BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2003-WAS-003(b)

In the matter of a request for costs under section 11(14.2)(a) of the *Environment Management Act*, R.S.B.C. 1996, c. 118.

BETWEEN:	Spike Investments Ltd.	**APPELLANT**
AND:	Assistant Regional Waste Manager	**RESPONDENT**
AND:	City of Burnaby Telus Corporation	**THIRD PARTIES**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Panel Chair	
DATE:	Conducted by written submissions concluding on June 27, 2003	
APPEARING:	For the Appellant: James Kitsul, Counsel For the Respondent: Dennis Doyle, Counsel For the Third Parties: Waldemar Braul, Counsel	

APPLICATIONS FOR COSTS

On December 18, 2002, Alan W. McCammon, the Assistant Regional Waste Manager (the "Assistant Manager"), issued a Site Investigation Order (the "Order") to Spike Investments Ltd. ("Spike"). The Order requires Spike to submit all existing site investigation information and complete a detailed site investigation for a property located at 5608 Kingsway, Burnaby, B.C. and legally described as Lot 1 (BF491514) District Lot 94 Group 1 New Westminster District Plan 12078, PID: 018-039-006 (the "Property").

On January 14, 2003, Spike appealed the Assistant Manager's decision and requested a stay of the Order pending a decision on the merits of the appeal. On February 13, 2003, the Board denied the stay application. (*Spike Investments Ltd. v. Assistant Regional Waste Manager* (Appeal No. 2003WAS-003(a), June 3, 2003) (unreported)).

On May 20, 2003, Spike withdrew its appeal.

On May 26, 2003, the City of Burnaby (the "City") and Telus Corporation ("Telus"), submitted an application for costs against Spike. On May 27, 2003, the Assistant Manager also filed an application for costs against Spike.

These applications were conducted by way of written submissions.

The Board has the authority to make orders requiring a party to pay all or part of the costs of another party in connection with the appeal pursuant to section 11 (14.2) of the *Environment Management Act*, R.S.B.C. 1996, c. 118 (the "*Act*").

BACKGROUND

The Property has been the site of a service station operation since the 1920's.

Spike became the owner and operator of the Property in 1984, and currently operates a Super Save Gas service station on the Property.

There is no dispute that the Property is contaminated by the presence of gasoline hydrocarbons in the soil. In 1999, the City of Burnaby advised the then Ministry of Environment, Lands and Parks (now the Ministry of Water, Land and Air Protection) (the "Ministry") of this contamination, and the Ministry requested that Spike undertake site investigation and remediation measures.

By letter dated August 24, 1999, Spike advised the Ministry that it was undertaking independent remediation of the site by way of "vapour extraction of petroleum vapour." Spike also included a time schedule for submission to the Ministry of a detailed site investigation, a remediation plan and an application for an approval in principle, all of which were to be completed by April 2000. These documents were never submitted to the Ministry. The only document provided to the Ministry was an outline for site investigation work.

The Ministry continued to request that Spike undertake a site investigation and remediation by letters dated September 3, 1999, October 20, 1999, August 25, 2000, June 15, 2001, and April 30, 2002.

On October 22, 2002, the Ministry was advised by Telus and the City of upgrading activities respecting the drinking water main and Telus services in the underground utility corridor adjacent to the Property. Results of soil sampling by Stantec Consulting Ltd., on behalf of Telus, indicated the presence of contaminated soil in the underground service corridor.

By letter dated November 1, 2002, the Ministry advised Spike of its intention to issue a site investigation order and requested comments from Spike on the draft order.

By letter dated November 7, 2002, Spike informed the Ministry of difficulties that it experienced during attempted site investigations in 1999 and 2000, and advised that site investigation undertaken in 2001 indicated no contamination under the road located to the north of the utility corridor. The 2001 investigation concluded that off-site contamination was restricted to the utility corridor. The letter states that:

> …the statement in your [the Ministry's] letter of November 1, 2002, that new contamination was found is absolutely incorrect. The contamination was present directly under the City of Burnaby water line and under the Telus utility lines. Previously, Telus had noted the contamination but had not been able to excavate under the conduits until recently….
>
> Super Save is of the opinion that the site is being managed in an appropriate manner at this time and there is no additional contamination being generated on the site. The Ministry's request for a costly DSI [Detailed Site Investigation] is unjustified in the circumstances. To date Super Save has spent several hundreds of thousands of dollars on remediation management of the site and continues to spend money on the ongoing remediation;
>
> Seacor Environmental previously did an environmental baseline study of the property…a copy of this report is being sent to the Ministry.

The Ministry maintains that it never received Seacor's report.

In a two-page Memorandum to the Assistant Manager dated December 17, 2002, Coleen Hackinen, Senior Pollution Prevention Officer with the Ministry, recommended that a site investigation order be issued and attached a draft order to the Memorandum. In the letter, she stated that it was impossible to establish whether Spike's remedial activity had addressed Ministry concerns about off-site migration of contamination that could cause harm to human health and the environment. She maintained that a detailed site investigation was still needed.

On December 18, 2002, the Assistant Manager issued the Order to Spike, under section 26.2 of the *Waste Management Act*.

On January 14, 2003, Spike appealed the Order to the Board and requested a stay of the Order pending a decision on the merits of the appeal.

On February 13, 2003, the Board denied the application for the stay. The Board found that although there was a serious issue to be tried, Spike did not succeed in establishing irreparable harm, and the balance of convenience did not favour the granting of a stay.

On February 28, 2003, the Board scheduled an oral hearing on the merits of the appeal for four days commencing on May 21, 2003.

Between early February 2003 and late April 2003, expert reports known informally as the Aqua Terra, Seacor, and Stantec reports, were exchanged between the parties. Telus and the City forwarded the Stantec Report, by courier, to the Board and the other parties, approximately 33 days prior to the hearing.

On May 20, 2003, the day before the hearing was scheduled to begin, Spike withdrew its appeal. Spike advised that it was withdrawing the appeal after discussions with its expert regarding the Stantec report.

By letter dated May 26, 2003, Telus and the City made an application for costs against Spike. The following day, the Assistant Manager filed an application for costs against Spike.

Spike opposes the applications. It argues that it withdrew its appeal promptly after reviewing the Stantec report.

ISSUES

The sole issue to be determined is whether the Panel should order Spike to pay all or part of the costs of the Assistant Manager, Telus, and the City, in connection with the appeal.

LEGISLATION AND POLICY

The Board has the authority to award costs pursuant to section 11(14.2) of the *Environment Management Act*:

> **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;
>
> ...

The Board has adopted a general policy to award costs in special circumstances. These circumstances are outlined in the Environmental Appeal Board Procedure Manual, and include:

a. where, having regard to all of the circumstances, an appeal is brought for improper reasons or is frivolous or vexatious in nature;

b. where the action of a party, or the failure of a party to act in a timely manner, results in prejudice to any of the other parties;

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”;

d. where a party unreasonably delays the proceeding;

e. where a party's failure to comply with an order or direction of the Board, or a panel, has resulted in prejudice to another party; and

f. where a party has continued to deal with issues, which the Board has advised are irrelevant.

The policy also provides that a Panel of the Board is not bound to order costs when one of the above-mentioned examples occurs. Furthermore, the list is not exhaustive and the Panel can order costs for circumstances beyond those found on the list.

DISCUSSION AND ANALYSIS

Whether the Panel should order Spike to pay all or part of the costs of the Assistant Manager, Telus, and the City, in connection with the appeal.

The Assistant Manager submits, and Telus and the City concur, that they should be awarded costs on the basis of Spike's prior behavior, Spike's abuse of process, and Spike's failure to act in a timely manner with respect to the Stantec Report.

All of the applicants submit that Spike's behavior in the past has been sporadic with respect to requests for information and release of expert reports. In particular, the Assistant Manager submits that the Ministry has been forced to go to considerable time and expense to obtain reports and information about the Property. He submits that despite four years of efforts from the Ministry, the parties are no closer to knowing the current situation on the Property, or whether appropriate remediation has been undertaken.

The applicants further argue that Spike's actions amount to an abuse of process because of its failure to make timely disclosure of information, and because, it appealed the Order even though it had previously agreed to submit a detailed site investigation to the Ministry

The applicants also submit that Spike failed to review and respond to the Stantec report in a timely fashion. The applicants submit that this report was provided to Spike over 30 days prior to the hearing, and that Spike should have reviewed the report and withdrawn the appeal earlier than the day before the hearing was scheduled to commence. Specifically, Telus and the City argue that much of their pre-hearing preparations occurred in the two to three weeks prior to the hearing. This preparation could have been avoided if Spike had been more diligent.

Telus and the City further submit that Spike's appeal was frivolous and vexatious, as Spike knew that a site investigation was necessary.

Telus and the City argue that Spike's Statement of Points failed to properly address the issues in its appeal and that Spike's argument about the successful remediation of the Property is irrelevant because the Order pertains to the investigation, and not the remediation, of the Property.

Telus and the City also submit that the Board's findings in the stay decision that "the Property has not been fully investigated" substantiate that the Order was justified. They argue that they have incurred significant legal costs since that stay decision in February 2003, and that Spike should pay these costs because it did not withdraw the appeal at that time.

The Assistant Manager, Telus and the City, all submit that Spike should be ordered to pay costs.

Spike argues that costs should not be awarded to the other parties in this case. Specifically, Spike maintains that its appeal was not an abuse of process, was not frivolous or vexatious, and that it did act in a timely manner.

Spike submits that since the beginning of its involvement with the Ministry, it has taken its responsibility to provide information to the Ministry, and remediate the Property, seriously. It argues that it made good faith efforts to remediate the Property and has spent considerable amounts of money on remediation. It further states that the Ministry currently has all of Spike's documentation, and that any failure to provide that information in the past was unintentional.

Spike also submits that the cost to the other parties has been exaggerated. In particular, Spike argues that there is no evidence that the Ministry expended more resources and efforts than are normal in similar matters.

In response to the argument that it should have looked at the Stantec report earlier, Spike submits that it had no opportunity to do so. It states that its expert's schedule precluded him from meeting with Spike's counsel until the day before the hearing was scheduled to commence. Spike also notes that its counsel is also general counsel for the Super Save Group of Companies, and has "numerous other day to day matters to attend to." It also argues that it did the responsible thing by dropping the appeal once it had heard from its expert, thus saving all parties the time and expense of a hearing.

Spike argues that its pursuit of the appeal was neither frivolous nor vexatious. It submits that it pursued the appeal because it believed its remediation efforts had eliminated concerns about migration of hydrocarbons and the threat to human health, and that the Order to obtain more information was therefore unnecessary.

Spike argues that the Board's stay decision is evidence that Spike believed its remediation efforts had been successful and were relevant to the appeal. Therefore, Spike submits that the contents of its Statement of Points were appropriate.

Furthermore, Spike submits that the Board's finding that there was a serious issue to be tried refutes the allegation by Telus and the City that the appeal was frivolous and vexatious. Therefore, Spike submits that the fact that it continued the appeal after the stay was denied does not amount to special circumstances that would warrant an award of costs.

Spike submits that the participation of Telus and the City in the appeal was unnecessary because:

> The Manager was fully represented by counsel in this matter and the interests of the Third Parties would have been sufficiently protected by the Manager's counsel who was trying to achieve exactly the same result as the Third Parties.

The Assistant Manager, and Telus and the City responded to Spike's submissions.

The Assistant Manager states that the Ministry expended more effort on this matter than is typical. He states that Spike's appeal placed "considerable and unnecessary demands on Ministry resources which exceed by a wide margin" the kind of resources that are normally required to administer this type of file.

Telus and the City take issue with Spike's assertion that its expert and counsel were too busy to meet and that Spike has limited resources. Telus and the City argue that Spike should have arranged for time to properly conduct the appeal, given that it knew, or should have known, that the other parties would spend time and money preparing for the hearing. Finally, Telus and the City argue that lack of resources is not a valid excuse for Spike, as Spike is part of the Super Save Group of Companies whose website indicates it is a "large going concern with 78 gas stations."

Panel's Findings

The issue in this application is whether Spike should pay all or part of the costs of the applicants in connection with the appeal. The power to award costs may be used as a method of discouraging improper claims and to compensate parties who are unduly inconvenienced or incur unnecessary costs as a result of frivolous or vexatious appeals.

In deciding this issue, the Panel has reviewed the Board's decision in *Klassen v. Environmental Health Officer* (Environmental Appeal Board, Appeal No. 98-HEA-08(a), August 31, 1998, page 6) (unreported), where the Board considered the meaning of "frivolous and vexatious" in the context of awarding costs in an appeal. In that decision, the Board stated:

> …an appeal might be said to be "frivolous" if there is no justiciable question, little prospect that it can ever succeed and it is lacking in substance or seriousness; and "vexatious" if it is instituted maliciously or based on improper motives, intended to harass or annoy.

In *Salmon Arm (District) v. British Columbia (Ministry of Environment, Land and Parks)* [1998], B.C.E.A. No. 81 (QL), the Board stated that an "appeal was not found to be 'frivolous' as long as there remained outstanding issues to be resolved, such that the appeal was neither without merit nor lacking in substance."

The Panel finds that Spike had a justiciable issue that, on its face, had merit and substance. The Board's finding in the stay decision that there were serious issues to be tried is confirmation that Spike had a *prima facie* basis for its appeal. It is apparent that Spike pursued the appeal and believed that the Order was unnecessary because its remediation efforts had eliminated any environmental and health concerns. Despite the concerns raised by the other parties, there is no clear basis upon which to conclude that Spike's actions and motives in filing the appeal were improper, or intended to harass or annoy the other parties.

Each of the applicants raised the issue of Spike's past behavior. Spike submits that none of its behavior prior to filing the appeal should be considered by the Panel. Spike references *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.) (hereinafter *Garcia*), as authority for the proposition that conduct prior to the inception of litigation is not to be considered in a finding of reprehensible conduct warranting special costs. However, the Panel is of the view that *Garcia* is authority for the proposition that the Panel may consider a party's conduct prior to the inception of litigation in determining costs. Justice Lambert states, at page 745, that special costs:

> should not be awarded unless there is some form of reprehensible conduct, **either in the circumstances giving rise to the cause of action**, or in the proceedings, which makes such costs desirable as a form of chastisement. [emphasis added]

The Panel notes that Spike's cooperation with the Ministry has been sporadic. However, the Panel finds that Spike's level of cooperation prior to the appeal does not amount to "special circumstances" in this case. The Panel agrees with Spike's summation of the situation that while:

> [i]t may be that Spike has not provided the fullest of cooperation with the Ministry, it is no different from numerous other companies that the Ministry deals with and as such its behaviour in this matter does not amount to special circumstances.

The Panel has also considered the allegation that Spike's behavior amounted to an abuse of process. However, the Panel was not presented with any evidence to support this allegation and the parties failed to provide any case law on this point. As such, the Panel is unable to conclude that Spike's behavior constitutes an abuse of process.

The other parties have also questioned Spike's conduct during the appeal. They argue that Spike's failure to act in a timely fashion has resulted in expenditures to them. The applicants all submit that Spike should not have waited to view the Stantec report until the day before the hearing was scheduled to commence.

The Panel finds that Spike did not wait an unreasonable amount of time after it received the Stantec report, prior to reviewing it with its expert. It is not unreasonable or uncommon for expert reports to be reviewed by experts up to the commencement of proceedings such as a hearing before this Board. Indeed, to the contrary, it would be unreasonable to not review an expert report in preparation for a hearing. The fact that the review of that report resulted in the withdrawal of the appeal on the eve of the commencement of the oral proceedings should not result in an award of costs when Spike's withdrawal saved the Board, Telus, the City, and the Assistant Manager the costs of attendance at the hearing.

Accordingly, the Panel will not award costs against Spike in response to Spike's decision to abandon the appeal on the day before the hearing.

In all of the circumstances, the Panel finds that there are no special circumstances that merit a finding of costs against Spike for either Telus and the City, or the Assistant Manager. Spike had a valid question about the Order and it pursued the appeal in good faith until it became apparent that abandonment of the appeal was the best option. The Panel finds that there were no unreasonable delays or failures to act in a timely fashion, nor was the appeal frivolous and vexatious.

DECISION

In making this decision the Panel has considered all of the evidence, documents and arguments before it, whether or not they have been specifically reiterated here.

For the reasons stated above, the Panel finds that an order for costs is not warranted in this case.

The applications are dismissed.

Alan Andison, Chair
Environmental Appeal Board

November 21, 2003