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DECISION NO. 2017-EMA-011(d)

In the matter of an appeal under section 100 of the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Thomas H. Coape-Arnold	**APPELLANT**
AND:	Delegate of the Director, *Environmental Management Act*	**RESPONDENT**
AND:	Pinnacle Renewable Energy Inc.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board: Gregory J. Tucker, QC, Panel Chair R.G. (Bob) Holtby, Member Kent Jingfors, Member	
DATE:	Conducted by way of written submissions concluding on November 29, 2019	
APPEARING:	For the Appellant: For the Respondent:	William J. Andrews, Counsel Meghan Butler, Counsel Johnny Van Camp, Counsel

APPLICATION FOR COSTS

[1] Following the Panel's decision dismissing this appeal, the Respondent applied for an order requiring the Appellant to pay all or part of the Respondent's costs in connection with the appeal (the "Costs Motion"). The Appellant filed an application to summarily dismiss the Costs Motion pursuant to section 31(1)(f) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), and the Board's power to control its own process. The Panel denied that application in *Thomas H. Coape-Arnold v. Delegate of the Director*, (Decision No. 2017-EMA-011(c), November 1, 2019) (the "Summary Dismissal Decision"), leaving the Costs Motion to be determined on the merits.

[2] The Third Party did not participate in the Costs Motion.

BACKGROUND

[3] The appeal concerned a July 10, 2017 decision (the "Decision") made by Brian Vroom, delegate of the Director, *Environmental Management Act*, Ministry of Environment and Climate Change Strategy (the "Ministry"). The Decision granted an amendment (the "Amendment") to a 2014 permit (the "Permit") issued to Pinnacle Renewable Energy Inc., the Third Party in this proceeding. The Permit authorizes the discharge of contaminants to the air from the Third Party's wood pellet manufacturing plant located in Lavington, British Columbia (the "Facility"). The Appellant asserted in the appeal that that the Amendment should not have authorized certain emissions, and that certain conditions should have been attached to the Permit.

[4] The appeal followed an earlier appeal, commenced in 2015, which challenged the Ministry's decision to issue the original Permit to the Third Party (the "First Appeal"). The Appellant was also an appellant in the First Appeal. The First Appeal was settled by way of a Memorandum of Understanding dated June 7, 2016 (the "MOU").

[5] The Third Party formally applied for the Amendment in 2017 in order to make certain changes to the Facility. Specifically, the Third Party wished to convert the Facility from a "double pass" system, in which air passes over the drying pellets twice before release, to a "single pass" system, in which air passes over the pellets only once. The Third Party applied for those changes following a fire, which was attributed to the double pass system, and to deal with humidity issues associated with the double pass operation. As the conversion would potentially impact emissions, an amendment application was necessary. After various meetings, consultation, and submission of reports over the spring and early summer of 2017, the Decision was issued granting the Amendment.

[6] The Appellant appealed the Amendment on several grounds. During extensive pre-hearing conferences and proceedings certain proposed grounds of appeal were either struck or withdrawn. There were also pre-hearing discussions and rulings on the question of whether certain proposed grounds of appeal would require expert evidence, and whether the Appellant intended to rely on expert evidence. Ultimately, the appeal proceeded on four grounds:

- The Decision failed to properly consider the potential for the Amendment to increase emissions of volatile organic compounds ("VOCs") from the Facility.
- The Decision was based on inadequate dispersion modelling, and the Ministry should have required additional modelling prior to considering the Amendment.
- The Decision should have specified discharge limits for $PM_{2.5}$ (very small particles, and the particles of primary concern from a human health perspective).

- The Decision permits unnecessarily high limits for total particulate matter ("TPM").

[7] An additional ground of appeal was referred to at the outset of the hearing, but was abandoned by the Appellant following discussion with the Panel.

[8] The hearing of the appeal proceeded in February-March 2018. The Appellant presented arguments in support of the first three grounds of appeal based, in large part, on email correspondence from two university professors, a variety of journal articles, as well as standards and guidelines from other jurisdictions concerning the treatment of VOC's and the behaviour of pellet dryers and other types of equipment, such as kilns. In support of the final ground of appeal, the Appellant relied primarily on statements and correspondence made during the Amendment application process. The Appellant asserted that this material showed that the TPM limits in the Amendment were too high, as the Facility could operate at lower limits.

[9] At the conclusion of the Appellant's case, the Third Party brought a no evidence motion, supported by the Respondent. The primary ground for that motion was an argument that the Appellant had presented arguments requiring expert evidence without tendering any such evidence, and, generally, provided no admissible evidence in support of the appeal. After consideration, the Panel granted the no evidence motion on the first three grounds of appeal, but not on the fourth ground, with reasons to follow. The hearing then proceeded, with the Respondent and Third Party tendering evidence on the fourth ground of appeal.

[10] At the conclusion of the hearing, the Respondent and the Third Party requested the opportunity to make submissions concerning costs in the event that the appeal was dismissed. The Appellant did not oppose proceeding in this way. Accordingly, no submissions were made at the hearing concerning costs.

[11] The Panel's decision on the merits of the appeal was issued on March 27, 2019: see *Thomas H. Coape-Arnold v. Delegate of the Director*, (Decision No. 2017-EMA-011(b)). In that decision, the Panel explained the reasons for accepting the no evidence motion on the first three grounds of appeal, and dealt with the fourth ground of appeal. In dealing with the first three grounds of appeal, the Panel noted the Board's broad discretion as to whether expert evidence would be required. The Panel did not entirely reject the Appellant's ability to rely on journal articles, standards and guidelines from other jurisdictions, and similar documents. However, the Panel found that none of the material relied on was of assistance on the matters in issue. In very broad summary, none of the material relied on supported the Appellant's argument that conversion from a double pass to a single pass operation would have any material impact on VOC emissions from the Facility. The Panel also noted some strengths of the Amendment, including the fact that the Ministry had required additional ongoing monitoring, which would be superior to additional modelling, and to the fact that certain arguments made by the Appellant involved a challenge to the terms of the MOU, which all parties agreed remained in force.

[12] On the fourth issue, the Panel found that the Third Party had requested and the Respondent had authorized, in the Amendment, that TPM levels be set at a level consistent with the TPM emission level warranted by the manufacturer of the dryers. The Panel also found that the Amendment permitted the emission of a TPM level based on a reasonably conservative perspective, due to uncertainties associated with projected emissions upon conversion to a single-pass system. The Panel dismissed the appeal. At paragraph 165 of this decision, the Panel addressed the Respondent's and Third Party's request to make submissions on costs by setting deadlines for their submissions and the Appellant's reply.

[13] On April 23, 2019, the Respondent filed the Costs Motion consisting of a bill of costs in the amount of $23,758.98, a written argument, and copies of certain case management correspondence that had passed among the parties and the Board in the period leading up to the hearing. The Third Party ultimately elected not to apply for costs from the Appellant.

[14] After retaining legal counsel, the Appellant applied to summarily dismiss the Costs Motion. He provided submissions in support of the summary dismissal application as well as submissions on the Costs Motion.

[15] The Panel dismissed the Appellant's application for summary dismissal of the Costs Motion. At paragraphs 35 and 36 of the Summary Dismissal Decision, the Panel set out the "next steps and timing" for completion of the outstanding Costs Motion:

> 35. The Panel is mindful of the time and expense that this proceeding has already involved. It is in the interests of all parties that the Costs Motion be completed with a minimum of additional time and expense, consistent with ensuring a just result. To that end the Panel makes the following comments:
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> - The Appellant's submissions on the summary dismissal application contain extensive and comprehensive arguments regarding the merits of the Respondent's Costs Motion. The Panel will consider those submissions in deciding the Costs Motion. Any further submissions should be restricted to new points not previously covered as part of the summary dismissal application.
> - The Appellant indicated in his submissions on the summary dismissal application that he may need to provide affidavit evidence in response to the Costs Motion. While it is up to the Appellant to add whatever additional information he believes is relevant and reasonably required to respond to the Costs Motion, the Panel is prepared to consider the Costs Motion on the basis of written argument and the evidence that was before us at the hearing.
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> 36. The Appellant will have 30 days from the date of this decision to file any additional submissions in response to the Respondent's Costs Motion. The

> Respondent will then have seven days to provide any rebuttal submissions, with rebuttal restricted to new matters arising out of the Appellant's response, not previously dealt with in the Respondent's Costs Motion or its response to the Appellant's summary dismissal application.

[16] The Appellant filed additional submissions and a supplemental affidavit sworn by him on November 14, 2019. On November 29, 2019, the Appellant also provided the Panel with a decision issued that day by the Board on a costs application in a different appeal. That decision will be discussed below.

[17] The Respondent did not file any additional submissions on its motion.

ISSUE

[18] The sole issue to be decided is whether the Board should order costs to be paid by the Appellant, in favour of the Respondent.

RELEVANT LEGISLATION AND CASE LAW

[19] The Board's authority to order a party to pay all or part of the costs of another party in connection with an appeal is found in section 47(1)(a) of the *ATA*. The Board's policy is to award costs only in "special circumstances". Section 13 of the Board's Practice and Procedure Manual sets out certain matters that may qualify as "special circumstances", without attempting to be exhaustive. The matters referred to in section 13 include: bringing an appeal for an improper purpose; bringing a "frivolous or vexatious" appeal; failure to take steps in a timely manner to the prejudice of other parties; and failure to comply with an order or direction of the Board.

SUBMISSIONS OF THE PARTIES

The Respondent

[20] In support of its Costs Motion, the Respondent recognizes the narrow circumstances in which the Board will award costs; however, it says that the test is met in this case, relying primarily on the following arguments:

- The Appellant included matters in the appeal that were the subject of a binding settlement arising out of the 2015 First Appeal (see paragraphs 27-28 of the Panel's decision on the merits), and certain procedural rulings were necessary to define the proper scope of the present appeal.
- The Appellant, prior to the hearing and in the context of case management proceedings, advised that no expert evidence would be called but subsequently gave notice that he would rely on scholarly articles and/or correspondence as expert evidence.

- The Appellant offered expert opinions at the hearing.
- The Appellant was "disingenuous" in his initial answers given in cross-examination concerning tendering of expert evidence in the First Appeal (although the Appellant ultimately agreed that expert reports had been tendered).
- The Appellant unreasonably proceeded to a four-day hearing without expert evidence in support of the Appellant's "theory", relying on inadmissible material and scholarly articles that did not support the conclusions the Appellant sought to draw from them.

The Appellant

[21] In response, the Appellant states:

- There are only a few cases in which the Board has awarded costs. The Appellant submits that all of those cases involved an element of "bad faith".
- There was no bad faith in this case. The Appellant had no pecuniary or other interest in the proceeding and had a genuine belief in the arguments he put forward.
- The fairly extensive case management proceedings did not involve any finding or determination that the Appellant could not proceed with an appeal based on his "theory". Direction from the Board was to the effect that, if there was no merit to the Appellant's case, the appropriate course would be a no evidence motion by the Respondent and/or Third Party at the conclusion of the Appellant's case (as ultimately occurred).
- The Appellant made one or more proposals to settle the appeal if certain environmental studies, including studies that the Amendment describes as being within the authority of the Respondent to order, were undertaken.
- The Appellant's conduct during the hearing was respectful and reasonable, and not intended to hinder or delay conduct of the appeal. For example, the Appellant adopted the Panel's suggestion that a particular ground of appeal be dropped, and revised his argument to ensure that it did not involve a challenge to the original Permit.
- The Board's approach to costs is set out in a recent decision, *Gibsons Alliance of Business and Community Society and Marcia Timbres v. the Director,* (Decision No. 2017-EMA-010(d), November 29, 2019) [*Gibsons Alliance*]. That decision emphasizes the narrow circumstances in which the Board will order costs, and this case does not meet that test.

[22] In his supplemental affidavit, the Appellant explains that he filed the appeal because he was concerned that the Amendment would impact his lung condition

and increase air quality risks for the community and schools. He states that many members of the community encouraged him in his efforts.

[23] The Appellant also explains that he was unable to afford legal representation for the hearing and thought that the research documents he presented were sound and supported his case. He states that he appealed in good faith and presented his case to the best of his ability. He explains that he made a mistake during cross-examination when asked about expert evidence in the First Appeal, and that his response was not disingenuous. The Appellant believed that he could made a credible case in the appeal based on his research and experience and states that his testimony was sincere.

The Panel's Findings

[24] The principles applicable to an award of costs by the Board were recently and comprehensively discussed in *Gibsons Alliance*, at paragraphs 34-35. In summary:

- An award of costs in proceedings before the Board is an extraordinary remedy, to be used at the Board's discretion to punish and dissuade abuses of process or other forms of reprehensible conduct.
- Whether to award costs involves considerable exercise of discretion and will often be a very fact-specific exercise.
- The Board must keep in mind that a range of personality types are permitted to participate in the appeal system, and that costs awards should not dissuade people from participating in an appeal just because they are more strident or persistent than others.
- Finally, costs may only be awarded where there are "special circumstances", meaning conduct amounting to a significant departure from expected standards.

[25] As the Panel noted in the Summary Dismissal Decision, the facts in this case are unusual: the Appellant was involved in the First Appeal and the settlement of that appeal; there were extensive case management discussions concerning expert evidence in the present appeal; and the Appellant pursued the present appeal on the basis of voluminous scholarly articles and limited correspondence from potential experts which, on an objective reading, did not support the interpretation sought to be drawn from them.

[26] Some of the matters raised by the Respondent can be dealt with relatively easily. The Respondent refers to evidence given by the Appellant concerning the First Appeal, and whether expert evidence was tendered in support of the First Appeal. The Appellant initially said this was not the case, but on cross-examination conceded that, in fact, evidence given by one of the other appellants was delivered in the form of an expert report. The Panel concludes that the Appellant was not being intentionally misleading in his evidence. The Panel would have reached this

conclusion irrespective of the Appellant's supplemental affidavit, in which the Appellant expressly discusses this evidence.

[27] Similarly, the Panel finds that there was nothing improper, in principle, in the Appellant's reliance on scholarly articles and material from other jurisdictions (although certain specific aspects of that reliance are problematic, and are discussed below). The Panel also finds that, while certain arguments made by the Appellant were not available to him as a result of the MOU, those arguments were not improper or an abuse of process.

[28] There are certainly aspects of the Appellant's approach to the appeal that are open to criticism. The Appellant was undoubtedly motivated by genuine concerns for the quality of the environment in his community. The Appellant is intelligent, scientifically trained and well-read. However, the shifting and wide-ranging nature of the Appellant's arguments during the course of the appeal, and the volume and nature of written material that he relied on, are problematic. Rather than researching and enquiring into one or more legitimate concerns regarding the Amendment, and raising those in a reasoned way, he used a scatter-gun approach, relying on anything that might be used to attack any aspect of the Amendment, and in some cases, the Permit itself and/or the terms of the MOU. This made it difficult for the Respondent and Third Party to understand, let alone respond to, his case. Whether that was the Appellant's intent, this is the impression left with the Panel. The case the Appellant put forward, intentionally or not, relied on strained readings of scholarly articles and the need to consider extensive material that, on a fair reading, had no real relevance to the issues.

[29] While aspects of the Appellant's handling of the appeal were problematic, the Panel finds that these do not rise to the level of abuse of process, and do not constitute special circumstances justifying an award of costs. As the Board noted in *Gibsons Alliance,* an appellant who is strident and persistent should not be punished for that. The Appellant's handling of the appeal may have skirted the boundary between acceptable and unacceptable conduct; however, the Panel finds that the Appellant did not cross that boundary, or did not do so clearly enough to justify imposing an award of costs against him. The Appellant's actions did not amount to "reprehensible conduct" and did not constitute a "significant departure from the expected standard" of an appellant in his position, such that an order of costs should be made.

[30] The Panel is conscious of the fact that there may be ongoing discussions between the Appellant and the Third Party under the Amendment. The MOU remains in place, insofar as the Panel is aware, and sets out a framework for discussions on issues of concern. Nothing in this decision should be taken to discourage an appeal against any future statutory decisions made in relation to the Permit. At the same time, the Panel hopes that, if issues do arise, they are approached in a constructive way, with a view to raising and obtaining answers on specific issues of concern, with an appeal to the Board only used where issues legitimately cannot be resolved.

DECISION

[31] In making this decision, the Panel has carefully considered all of the submissions and arguments before it, whether or not specifically reiterated here.

[32] For the reasons provided above, the Costs Motion is denied.

"Gregory Tucker"

Gregory Tucker, Q.C., Panel Chair
Environmental Appeal Board

"R.G. (Bob" Holtby"

R.G. (Bob) Holtby, Panel Member
Environmental Appeal Board

"Kent Jingfors"

Kent Jingfors, Panel Member
Environmental Appeal Board

May 26, 2020