this is not an appropriate case for costs.

SUMMARY OF THE PROCEEDINGS

[3] To put this request for costs in context, it is necessary to look at these proceedings in their entirety. The course of proceedings can be summarized as follows:

(a) Mr. & Ms. Nurani applied to the Director for authority to operate a Universal Beverage Container Depot. The Director refused their request.

(b) The Nuranis (Appellants) filed a Notice of Objection with the Board. The Nuranis were anxious to proceed because of their business plans and a pending purchase and related approval requests with the City of Edmonton.

(c) A hearing date was set for August 18, 1997 after a mediation meeting of July 31, 1997 and after consultation with the Nuranis' counsel and the Department. An advertisement was placed on August 3, 1997. Written submissions were called for and received. The hearing occurred on August 18, 1997.

(d) Certain people with business interests in the bottle depot industry had intervened with

the Director, opposing the Nuranis' request for an operating permit. They were not given direct notice of the Board's August 18, 1997 hearing, although some of the people involved attended the hearing, having heard about it informally just prior to August 18, 1997.

(e) The Board panel sitting on August 18, 1997 decided to allow the appeal and recommended that the Nuranis get their permit. The Minister approved this Report and Recommendations on September 2, 1997.[1]

(f) The Alberta Bottle Depot Association and certain bottle depot owners objected and applied to the Board to reconsider its Decision. These parties said that they had no notice, or inadequate notice of the Board's proceedings, that (in some cases) they had intervened in front of the Director (thus showing their interest) and had relevant information and submissions to make opposing the granting of a new bottle depot permit.

(g) The Nuranis argued that the Board had no authority to reconsider and applied to the Court of Queen's Bench to block any attempt to reconsider the Report and Recommendations.[2]

(h) The Board deferred its proceedings until the Court ruled on the question of whether the Board had the power to reconsider. If the Board lacked the legal authority (as argued by the Nuranis) all else was academic at that point. However, those seeking reconsideration made it clear throughout that:

(i) they believed the Board could reconsider, and
(ii) that if the Board failed to reconsider and allow them to argue their objections, they intended themselves to go to Court and argue that the Board's Report and Recommendations was invalid because of the failure to give them adequate notice.

(i) The Court of Queen's Bench ruled that the Board had the statutory authority to reconsider its Decision in these circumstances and notwithstanding the Minister's subsequent approval.[3]

(j) The Board held a full day hearing on January 13, 1998 to decide whether to allow the

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1 Board Report and Recommendations (*Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection)* in Appeal No. 97-026 dated August 22, 1997, adopted and approved by the Honourable Ty Lund, Minister of Environmental Protection, on September 2, 1997.

2 Court of Queen's Bench Action No. 9703 18343.

3 Reasons for Judgment of the Honourable Mr. Justice Tellex W. Gallant, dated November 27, 1997.

Intervenors request that the Board's August 22, 1997, Decision be reconsidered, set aside and reheard.

(k) On January 29, 1998, the Board issued reasons for the Decision stating that, in part:

> The Board has decided to reconsider its earlier Report and Recommendations and to that end will be proceeding with a new (*de novo*) hearing. The Board is doing this because it believes that the parties who claim that they received either no notice or insufficient notice to prepare their case may have new evidence to present to the Board.[4]

(l) On April 29, 1998, the Board held the *de novo* hearing, which lasted a full day.

(m) On May 22, 1998, the Board issued its reasons for the Decision stating in paragraph 38:

> [38] This involves a request for reconsideration. The Board has reheard the matter *de novo*, hearing the evidence and argument of all parties. The Board has come to the same conclusion as the original panel and for similar reasons. Given this conclusion, there is no basis on which to set aside the previous Report and Recommendations, which will stand, along with the Minister's approval.

(n) On June 18, 1998, one of the Intervenors filed for judicial review of the Board's Decision in the Court of Queen's Bench. Subsequently, the other Intervenors became party to that motion.[5]

(o) The judicial review motion was heard before Mr. Justice M. Shannon in the Court of Queen's Bench on March 3, 1999. The Court dismissed the motion to quash the Board's Decision, with costs to the Nuranis, but without written reasons.

(p) On June 10, 1999, counsel for the Nuranis wrote to the Board as follows:

> We wish to advise that the appeal period has passed and it appears that there will be no appeal from the Judicial Review. Therefore, our client has instructed us to pursue the matter of costs with respect to the extra steps he was required to incur because of the

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4 Decision (*Alberta Bottle Depot Association request for reconsideration, re: Nurani and Virji-Nurani v. Director of Action on Waste, Alberta Environmental Protection)* dated January 29, 1998, in Appeal No. 97-026 and 97-039.

5 Court of Queen's Bench Action No. 9803 10403.

reconsideration, etc.. Could you please advise how you wish this to be handled.

An exchange of submissions followed, pursuant to the Board's directions.

THE BOARD'S COSTS JURISDICTION

[4] The Board's power to order costs comes from section 88 of the *Environmental Protection and Enhancement Act*:[6]

> 88 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 authority is supplemented by Ministerial regulations enacted under the authority of section 94:

> 94 The Minister may make regulations
>
> ...
>
> (d) prescribing the criteria to be considered by the Board in directing interim or final costs to be paid;

[5] The Environmental Appeal Board Regulation[7] expands upon this costs jurisdiction by describing both limitations upon the costs to be awarded and the criteria the Board should consider. The pertinent sections for this case are:

> 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.
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> (2) A party may make an application for all costs that are reasonable and that are directly and primarily related to
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> (a) the matters contained in the notice of objection, and
> (b) the preparation and presentation of the party's submission.

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6 S.A. 1992, Chapter E-13.3, as amended.

7 114/93 as amended.

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 objection 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.

IS THIS REQUEST TIMELY?

[6] The Respondents all take the position that this request for costs, only advanced on June 10, 1999, is untimely. Contrary to section 20(1) of the Regulation set out above, and also contrary to the Board's own Rules of Practice, it was not made "at the conclusion of the hearing." The Nuranis' reply that this is a unique case because it involved a reconsideration hearing not an original hearing. They argue, in part:

> They [the Nuranis] were advised to make their request for costs after the Decision was made. The Decision was then the subject of a Judicial Review application. Once the Judicial Review was refused the Appellants waited until the appeal period passed. It is submitted it would have been premature and impractical to address it

> earlier. Had the Judicial Review been successful or the Judicial Review Decision appealed and ultimately successful, the time and money would have been wasted.[8]

[7] Notwithstanding the practicality of the Appellants' comments about when their requirement might best be addressed, the Regulation nonetheless requires that the request be made at the conclusion of the hearing. It was not made until long after that point. It could have been made in a timely way and then adjourned pending the judicial review proceedings. The Board finds the application is untimely. However, for the reasons given below, the Board would in any event have found this was not an appropriate case for an award of costs.

REQUEST FOR COSTS AGAINST THE DIRECTOR

[8] The Applicants seek costs against the Director of Action on Waste, Alberta Environmental Protection. The first justification for such an award is said to be that, contrary to its past practice, the Director's office failed to notify the Board of those who had intervened with the Director when he denied the Approval, or of the Respondents' interest in the proceedings. The second justification is said to be the Director's repeating, at the *de novo* hearing, the same evidence he had offered at the first hearing.

[9] The Board has recently commented on the limited circumstances where it is appropriate to award costs against a Director as an official of Alberta Environmental Protection. In that instance, the Board stated:[9]

> [34] The legislation protects the departmental officials from claims of damages for all acts done by them in good faith in carrying out their statutory duties. While a claim for costs is not the same as a claim of damages, this provision emphasizes how the legislation views the role of the Department differently than the role of those

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8 Written Submission from Nuranis dated October 4, 1999, page 2, #5.

9 *Cost Decision re: Mizeras, Glombick, Fenske et al*, 98-231, 232 and 233-C, at p. 14, para. 34.

> proposing projects. Where, on the facts of this case, the Department has carried out its mandate, but has been found on appeal to be in error, then in the absence of special circumstances, this should not attract an award of costs . . .

[10] In this case, whatever the past practice, the Director was not under any statutory duty to notify Intervenors of an appeal to the Board. The Director, in refusing the Nuranis the Approval they sought, was operating on the view that such an Approval was inappropriate given the current guidelines for the bottle depot industry. This is not a circumstance where an Order of costs against the Director is appropriate.

REQUEST FOR COSTS AGAINST THE INTERVENORS

[11] The Applicants' argument for costs against the various Intervenors other than the Director proceeds on several grounds. The Applicants cite the Board's Decisions in *Kozdrowski v. Alberta* [1997] AEABD No. 14 and *Ash v. Alberta* [1998] AEABD No. 24, and quotes five criteria to be considered in respect for an award for costs. These are:

(a) The appeal process is to provide an efficient and effective manner to deal with appeals;
(b) The value of the contribution of the submissions to the matter and, in particular, its relevancy and materiality;
(c) Were the submissions in the public interest;
(d) The outcome of the hearing; and
(e) Do the costs relate to the matters before the Board.[10]

[12] The Applicants then proceed to comment on the contribution of each Intervenor based on these criteria. The Board agrees with the submission of the Director that this approaches the issue from the wrong direction. As the Director's brief states at paragraph 28:

> The onus is on the Applicants to show that <u>their</u> participation in the hearings meet the

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[10] Written Submission of the Nuranis dated September 1, 1999, p. 9, #22.

> test for awarding costs set out in the Act and the Regulation and the principles applied by the Board. This includes whether or not an award of costs is both reasonable and necessary. It is not relevant to say that the Director and the Intervenors did not meet the test. Neither the Director nor the Intervenors is making an application for costs. It is the Applicants' contribution that is relevant.[11]

[13] The main substantive arguments in favour of the Intervenors paying costs to the Applicants are, distilled from the Appellants' brief:

(a) That the Intervenors could have raised their concerns at the initial hearing but did not. Instead, by sitting silent and only objecting later they caused the protracted reconsideration hearings.

(b) That the Intervenors sought reconsideration, and obtained a new hearing so they could present new evidence showing the economic effects a new bottle depot would have on their own operations. In the Applicants' view the Intervenors failed to provide such new evidence, justifying costs for what were, for that reason, unnecessary hearings.

(c) The Intervenors were pursuing their private economic interests not the broader public interest. "Therefore, in our view, they should be treated as private litigants and since they lost, costs should be awarded against them."[12]

[14] The Board is unable to accept the Applicants' submission about the first hearing. It is true that some of this protracted litigation could have been avoided had the Director raised the interest of the Intervenors. However, it is equally true that the Applicants could also have raised their identities and concerns with the Board but did not do so. The Board required both the Nuranis and the Director to identify interested parties. The Nuranis too failed to identify those who had intervened with the Director as potentially interested parties. Rather, the Nuranis precipitated some of these difficulties themselves by urging the Board to reduce the customary period for giving notice of Board hearings by newspaper advertisement. Their concern at the time was not the public interest, but the exigencies of their own business situation as they were under pressure because they had

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11 Written Submission of the Department dated September 13, 1999, p. 7, #28.

12 Written Submission of the Nuranis dated September 1, 1999, p. 10, #30.

purchased land and already obtained development approval. It was the decision to reduce the normal notice period, made at the request of the Nuranis, combined with the Nuranis' own failure to identify interested parties, that laid the foundation for the subsequent reconsideration.

[15] It is true certain parties were present at the first hearing and did not raise objection. However, the reconsideration panel found the notice they had received was too short in the circumstances. While it may have been enough to enable some to attend, it did not enable their effective participation.

[16] The Board does not accept the Nuranis' argument that the Intervenors promised, but failed to produce, new evidence. Evidence produced was not sufficient to convince the Board that a different result was appropriate, but the Intervenors did present evidence including some evidence of economic impact on their operations. While there was a heavy element of private interest to this, the viability of bottle depots generally is a significant environmental factor and therefore something that was appropriate for the Board to consider.

[17] The argument that the Intervenors were pursuing just their private interest and therefore should pay costs on a loser pay approach is not convincing. Both the Nuranis and the Intervenors were pursuing their private interests. Bottle depot approvals were being granted under a managed system. They were sufficiently attractive as an economic enterprise to encourage the Nuranis to try to enter the market by obtaining a new approval. The Intervenors wished to protect their market share and existing client base by resisting that attempt. The Director and, on appeal the Board, must weigh the public interest in accordance with their respective legislative mandates. The existence of private interests does not mean the Board should automatically adopt a "loser pay" approach to costs. The Board has made it clear in several cases that a loser pay approach will not usually form the basis of its exercise of its costs jurisdiction. The criteria in section 20(2) make other factors relevant. Even assuming costs in this case were to be awarded on a loser pay basis, success in this case has been mixed. It was the Intervenors, not the Nuranis that "won" the application to reconsider, although the Nuranis subsequently prevailed on the merits.

[18] In this case, it is the Board's view that the costs of these various proceedings should be born by the parties themselves. It is not an appropriate case for any award under section 20 of the Act.

DECISION

[19] No costs will be awarded in this appeal.

[20] So ordered.

Dated on March 6, 2000, at Edmonton, Alberta.

Dr. John P. Ogilvie, Panel Chair

Dr. M. Anne Naeth

Mr. Ron V. Peiluck