



Province of
British Columbia

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2000-WAS-003(a)

In the matter of an appeal under section 44 of the *Waste Management Act*,
R.S.B.C. 1996, c. 482.

BETWEEN: Delta Shake & Shingle (1989) Ltd. and **APPELLANTS**
429155 British Columbia Ltd.

AND: Assistant Regional Waste Manager **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Toby Vigod, Chair

DATE OF HEARING: Conducted by way of written submissions
concluding on July 10, 2000

APPEARING: For the Appellant: Ted Myrah
For the Respondent: Gareth Morley, Counsel

APPLICATION FOR COSTS

This is an application by the Assistant Regional Waste Manager (the "Assistant Manager") for its costs in relation to the appeal by Delta Shake & Shingle (1989) Ltd. ("Delta Shake & Shingle") and 429155 British Columbia Ltd. ("429155").

BACKGROUND

On December 14, 1999, the Assistant Manager issued Pollution Prevention Order OR-16222 (the "Order"). The Order required Delta Shake & Shingle and 429155 to undertake certain actions and prepare a remediation plan by specified dates following a fire that took place at the landfill owned by Delta Shake & Shingle located at 8970 River Road, Delta.

On January 13, 2000, Delta Shake & Shingle and 429155 appealed the Assistant Manager's decision to the Environmental Appeal Board. A hearing was scheduled for June 20, 2000. The Appellants failed to appear at the hearing. On June 21, 2000, the Board issued a decision ordering the appeal dismissed as abandoned. The Board indicated that the Order stands as issued.

The Board's decision setting out the chronology of events is found in *Delta Shake & Shingle (1989) Ltd. and 429155 British Columbia Ltd. v. Assistant Regional Waste Manager*, (Appeal No. 00-WAS-003, June 21, 2000) (unreported). The Board noted that the Appellants failed to file any Statement of Points by the dates set out by the

Board. Further, on June 19, 2000, Ted Myrah, an officer and representative of both Appellants, returned a call placed by the Board office and talked to the Executive Director of the Board. At that time, Mr. Myrah indicated that he had received all the documents and that he would attend the hearing, but might be requesting an adjournment. He was reminded that the hearing was set for 9:00 a.m. and that a failure to attend could result in an order for costs being made against him. Despite that reminder, Mr. Myrah did not attend the hearing.

At the hearing, the Assistant Manager applied for an order requiring the Appellants to pay its costs in connection with the appeal. The Board ordered that, since Mr. Myrah was not present, submissions on costs and quantum would be done by writing. A Notice was sent by the Board to the parties on June 20, 2000, setting out a schedule for the receipt of written submissions. The parties were also provided a copy of the British Columbia Court of Appeal's decision in *Roberts v. College of Dental Surgeons of British Columbia* [1999] B.C.J. No. 357 (February 19, 1999) for comments regarding the issue of the appropriate quantum of costs.

The Respondent's submission was filed with the Board on June 27, 2000. Due to an administrative error, a copy did not reach the Appellants until June 30, 2000. As a result, the Board extended the time for the Appellants' reply submissions until July 7, 2000, with any rebuttal by the Respondent due on July 10, 2000. The Appellants did not file any submissions with the Board.

The Respondent seeks the following orders:

- An order of costs, assessed as special costs, in the amount of \$2109.75 payable to Her Majesty the Queen in Right of the Province of British Columbia jointly and severally against Delta Shake & Shingle and 429155; or
- In the alternative, an order of costs, assessed as party and party costs at Scale 3, in the amount of \$1383.35 payable to Her Majesty the Queen in Right of the Province of British Columbia jointly and severally against Delta Shake & Shingle and 429155.

In its written submission, the Respondent also argued that the Appellants should be ordered to pay the expenses of the Board in connection with the appeal.

ISSUES

1. Whether the Board should order the Appellants to pay the costs of the Respondent in relation to this appeal.
2. If an order of costs is appropriate, whether costs should be awarded on a party-and-party or special costs basis.
3. If an order of costs is appropriate, whether costs should be awarded jointly and severally against the Appellants.

4. Whether the Board should order the Appellants to pay all or part of the expenses of the Board in connection with the appeal.

RELEVANT LEGISLATION AND POLICY

Section 11(14.2) of the *Environment Management Act* provides:

11(14.2) In addition to the powers referred to in subsection (2) but subject to the regulations, the appeal board may make orders for payment as follows:

- (a) requiring a party to pay all or part of the costs of another party in connection with the appeal, as determined by the appeal board;
- (b) if the appeal board considers that the conduct of a party has been vexatious, frivolous or abusive, requiring the party to pay all or part of the expenses of the appeal board in connection with the appeal.

No applicable regulations have been passed.

Board policy on requests for costs is found in the *Environmental Appeal Board Procedure Manual*. It states that costs should only be ordered in special circumstances. The circumstances alleged to have occurred in this case are set out at page 44 of the Manual as follows:

- (a) where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;
- (b) ...
- (c) where a party, without prior notice to the Board, fails to attend a hearing or to send a representative to a hearing when properly served with a "notice of hearing."

Supreme Court Rules, B.C. Reg. 221/90

Rule 57- Costs

Special Costs

- (3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including
 - (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the solicitor,

- (c) the amount involved in the proceeding,
- (d) the time reasonably expended in conducting the proceeding,
- (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,
- (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
- (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor.

DISCUSSION AND ANALYSIS

1. **Whether the Board should order the Appellants to pay the costs of the Respondent in relation to this appeal.**

The Respondent refers to the Board's policy, as stated in its Procedural Manual, not to award costs routinely but only in special circumstances. The Respondent notes that the policy recognizes the important public interest in environmental matters, and the need to avoid deterring individuals with legitimate concerns from using the Board's process. The Respondent submits, however, that the Board's ability to fulfil its mandate would be equally harmed if parties are allowed to abuse the Board's process with impunity.

The Respondent argues that, in this case, the appeal was frivolous and vexatious from the outset. He submits that the Order simply required the Appellants to do things they were legally obligated to do in any event, and they have never raised a plausible objection to it. The Respondent submits that the only reasonable inference is that the Appellants brought the appeal for the improper purpose of delaying enforcement of the Order. The Respondent argues that the only reasonable inference from the conduct of Appellants is that, at least by June 1, 2000, when they ceased to be represented by counsel, they had no real intention of pursuing the appeal. The Respondent argues that the Appellants failure to advise the Board or the Respondent of this caused the Respondent the prejudice of having to put together its case, and expend resources unnecessarily.

The Respondent refers to the Board's Procedure Manual, which provides that "special circumstances" include "where a party, without prior notice to the Board, fails to attend a hearing or send a representative to a hearing when properly served with a 'notice of hearing'." The Respondent notes that the Appellants were properly served, and Mr. Myrah not only failed to notify the Board that no representative of the Appellants would attend, but falsely asserted that he would. The Respondent submits that, if these circumstances do not justify awarding costs, it is difficult to conceive of circumstances which would.

While the Panel is not in a position to rule on whether the appeal was frivolous or vexatious, as the merits were not argued, the Panel finds that the failure of the Appellants to attend the hearing after being properly served with a "notice of

hearing" warrants an award of costs against them. An award is particularly appropriate in this case, given Mr. Myrah's conversation with the Executive Director on June 19, 2000, at which time he indicated that he would be attending the hearing and was told that costs could be awarded against the Appellants if they did not attend.

2. If an order of costs is appropriate, whether costs should be awarded on a party-and-party or special costs basis.

The Board asked the parties to address the decision of the British Columbia Court of Appeal in *Roberts, supra*, in regard to the issue of the appropriate quantum of costs. In that decision, the Court of Appeal considered the power of statutory tribunals to award costs. The case involved a statutory appeal from a disciplinary decision of an inquiry committee of the College of Dental Surgeons of British Columbia. The appeal turned on the interpretation of section 26(1.1)(g) of the *Dentists Act*. The relevant provision permitted the College's governing council to make rules respecting:

cost of investigations and hearings concerning a current or former registrant or a class of current or former registrant including the assessment of some or all the costs against some or all of the parties to the hearing and the collection of costs;

The Court of Appeal ruled that the meaning of the word "costs" in the statute was a matter of statutory interpretation. In ordinary circumstances, "costs" in the statute was found to mean "party and party costs," which would include out of pocket expenses and an allowance for legal expenses consistent with the Supreme Court Rules, B.C. Reg. 221/90.

The Respondent notes that the Court left open the possibility that the College could have awarded special costs where "the conduct of the party was reprehensible in the sense that the word has been considered by the courts in the context of costs." In the circumstances of that case, where the appellant had done no more than defend himself against allegations he later admitted to be true, the circumstances necessary for an award of special costs were not found. The Court also stated that: "To justify special costs which encompass all of the legal expenses of the College requires a finding that the appellant's acts amount to an abuse of the process in which he is a party" (p.15).

The Respondent submits that the Court's interpretation of the word "costs" in *Roberts* applies to the word "costs" in the *Environment Management Act* (i.e. costs as per Rule 57 and Appendix B- Party and Party Costs of the Supreme Court Rules). However, the Respondent submits that the conduct of the Appellants in this case would justify special costs if the matter were before the Supreme Court.

The Respondent also refers to *Bradshaw Construction Ltd. v. Bank of Nova Scotia* (1991), 54 B.C.L.R. (2d) 309 (S.C.) at p.319, aff'd (1993), 73 B.C.L.R. (2d) 212 (C.A.) for the proposition that special costs are, as a rule of thumb, equal to 80% to 90% of the actual costs of the litigation. In *Bradshaw*, the Court notes that:

"Special costs are mostly reserved for those situations where the unsuccessful party has been guilty of gross misconduct or the like."

In this case, counsel for the Respondent is a salaried government employee of the Ministry of Attorney General in his second year of call. Counsel refers to the Government's Fee Tariff for a lawyer of comparable experience. He then calculated his hours preparing for the hearing and took 80% of the total, which resulted in a figure of \$1,766.40. Disbursements were in the amount of \$343.35, and the Respondent, therefore, submits that the appropriate amount of costs that should be awarded is \$2,109.75.

In the alternative, the Respondent submits that, if the Board determines that this is an appropriate case to award costs on a party-and-party basis, this case was one of ordinary difficulty, and should be assessed at Scale 3. The Respondent refers to the current Supreme Court schedule where \$80 is permitted for each unit when assessed at Scale 3, plus disbursements. On a party-and-party basis, the Respondent asks for an Order for costs in the amount of \$1,040 (\$80 x 13 units) plus \$343.35 for disbursements, for a total of \$1,383.35.

The Panel finds that, given the deliberate conduct of the Appellants in not filing any Statement of Points and in failing to appear at the hearing after indicating that they would appear, an award of special costs is warranted. The Panel finds that the behaviour of the Appellants constitutes an abuse of the Board's process referred to in the *Roberts* and *Bradshaw* decisions, above.

The Panel has the authority to award "all or part of the costs" in connection with the appeal. The Panel has considered all the circumstances, including the factors listed in Rule 57(3). In this case, the Panel orders the Appellants to pay the Respondent the sum of \$2,109.75, as requested by the Respondent.

3. If an order of costs is appropriate, whether costs should be awarded jointly and severally against the Appellants.

The Respondent submits that in Supreme Court practice, where a number of plaintiff's jointly pursue a claim and costs are awarded against them, costs are awarded jointly and severally (see, *King v. On-Stream Natural Gas Management Inc.*, [1993] B.C.J. No. 2283, British Columbia Supreme Court (November 9, 1993) and that practice should be followed by the Board.

The Panel finds that Mr. Myrah was a representative of both Appellants and that it was his failure to attend the hearing that led to the award of costs against the Appellants. The Panel orders that the Appellants are jointly and severally liable to pay the Respondent's costs.

4. Whether the Board should order the Appellants to pay all or part of the expenses of the Board in connection with the appeal.

In its written submissions, the Respondent submits that the Board has the jurisdiction to recover its expenses in connection with the appeal. Unlike the College of Dental Surgeons in *Roberts*, the Respondent notes that section

11(14.2)(b) of the *Environment Management Act* expressly permits the Board to order that a party pay all or part of its expenses where it considers that the conduct of a party has been frivolous, vexatious or abusive. The Respondent submits that the Appellants' conduct has been frivolous, vexatious and abusive, and that the Board has jurisdiction to make such an order against the Appellants.

Due solely to the fact that the Panel did not specifically request submissions on whether it should recover its expenses, the Panel declines to make such an order in this case.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all the evidence before it, whether or not specifically reiterated here.

The Panel orders that Delta Shake & Shingle and 429155 are jointly and severally liable for the costs of the Respondent in the amount of \$2,109.75.

The application for costs is allowed.

Toby Vigod, Chair
Environmental Appeal Board

July 11, 2000