

**Normal Farm Practices
Protection Board**

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**Commission de protection des pratiques
agricoles normales**

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FILE NO.: 006Rocca22
DATE: 2022/12/22

IN THE MATTER OF the *Farming and Food Production Protection Act, 1998*

AND IN THE MATTER OF an application to the Normal Farm Practices Protection Board (“Board”) under Section 5 of the *Farming and Food Production Protection Act, 1998* for a determination as to whether disturbances are a result of normal farm practices

AND IN THE MATTER OF an application for costs pursuant to Rule 66 of the Board’s Rules of Practice and Procedure.

BETWEEN:)	
)	
Jacqueline and Claudio Rocca)	
)	Self-Represented
Applicants)	
)	
– and –)	
)	
Roy and Doris Bayer)	
)	Represented by Devan J. Munch
Respondents)	
)	

Submissions from:
Jacqueline and Claudio Rocca
Devan J. Munch

Before:
Christine Greydanus, Vice-Chair; Judy Dirksen, Member; and Rod de Wolde, Member.

DECISION ON APPLICATION FOR COSTS

- [1] An application was made on April 22, 2019 to the Board under section 5 of the *Farming and Food Production Protection Act, 1998*. After a hearing lasting seven days, held on April 18, 19, 20, 21, 22, May 16 & 17, 2022, a decision was rendered in favour of the Respondents, Roy Bayer and Doris Bayer. The Respondents made a claim for costs for these proceedings against the Applicants, Jacqueline and Claudio Rocca. The Board requested that the parties serve and file written submissions with respect for the claim for costs.
- [2] In its submissions, the Respondents argue that the grounds for the costs request are that the Applicants acted in a manner that was “unreasonable, frivolous and vexatious” including,
- a. the frivolous and vexatious commencement of the application;
 - b. the raising of a multitude of issues and failing to present evidence on particular issues;
 - c. the attempt to malign or vilify the Bayer’s;
 - d. the serving of an excessive amount [*sic*] of documents onto the respondents, many of which were irrelevant, for no purpose;
 - e. bringing a number of motions which were unreasonable and unsuccessful; and
 - f. the continued allegations of bias throughout the proceeding.
- [3] The Respondents submitted that they incurred legal fees of \$73,243.79 (incl. HST), disbursement cost of \$160.05 (incl. HST) and expert witness fee of \$8,935.63 (incl. HST) for a total of \$82,339.47 (incl. HST) less a cost award of \$1000. The Respondents are seeking a costs award of \$60,000 being \$51,064.37 (incl. HST) of legal fees and \$8,935.63 (incl. HST) for expert witness fees.

LAW ON COSTS

- [4] Section 17.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 sets out the two statutory prerequisites to the Board’s jurisdiction to award costs. That section provides:

Costs

17.1(1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party’s costs in a proceeding.

Exception

- (2) A tribunal shall not make an order to pay costs under this subsection unless,
- a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith, and
 - b) the tribunal has made rules under subsection (4).

Amount of Costs

(3) The amount of costs ordered under this section shall be determined in accordance with the rules made under subsection (4).

Rules

- (4) A tribunal may make rules with respect to,
- a) the ordering of costs;
 - b) the circumstances in which costs may be ordered;
 - c) the amount of costs or the manner in which the amount of costs is to be determined.”

[5] The Board has made rules reflecting section 17.1 of the *Statutory Powers Procedure Act* and the rules appear as Section 66 of the Normal Farm Practices Protection Board – Rules of Practice and Procedure. Subsection 66(1) of the Rules provides that “where a party believes that another party has acted clearly unreasonably, frivolously, or in a vexatious manner, or in bad faith, considering all of the circumstances, it may ask for an award of costs.”

[6] In subsection 66(8) of the Rules, the Board has enumerated some of the circumstances in which costs may be ordered as permitted by subsection 17.1(4) of the *Statutory Powers Procedure Act*. This list is non-exhaustive.

Subsection 66(8) states as follows: “Clearly unreasonable, frivolous, vexatious, or bad faith conduct can include, but is not limited to:

- (a) Failing to attend a hearing event or to send a representative when properly given notice, without contacting the Board;
- (b) Failing to give notice or adequate explanation or a lack of cooperation during pre-hearing proceedings, changing a position without notice, or introducing an issue or evidence not previously mentioned;
- (c) Failing to act in a timely manner or to comply with a procedural order or direction of the Board where the result causes undue prejudice or delay;
- (d) Conduct necessitating unnecessary adjournments or delays or failing to prepare adequately for hearing events;
- (e) Failing to present evidence, continuing to deal with issues, asking questions or taking steps that the Board has determined to be improper;
- (f) Failing to make reasonable efforts to combine submissions with parties of similar interest;
- (g) Acting disrespectively [*sic*] or maligning the character of another party; and
- (h) Knowingly presenting false or misleading evidence.”

[7] Subsection 66(9) also provides that:

“The Board will consider the seriousness of the misconduct. If a party requesting costs has also conducted itself in an unreasonable manner, the Board may decide to reduce the amount awarded; the quantum, the Board may take into consideration the concept of partial and substantial indemnity, and the Rules and Regulations regarding quantum of costs awarded in the Ontario Superior Court of Justice.”

[8] In the matter of *Dubois v. Burkhardt (No. 1)* 2010 ONNFPPB 55 (CanLII), the Board stated:

“The decision in this matter is intended to establish a Board practice that costs are not awarded lightly nor are they awarded routinely. Awards of costs will be rare. Potential parties and the public should not be fearful of participating in Board proceedings. Costs should never be used as a threat or a reason to dissuade public participation. The Board has the statutory jurisdiction to award costs for the purpose of controlling its process. Costs before the Board are not intended to follow “the cause” nor are they intended in any way to indemnify a successful party. Each application for costs will be decided on its own merits, based on an assessment of conduct.”

[9] The matter of *Dell v. Zeifman Partners Inc.*, 2020 ONSC 3881 (CanLII) provides that any award of costs is in the discretion of the administrative tribunal; and that “the party claiming costs must come to the Board with clean hands as to its conduct.”

SUBMISSIONS

A. The Frivolous and Vexatious Commencement of the Application

[10] The Respondents argued that the entirety of the Rocca application was frivolous and/or vexatious and that the application was premised on the Applicants allegation that after the land use agreement between themselves and the Respondents ended in or around 2016, the Respondents changed their farming practices significantly resulting in an increase in flies and odours at the Applicants’ property and cottage.

[11] The Applicants submitted that the nuisance of flies at their cottage was a result of, amongst other things, the Respondents increased spreading of manure in the neighbouring fields, the storage of large quantities of manure in adjacent barn yards and the discarded and rotting hay bales on neighbouring fields and properties. The Applicants testified at the hearing that until the land use agreement had ended, they used the Respondents’ manure on their vegetable garden next to their cottage and that there were discarded hay bales near their cottage, on their land, up until 2018.

B. The Raising of a Multitude of Issues and Failing to Present Evidence on Particular Issues

- [12] The Respondents submitted that the Applicants added additional issues when they discovered other practices could potentially cause flies and odour, including practices of deadstock disposal, tree/shrub removal and the nuisance of manure laden dust.
- [13] The Respondents argued that the Applicants failed to submit evidence on the issues of fly and odour nuisance as a result of deadstock disposal or of the nuisance of manure laden dust.
- [14] In their response submissions, the Applicants maintain that they did call evidence on all the issues, and that the strength of their evidence or its favourability with the Board is not relevant to the issue of making a costs award.

C. The Attempt to Malign or Vilify the Bayer's

- [15] The Respondents submit that the Applicants attempted to malign and vilify the Respondents by first alleging that Respondent Mr. Bayer intentionally spread manure within 26 meters of the Applicants well; second by repeatedly asserting throughout the hearing that the Respondent Mr. Bayer altered his farming practices after the breakdown of the land use agreement, spreading manure near the Applicants cottage more frequently and in greater quantities causing an increase in odour and flies.
- [16] The Applicants' submissions allege that the Respondents did not "conduct themselves flawlessly" citing in their submissions emails sent by the Applicants to the Respondents' council that allegedly were not acknowledged or responded to in a timely manner; the Respondents seeking direction for the Board prior to the hearing with regard to projected length of hearing; the Respondents bringing a motion to quash the summons for the Respondent, Doris Bayer to testify; the Respondents refusal to remove documents from their Document Brief prior to the hearing due to their alleged lack of relevance; the Respondents taking issue with the unsworn and undated Affidavit of the Applicant Jacqueline Rocca; the Respondents questioning of the Applicants during the hearing alleging the Applicants had moved the Respondents old hay bales.
- [17] The Applicants assert that their conduct never rose to the level as in *Smith v Smith*, 2017 CanLII 17617 (ON NFPPB) resulting in costs being awarded,

"However, the Board finds that the conduct of the Applicants and their representative in attempting to malign or vilify Robert Smith is significantly different. This was in bad faith and vexatious conduct which should be sanctioned. Notwithstanding that the Board allowed some evidence of this nature to become part of the record, it was the Applicants and their representative who insisted on going down this road. It was totally unreasonable for the Applicants and their representative to take the position that Robert Smith would not abide by an Order of this Board. No previous disregard for court or tribunal orders was established. The Board therefore determines that the Respondents are entitled to costs from the Applicants on the basis of this conduct."

[18] In the Applicants' response, they assert it was their desire to have the hearing closed to the public which speaks to their lack of desire to vilify the Respondents.

[19] The Applicants submitted that they showed good faith in dealing with the application and hearing process by being agreeable to a request by the Respondents for a delay in filing documents; promptly responding to and acknowledging Respondents' email correspondence, complying with Board Orders and directions; coming prepared to any motion and the hearing; and continuing as planned on April 28th, 2022 when their expert witness Stephen Redmond texted them in the morning to advise he would not be available after 11:45am and the Applicant Ms. Rocca, needed to have finished with him as a witness by that time.

[20] In the Respondents Reply submissions, evidence was provided of each of the emails allegedly not being acknowledged or responded to in a timely manner were responded to, and responded to within minutes to within a week.

D. The Serving of An Excessive Number of Documents onto the Respondents, Many of Which Were Irrelevant, For No Purpose

[21] The Respondents argue that the Applicants served on the Respondents over 475 documents, which included 2,100 pages and 38 videos. The Respondents noted that less than half the documents were entered into evidence. The Respondents argued that the review of these documents required a significant amount of time and cost to the Respondents.

E. Bringing a Number of Motions Which Were Unreasonable and Unsuccessful

[22] The Respondents' submissions identified four motions and a request for review brought by the Applicants prior to the hearing. The Applicants were partially successful on one motion, and unsuccessful on three motions and were ordered to pay \$1,000 of costs and denied bringing further motions without leave of the Board on their final motion. The Applicants' Request for Review was also unsuccessful with the Board's order being found to be reasonable.

[23] The Applicants acknowledge that they made a number of motions during the course of the proceedings. The Applicants argue that as unrepresented litigants they understood the process to require them to bring motions to address any issues prior to the hearing. The Applicants argue they were advocating for themselves as best as possible.

F. The Continued Allegations of Bias Throughout the Proceeding

[24] The Respondents argue that throughout the proceedings the Applicants alleged bias and conflicts of interest on the part of Board Members; discrimination due to her Italian heritage from the Board; alleged breaches of the Board Member's Code of Conduct citing breaches of procedural fairness and natural justice.

DISCUSSION AND FINDINGS

- [25] The Board has established that there is a high bar to meet in order to establish grounds for a cost order after a hearing. The Board finds that the conduct of the Applicants in this matter crossed over the bar on all the above headings A, B, C, D, E & F.
- [26] First on A, the frivolous and vexatious commencement of the application. The Applicants alleged that the Respondents altered their farming practices to aggrieve the Applicants. The Board found that the Respondents farming practices had not been altered and further that the Respondents were carrying out normal farm practices.
- [27] The Board was made aware that the Applicants were pursuing other legal actions against the Respondents, however, these actions are outside the jurisdiction of the Board.
- [28] The board therefore determines that the Respondents are entitled to costs from the Applicants on the basis of the frivolous commencement of the application.
- [29] Second on B, the raising of a multitude of issues and failing to present evidence on particular issues. The Board finds that the Applicants raised additional issues during the proceedings and failed to bring evidence at the hearing to substantiate all of their additional issues. On both issues of deadstock disposal and manure laden dust no relevant evidence was offered at the hearing. The Board therefore determines that the Respondents are entitled to costs from the Applicants on the basis of this conduct.
- [30] Third on C, the attempt to malign or vilify the Bayers. The Board finds that the conduct of the Applicants in attempting to malign and vilify the Respondents was an ongoing in the proceedings. The Applicants' assertion that their being unrepresented should allow that they will be given greater latitude. The Board finds that the greater latitude does not extend to sanctioning allegations of contempt, accusations of deliberate acts to cause the Applicants nuisance, and unfounded allegations that the Respondents did not respond to Applicants email. The Board therefore finds that the Respondents are entitled to costs from the Applicants on the basis of this conduct.
- [31] Fourth on D, the serving of an excessive number of documents onto the Respondent, many of which were irrelevant and for no purpose. The Board finds that 60% of the Applicants documents were not used and/or entered into evidence. The Board finds that the serving of excessive documents added to the cost of the proceedings. The Board therefore finds that the Respondents are entitled to costs from the Applicants on the basis of this conduct.
- [32] Fifth on E, the bringing of a number of motions which were unreasonable and unsuccessful. The Board finds that the Applicants conduct in bringing numerous motions, many of which were unsuccessful, vexatious and costly and delayed the proceedings. The Applicants were ordered to pay costs in the amount of \$1,000 on a partial indemnity basis as a result of the

Motion heard March 4, 2021. The Board finds that the Respondents are entitled to further costs from the Applicants on the basis of this conduct.

- [33] Sixth on F, the continued allegations of bias throughout the proceedings. The Board finds that the Applicants delayed the proceedings by their repeated allegations of bias. The Board responded to allegations of bias by appointing new members of the Board to the panel for the hearing.
- [34] The Board relies on the Rules of Practice and Procedures at 66(8) b, d, e, g & h.; and on *Dubois v. Burkart (No.1)* 2010 ONNFPPB (CanLII) "Costs should never be used as a threat or a reason to dissuade public participation...Each application for costs will be decided on its merit, based on an assessment of conduct."
- [35] The party claiming costs must come to the Board with clean hands as to its conduct. The Board has determined that the Respondents have conducted themselves appropriately throughout the proceedings.
- [36] The Board must consider the proportionality of the disputed conduct with the amount of the costs award. Further there is the need to ensure that potential parties and the public should not be fearful of participating in Board proceedings. The Board has determined that the totality of the Applicants' conduct throughout the proceedings warrants the following award for costs.

DECISION

- [37] The Respondents' claim for costs is allowed in part and the Appellant shall pay the Respondents the sum of \$40,000 together with interest after 30 days at the *Court of Justice Act* post-judgement rate.



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Vice-Chair

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