Files: 1476 - Star vs. Henkels 2-25-79-15 W6M
1476A - Star vs. Henkels 2-25-79-15 W6M
1477 - Star vs. Henkels 1-35-79-15 W6M
1481 - Star vs. Henkels 1-36-79-15 W6M
1481A - Star vs. Henkels 1-36-79-15 W6M
1482 - Star vs. Henkels 10-18-79-14 W6M
1528 - Henkels vs. Arc 10-18-79-14 W6M
1529 - Arc vs. Henkels 10-35-79-15 W6M

Between:	Arc Resources Inc.	**Applicant**
And:	Walter Henkels	**Respondent**

Appearances:

Arc Resources Inc.	John Hagen
Walter Henkels	Darryl Carter, Q.C.

BOARD ORDER - February 18, 2005

Order - 387 Interim

MEDIATION AND ARBITRATION BOARD

The *Petroleum and Natural Gas* Act, RSBC 1996, Chapter 361

The respondent, Mr. Henkels has applied for an order for costs in advance of a hearing scheduled for April 2005. The application was made on September 15, 2004, by his counsel, Mr. Carter. Mr. Henkel seeks a cost award in the amount of $6,500 for legal fees, and $2,500 for personal costs. On September 24, 2004 I issued directions for the resolution of this issue based on written submissions of the parties according to the following schedule:

(a) A written submission from Mr. Carter, by the close of business on October 8, 2004;
(b) A reply argument from Arc Resources Inc., by the close of business on October 22, 2004;
(c) A reply argument from Mr. Carter by the close of business on October 29, 2004

The Board received written submissions from Darryl Carter on October 5, 2004 and John Hagen October 22, 2004. The Board did not receive a reply argument from Mr. Carter, and therefore determines this issue on the basis of material received by October 29, 2004.

Mr. Henkel's Argument:

Mr. Carter says that because the nature of the application made by Arc Resources Ltd. is in the nature of a forced taking, the landowner should not be out of pocket for legal fees and expenses: *Cochin Pipelines Ltd. v. Rattray et. al.* (1980) 22 LCR 198 (Alta. C.A.); *Campbell River Woodworkers' & Building Supply (1966) Ltd.* v. *The Queen in right of British Columbia*, (2004), L.C.R. 275 (B.C.C.A.). Mr. Carter argues that costs should be assessed on the basis of actual legal costs, and not according to the tariff of costs in the *Supreme Court Rules*.

Arc Resources Argument:

Arc Resources Inc. resists payment of any costs prior to the hearing in this matter, as it is unfair to pay costs in advance, and costs cannot be determined until after the hearing is concluded.

Ruling:

The Board is not inclined to award costs prior to the hearing of this matter. Generally costs in an arbitration proceeding are determined and awarded after a hearing has been completed, when the person assessing costs has the full opportunity to consider all relevant factors. I accept that most parties in a litigation process, whether it be before an administrative tribunal, commercial arbitration process, or before the courts incur costs prior to the hearing of evidence. A pre-hearing award of costs is, however, in the nature of an application for security of costs. It is of an extraordinary nature. No cause has been shown by Mr. Henkels as to why costs should be awarded on a pre-hearing basis.

At this time I do not intend to address the method of assessing costs, or the quantum of costs, if costs are awarded. This is a matter that the arbitrator(s) will address at the conclusion of the hearing, likely after a ruling on the merits of the application. While both the *Petroleum and Natural Gas Act, R.S.B.C. 1996, c. 361* and the *Administrative Tribunals Act, S.B.C. 2004, c. 45* provide that the Board has the jurisdiction to make a cost award, the basis for assessing costs is not outlined in the legislation. The Board at present does not have a fixed tariff for the assessment of costs. Mr. Carter's position is that Mr. Henkels is entitled to reasonable costs, and not necessarily costs assessed in accordance with the *Supreme Court Rules*. He has supplied one contrary authority to his position: *Encal Energy Ltd. v. Viens*, Dawson Creek Registry 10780. In that case the court held, relying on the authority of *Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd.* (1990), 45 B.C.L.R. (2d) 367 (B.C.C.A.), that costs should be assessed in accordance with the Supreme Court Rules when no tariff is prescribed:

> The Petroleum and Natural Gas Act authorized the board to prescribe a scale for awarding costs. It is my opinion that unless and until the board does prescribe such a scale, the costs referred to in section 27 of the Act, must be fixed in accordance with appendix B to the Rules of the Supreme Court.

Mr. Carter argues that the *Encal* decision is wrong and was made without reference to the law in forced takings. I also note that Mr. Carter has correctly noted that Ms. Viens was not represented by counsel, and because of this, the court's attention was not likely drawn to the costs practice in cases involving "forced takings".

The issue of costs is a matter of some importance to the parties in this case and generally of importance to practice before this Board. I would like to have full and complete argument from counsel on this point following the conclusion of the hearing on the merits. I note that since the *Encal* decision the Legislature has introduced and passed the *Administrative Tribunals Act*. Further, the *Encal* decision was based on *Ridley Terminals Inc.*, which interpreted the costs section of the *Commercial Arbitration Act*, which has since been amended by the legislature. It may be that an application could be heard by written submissions, or conference call. The panel hearing this matter will determine this process at a later date, after canvassing the parties for their procedural preference

Paul E. Love
Chair, Mediation and Arbitration Board