Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

Date: February 19, 2007

FILE NO. 1556
Board Order No. A415

BEFORE THE ARBITRATOR:	IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361 as amended; **(THE ACT)** AND IN THE MATTER OF N ½ Section 4, Township 86 and Range 17 W6M **PID**: 014-377-730 **(THE LANDS)**
BETWEEN:	Hartley Blatz, Karen Blatz and Clifford Blatz **(APPLICANTS)**
AND:	Canadian Natural Resources Limited **(RESPONDENT)**

Appearances:

R.J. Strandberg, for Mr. and Mrs. Blatz

J. Hope and L. Dellow, for Canadian Natural Resources Limited

Reasons for Adjourning the Hearing Set for February 12 to 16, 2007
Brief Oral Reasons given on February 12, 2007
Written reasons given on February 19, 2007

These are my written reasons to adjourn a hearing set for February 12 to 16, 2007.

Background:

On November 21, 2005, Mr. and Mrs. Blatz filed an application for damages against Canadian Natural Resources Limited ("CNRL") pursuant to section 16(2) of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361 ("*PNGA*"). A mediation meeting took place on January 10, 2006. The parties were unable to settle the matter at mediation and the Board member conducting the mediation ordered that the claim for damages proceed to arbitration. I was appointed as a single arbitrator to hear this case.

I held a pre-hearing conference with the parties on February 24, 2006. As a result of the pre-hearing conference directions for hearing were made orally at the conference. As a result of the oral directions for hearing Mr. and Mrs. Blatz delivered their documents to the Board on May 26, 2006. At that conference call a tentative date of the week of October 23, 2006 was reserved for the hearing. The Board was expecting to hear from Mr. Carter [1] concerning the dates, as he did not attend the conference call. The Blatz's were represented at the conference call by Mr. Darcy Delko, from Mr. Carter's office. At the time of the conference call the week of October 23, 2006 appeared to be agreeable to Mr. Dellow. Mr. Carter was supposed to confirm his availability and the Board has no record that he did so. The Board's administrator had e-mail communication with Mr. Delko about the October 23, 2006 dates and indicated that there would be written directions for hearing issued.

The Board's directions for hearing were released to the parties in writing on July 13, 2006. After the release of the directions, Mr. Dellow informed the Board by letter dated July 31, 2006 that neither he nor Mr. Carter had been consulted adequately by the Board about the October dates and that the dates should have been confirmed in writing at an earlier time. Mr. Dellow wrote to the Board as follows:

> *Mr. Carter and I have spoken about an appropriate hearing date for this arbitration. He and I agree that the matter should be scheduled to proceed in February of 2007. Proceeding in February would accommodate various scheduling concerns of the parties and counsel.*

After further consultation between the Board's administrator and the parties about available dates for the hearing, on August 22, 2006, the parties were notified of a change in the dates of hearing to February 12 to 16, 2006, by an email from the Board's administrator. It is my finding that the October dates were changed by the Board, based on the consent of both parties and based on the scheduling concerns of both parties. I cannot conclude from the material before me that the Blatz's were ready to proceed on the October hearing dates and that this matter was adjourned simply because CNRL was not ready to proceed. It would appear that this is not the case as the Blatz's delivered further documents to the Board in November 2006. The Board issued a reminder letter to the parties of the hearing date on November 20, 2006.

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[1] Then the counsel for Mr. and Mrs. Blatz

This is a case which is of considerable importance not only to the parties, but to parties in the Peace area generally. It involves an issue of weed control and damages claimed for scentless camomile, alleged to emanate on a lease site on lands owned by the Blatz's, with transmission of the seeds by water running off the lease site and possibly by the hooves of buffalo to other parts of the Blatz farm. It also involves transmission to parcels of land referred to as the Blatz farm, but which are not on the same legal title on which the lease has been granted. There are some differences in the names of the registered owners on the various parcels comprising the Blatz farm. The claim for damages is in excess of $280,000 and involves a claim for hand picking the scentless camomile. From the material filed with the Board, the Blatz have prepared and documented their case, which also involves expert evidence.

Adjournment Application:

On January 29, 2007, counsel for CNRL advised the Board that he intended to raise a jurisdictional issue and the Board received submissions from CNRL on January 29, 2007, February 8, 2007, and from the Blatz's on February 9, 2007.[2] The gist of CRNL's jurisdictional argument is that the Board has jurisdiction to deal with damage issues only on the well site and the access road covered by the lease as "damage to land" in section 16(2) of the *PNGA* means the land occupied by the lease. CNRL submits that the Board does not have jurisdiction to consider damages on other portions of the Blatz farm. A further submission is that the Blatz's claim is limited to the time period that they have owned the land.

On January 31, 2007, the Board wrote to the parties requesting whether this jurisdictional issue required the hearing of evidence and also advised the parties that given the limited time before the hearing, it was unlikely that the jurisdictional issue could be dealt with before the hearing. The parties did not respond on the issue of whether evidence was required to determine the jurisdictional issue. In a submission dated February 9, 2007, counsel for the Blatz's informed the Board that it was the Blatz's view that the jurisdictional issue should be dismissed as it was without foundation, and in any event CNRL had attorned to the Board's jurisdiction by its acquiescence.

On February 2, 2007, Mr. Dellow wrote to the Board indicating that he was considering applying for an adjournment, or in the alternative a hearing conducted in stages. In his letter various suggestions are made including splitting the issue of damages from liability, hearing the jurisdictional argument only or hearing the Blatz's case only. On February 7, 2007, Mr. Dellow wrote to the Board indicating that he was seeking an adjournment, or in the alternative to have the hearing conducted in stages. He delivered affidavits in support of an adjournment to Mr. Strandberg on February 9, 2007, and Mr. Strandberg faxed his position along with the affidavits to the Board on February 9 2007 at about 4:12 p.m. Mr. Strandberg appears to have received the affidavits, according to the fax transmission at 3:28 p.m. The affidavits came to my attention after 6:00 p.m. on February 9, 2007, when I returned to my office from an out-of-town business trip. I was scheduled

[2] I have very briefly referred to the jurisdictional arguments and I have not set out the jurisdictional arguments in full. This application will be argued by the parties at a later time.

to fly to Fort St. John on Sunday to commence the hearing on Monday. Mr. Dellow faxed the affidavits to the Board on February 12, 2007 at 7:10 a.m.

Until one reads the affidavits dated February 9, 2007, CNRL's reasons for seeking an adjournment are not apparent.

At the outset of the hearing on February 12, 2007, after I made some opening remarks, I directed that the issue of the adjournment be dealt with first. The application could not proceed at the time scheduled as counsel appearing on the matter, Mr. Hope, was in Provincial Court, and would not be available until 10:00 a.m. There were two affidavits in support of the adjournment, from Mr. Leslie Dellow and Ryan DeLeeuw sworn on February 9, 2007. Mr. Strandberg indicated that he intended to cross-examine both deponents on their affidavits. As a matter of practice, in British Columbia, counsel does not generally speak to his own affidavit, and by letter dated February 9, 2007 and so the hearing was adjourned until later in the morning when Mr. Hope could appear.

Adjournment Application Process:

In terms of process, Mr. Hope spoke to the adjournment application and the affidavits. At the end of Mr. Hope's submission, Mr. Strandberg indicated that he wished to cross-examine Mr. DeLeeuw on his affidavit. Mr. Hope resisted this cross-examination as it was his view, that it was not cross-examination on the affidavit but cross-examination at large. I permitted Mr. Strandberg to cross-examine Mr. DeLeeuw on his affidavit, but set the scope for cross-examination. Given the lateness of the material, without cross-examination Mr. Strandberg has had no effective opportunity to question or challenge the material. Given the submissions of CNRL, this Board wanted to know whether CNRL was in fact an innocent party as has been alleged in the affidavits and submitted by counsel, or whether CNRL was responsible in whole or part for the lack of preparation by Mr. Dellow. The Board is conscious of the superior resourcing of CNRL [3] and wished to be satisfied that an adjournment is necessary in order to hold an adequate hearing of this damage claim.

Mr. Strandberg sought to cross-examine Mr. DeLeeuw on the following issues after hearing from counsel. I have paraphrased these issues as follows:

(1) Did CNRL follow through in a diligent fashion with Mr. Dellow to ensure that he was properly prepared for the hearing?

(2) What office services and staff services of CNRL were made available to Mr. Dellow to assist him in preparing and want assistance if any did he make of the services?

(3) Was CNRL an "innocent party" or where they wilfully blind to Mr. Dellow failure to properly prepare for the hearing?

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[3] From Mr. Dellow's affidavit which stated the earnings of CNRL were $2.2 billion

(4) Whether CNRL anticipates any witness problems if the hearing is adjourned and whether CNRL is prepared to pay costs, an advance, interest, and accruing damages if the hearing is adjourned?

I heard argument from counsel on the permissible scope of cross-examination in this application. I agreed with Mr. Strandberg that the first three issues were relevant to pursue and the Board wanted to know whether this was a case of neglect by counsel or whether CNRL facilitated or was wilfully blind to the lack of preparation claimed. The Board is very alive to the fact, from the affidavits filed, that CNRL appears to have vast resources to litigate. [4] Except for questions related to anticipated witness difficulties, I did not permit cross-examination regard to terms of an adjournment acceptable to CRNL. It was my view that anticipated witness difficulties was a relevant inquiry. It was unfair to the witness and unhelpful to the Board to have a witness negotiate the terms of an adjournment while under oath, as I would impose terms on CNRL if an adjournment granted.

Evidence on the Adjournment Application:

In his affidavit [5] Mr. Dellow deposed that the claim for damages was in excess of $280,000, that he had been retained since February 2006, but that he was not sufficiently prepared to proceed. In his affidavit, Mr. Dellow a solo practitioner who works as a solicitor as well as a barrister described a very busy conveyancing year, with the loss of two key staff members in the fall of 2006. In explaining why he required an adjournment of the February dates he said as follows:

. . .

9. Most of my preparation for the hearing in this matter was not started until early January of 2007.

. . .

22. Significant preparation for this hearing on my part did not commence until early January of this year. The workload issues described earlier in this affidavit were the major causes of the delay in preparation.

23. Areas in which I consider the preparation to be insufficient for the purposes of CRNL in this arbitration are as follows:

(a) an expert witness has not been retained to advise on certain agricultural aspects of this matter including:

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[4] According to the affidavit of Leslie G. Dellow sworn February 9, 2007 (Exhibit 2), CRNL had earnings in excess of $2.2 billion.

[5] Exhibit 2, Affidavit of Leslie G. Dellow, sworn February 9, 2007

(i) whether it is reasonable to attempt to control weeds organically in the circumstances of this case alleged by the Blatz's;

(ii) whether some of the damages claimed by Blatz's are for matters that farmers would have done in any event regardless of whether or not there was a weed problem as alleged (such as the claims for fencing and re-working the 192 hectare field);

(iii) whether the premises and/or assumptions in the Blatz analysis of damages for "loss of Production – Hay Bales" are reasonable;

(iv) whether it is reasonable that hand picking of scentless chamomile will be necessary for 20 years as alleged by the Blatz family;

(v) whether the actions of the Blatz's described in "Field Work and Seeding 192 Acre Field" in the "Compensation" section of the first Blatz binder were the optimal method of dealing with the situation or whether those actions may have exacerbated the situation;

(b) evidence has not been obtained re the cost of fencing;

(c) documents re actual weights of hay produced by the Blatz farm in recent years have not been obtained – such documents are in the possession of the Crop Insurance Office (I will be seeking disclosure of these documents from Blatz)

(d) witness statements are not finalized.

24. I advised Mr. Strandberg, counsel for the Blatz's on January 26, 2007 that an application for an adjournment might be made and so advised the Board administrator on January 29. I did not "bite the bullet" and advise unequivocally that an application for adjournment would be made as I had no finalized my thoughts in that regard. As my work on the file continued, I determined that an adjournment would be necessary. I advised the Board administrator and Mr. Strandberg's office by telephone on February 5 that the application would be made and confirmed my advice in writing.

25. In my opinion, to ensure that this proceeding, if the Board has jurisdiction, can be properly addressed on its merits, CNRL requires an adjournment to remedy the deficiencies that currently exist in the preparation of its case. I estimate that an adjournment of four months would be required. ... I am unaware of any information or witnesses that would not be available for presentation on behalf of the Blatz family if this matter is adjourned. CNRL, to the best of my knowledge, is a solvent corporation. CNRL's earnings for the 9 month period ending September 30, 2006, were approximately 2.2 billion dollars according to information published on CNRL's webite. I mention this only for the purpose of showing that there is no possibility that, if the Blatz's were successful in some or all of their claims, the

Blatz's would not be unable to collect on whatever amounts may be ultimately awarded to them.

Mr. Dellow also described the issues in his affidavit as:

(a) Does the Board have jurisdiction to hear and arbitrate upon all, some or none of the Blatz allegations/complaints?

(b) Is CNRL liable in law for the weed problems about which Blatz has complained?

(c) If CNRL is liable, what are the damages?

(d) If CNRL is liable, is Blatz precluded from recovering all provable damages due to a failure to mitigate?

In paragraph 3 and 4 of his affidavit Mr. DeLeeuw states:

3. Mr. Dellow advised me on January 26, 2007 of his concerns re state of his preparation for this arbitration. CNRL was not aware, prior to January 26, 2007 of the possibility that it might be necessary, in order to fully prepare CNRL's case, to seek an adjournment of the matter.

4. CNRL regards this case as very important. A substantial amount of money is being claimed in a case which is somewhat complex. While I understand that it is sometimes said that "cases are decided on their facts", I am concerned that if a decision adverse to CRNL results in this case, such decision will end up becoming a precedent if similar cases involving weed control are advanced by others in the future. If such a result were to follow from a decision in this case where we were not adequately prepared, I would be very concerned indeed on behalf of my employer.

Mr. DeLeeuw's evidence under oath was not substantially different from that contained in his affidavit. Some of his evidence was not entirely accurate as to dates; for example he believed that the hearing was set in November 2006; but that is not accurate, as the current dates were set on August 22, 2006. He also believes it was CNRL's second adjournment request. The correspondence clearly shows both parties consented to an adjournment of the October dates. I generally accept that he was a credible witness.

Mr. DeLeeuw had meetings and exchanged emails on a weekly basis with Mr. Dellow. He carried out tasks and investigations at the direction of Mr. Dellow. He indicated that he never sought assurances from Mr. Dellow that he would be ready to proceed, but he appeared to be working on the case. Mr. DeLeeuw indicated that CNRL had a problem in identifying a local expert witness on scentless camomile, and now they have determined that they will look for and engage a non-local expert. At the time when the October hearing was rescheduled, CNRL was expecting to be ready to proceed, but they

were "not absolutely confident" because they were looking for experts and witnesses. CNRL indicates that they have a "candidate list" for their witnesses.

In cross-examination, Mr. DeLeeuw testified that CNRL has four employees in the Fort St. John office. Because of the complexity of the file he was available to assist Mr. Dellow, but other staff persons would not be able to assist as they had their own duties and were not up to speed on the file.

After hearing the cross-examination, it is my view that CNRL could, in hindsight, have taken some further steps to ensure that their lawyer was prepared, but that they were relying on Mr. Dellow, and were very surprised when Mr. Dellow told them on January 26, 2007 that he was not prepared to proceed.

Argument:

CNRL's Argument

Mr. Hope argued on behalf of CNRL that the adjournment should be granted. The role of CNRL's land agent, Mr. DeLeeuw is one of a witness and the lawyer, Mr. Dellow had conduct of the matter. This matter involves a significant claim for damages. This is a "bit of a *mia culpa* application." Counsel says that he is not ready to proceed, and unforeseen problems in his office related to staffing problems and a busy year for conveyancing were root causes of the failure to prepare. Given the nature of the issues for hearing, an adjournment is necessary in order to ensure that rudimentary justice is done. Mr. Hope says that "that the reason is not the best that he has seen" but Mr. Dellow has been frank and full in his disclosure and the issues cannot be dealt with at this time, with justice to both parties. In essence as he put it, "the sins of the lawyer should not be visited on the client."

Mr. Hope says that a four month delay in the hearing of this case would not be undue delay. The Board should be concerned to have the full benefit of evidence that properly prepared and instructed counsel can bring to a hearing.

The Blatz's Argument

Mr. Strandberg argued that the adjournment should be refused. He submitted that the obvious point is that CNRL cannot say, after fifteen months, who their witnesses are or whether they will be able to proceed on a new date. CNRL had ample time to prepare the case for hearing since the pre-hearing conference in February of 2006. He says that the Blatz's are prejudiced by not finding out until the last business day before this hearing what the grounds were for the adjournment application, and by being denied a timely determination of their substantial claim for damages. They are prejudiced by having to argue an adjournment application on the date of the hearing.

Mr. Strandberg further argued that Mr. Hope made no submissions on the alternative position put forward by Mr. Dellow in his letters for a phased hearing. Mr. Strandberg

says that the hearing should not be split as the plaintiff should not have to bear the costs of educating two different arbitrators for two different phases of the hearing. He argues, in the alternative, if an adjournment is granted the Blatz's should be entitled to costs thrown away, an advance of damages, and interest and post judgement interest fixed from today's date on any damages proven.

In Reply by CNRL:

In particular, there is no testimony or evidence concerning the prejudice to the Blatz's if this matter is adjourned. Any prejudice can be dealt with by way of an order for costs thrown away. Costs should be assessed by a Master of the Supreme Court of British Columbia under Appendix B of the Supreme Court Rules: *Encal* v. *Viens*, 1996 CanLII 3022 (BC S.C.) and should be awarded and the conclusion of the arbitration. CNRL is not opposed to an order that the hearing be made peremptory on CNRL.

In Further reply by Blatz:

The Board is not limited to awarding costs based on the Supreme Court tariff, as the court in *Viens* was dealing with an interpretation of section 27 of the PNGA, now repealed, and section 47 of the *Administrative Tribunals Act* deals with costs.

Reasons for the Decision:

This is the second set of dates reserved for this hearing, but it is the first request to adjourn the hearing which is a contested. The Board has the statutory power to adjourn a case before the Board. In a decision to grant an adjournment the Board must consider the factors set out in section 39 of the *Administrative Tribunals Act,* S.B.C. 2004 c. 45 which read as follows:

> ***39*** *(1) An application may be adjourned by the tribunal on its own motion or if it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.*
>
> *(2) In considering whether an application should be adjourned, the tribunal must have regard to the following factors:*
>
> *(a) the reason for the adjournment;*
> *(b) whether the adjournment would cause unreasonable delay;*
>
> *(c) the impact of refusing the adjournment on the parties;*
>
> *(d) the impact of granting the adjournment on the parties;*
> *(e) the impact of the adjournment on the public interest.*

Section 39 of the *Administrative Tribunals Act* applies to the Board by virtue of section 13(6) of the *PNGA*. The Board's decision is a discretionary decision, and the Board must consider the facts advanced in this case for this adjournment request, apply section 39 of the *Administrative Tribunals Act*. In particular, the decision to adjourn should focus on

whether an adequate hearing can be held. The adequacy of the hearing must be determined in relation to factors requiring the adjudicator to consider the impact of the decision on both parties, and balance the interests or statutory factors set out in section 39(2) of the *Administrative Tribunals Act.*

I have considered and balanced the factors set out in section 39(2) of the *Administrative Tribunals Act* in reaching my decision to adjourn this hearing on terms. I wish to turn now to each of the criteria.

Reason for the Adjournment:

First, I have considered the reason for the adjournment, and the reason is that counsel is unprepared for this hearing. Mr. Dellow was candid in his admission that he was unprepared. It is my finding that counsel for CRNL is completely unprepared for this hearing, to the point that CNRL has been deprived of services of counsel. The reason for being unprepared is unacceptable given that the hearing dates have been known since August 22, 2006, counsel has had most of the Blatz's materials since April of 2006, and there is little that has changed in the issues other than an issue of jurisdiction raised by Mr. Dellow approximately two weeks before the hearing. It is unfortunate that counsel has not prepared properly for this hearing, and attempted to do most of his preparation in January of 2007.

I am satisfied that Mr. Dellow faced a substantial and unforeseen problem in his law practice with his conveyancing staff and workload. It is unfortunate that he did not come to grips with the preparation of this substantial case until January. The last minute adjournment of this case has been expensive for all parties.

It seems somewhat inexcusable that Mr. Dellow did not alert his client, opposing counsel, and the Board of problems in his readiness to proceed until late January. I do not fully accept that the problems arose in September of 2006, because there was a failure to deliver the points of defence in this matter by CNRL by the time agreed to at the preliminary meeting in February 2006 and further, a witness list was not delivered in a timely way. One would generally expect expert witnesses to be identified early in preparation of a case. This indicates problems in preparation which precede the problems in Mr. Dellow's conveyancing practice.

My sense is that CNRL could perhaps have taken further steps to inquire whether Mr. Dellow was ready for this hearing; however I accept the evidence of Mr. DeLeeuw that he was surprised when Mr. Dellow advised him he was not ready to proceed. Mr. Dellow is a competent and experienced counsel as submitted by both Mr. Strandberg and Mr. Hope. Generally, parties should be able to rely on competent and experienced counsel to prepare a case for hearing or alternatively alert the client in a timely way if there are difficulties in preparation. This is a case where CNRL is an innocent party and has not contrived an adjournment. I accept that CNRL is disappointed that this hearing cannot proceed as scheduled.

The reason advanced for this adjournment is not really an acceptable reason, but rather an inexcusable reason. Counsel should not leave the bulk of the work in defending a $280,000 claim for damages to six weeks before a hearing is due to commence, particularly where there is some complexity to the issues and counsel knew that the opposing party had supplied significant materials (a large binder) and an expert report. For example, leaving the bulk of the work until January would not have left any time for retaining an expert, instructing an expert or for the timely disclosure of an expert's report. Expert evidence is an issue which was canvassed at the pre-hearing conference. It is a factor that was taken into account in the fixing the first hearing dates. Nevertheless I am very concerned that if I were to force this hearing on, there would not be an "adequate hearing" of CNRL's defences to use the language in the *Administrative Tribunals Act*. Further, in order to make a proper decision in this case, the Board needs relevant evidence and submissions from both parties and at this time CNRL apparently has no documentary evidence or an expert report.

Unreasonable Delay:

I must consider whether the delay sought is an unreasonable delay. A delay of four months has been sought. Given the state of readiness, and the need to retain and instruct an expert and comply with the deadlines in the *Evidence Act*, a four month delay is not unreasonable. Mr. Strandberg has argued that this case should not be adjourned to an unknown date in the future, for witnesses who have not been identified and whose availability is unknown. Given the complexity of issues, and the need for expert witnesses, a four month delay is not an unreasonable delay. Any issue of further delay or a guarantee that the hearing proceed without additional delay can be dealt with by way of terms of an order which make the new hearing dates peremptory on CNRL. In considering the issue of delay, I have considered that while Mr. and Mrs. Blatz's application to the Board was filed in November 2005 and there were earlier dates for hearing reserved in October, their own former counsel consented to a change from October 2006 to February 2007. In my view, a consent by both parties to a change of dates "cannot count" as an earlier adjournment request by CNRL. CNRL probably was not prepared to proceed and the Blatz's were probably not prepared to proceed in October of 2006.

Impact on the Parties:

I must consider the impact on the parties of refusing or granting an adjournment. Forcing CNRL to a hearing, where that party clearly is not properly prepared has a risk of being less than an adequate hearing. At this point in time CNRL can cross-examine witnesses, but has no expert evidence to martial on the main issues of causation, quantum of damages or mitigation of damages. There is prejudice to CNRL if this hearing proceeds. If the hearing is adjourned there will be further legal costs for the Blatz's; however, this can be addressed and the Blatz's can be compensated from any prejudice arising from the adjournment with an award of costs. In my view there is a greater prejudice to CNRL than the Blatz's in being forced on to a complex hearing, without proper preparation. While it is always nice to get a decision as quickly as possible, any prejudice is wasted

hearing preparation and this can be adequately compensated by costs. The Board can provide for more certainty of this hearing proceeding in the future by imposing conditions that no further adjournments will be granted. The impact of granting the adjournment will result in a better hearing with more or fuller information to the Board on the issues alleged.

The Public Interest:

The public interest is a factor that the Board is required to take into account in making a decision to adjourn a hearing. It is not apparent from the small audience attending at the hearing that there is any significant degree of public interest in this case. Nevertheless, the issue of weed control is a serious issue, the amount of damages claimed is a serious issue and the jurisdictional issues raised are serious issues which go beyond the particular dispute involving these parties. In my view, it would be helpful for the community of persons who appear before the Board – landowners and industrial parties – to have a well reasoned decision which may assist the parties in arranging and negotiating their lease arrangements and settling or litigating damage claims. When the pre-hearing conference was held in February of 2006, the importance of the issues, with the exception of the jurisdictional issue recently raised, was known to the parties. The original date reserved for October was set sufficiently "down the road" for experienced counsel to adequately prepare an important case. It is unfortunate that CNRL did not take advantage of the time to prepare its case.

There is a public interest in timely hearings, but the greater public interest in my view rests in having an adequate and fair hearing, with each party having an opportunity to present fully the evidence in order for the Board to make an informed decision.
In my view at this time CNRL could not have an adequate hearing as required by section 39(1) of the *Administrative Tribunals Act* if forced to proceed. In applying section 39, the ultimate test is whether an adequate hearing can be held. In this case because of the lack of proper preparation, CNRL would be deprived of the services of counsel. In my view, counsel's failure to properly prepare for this hearing is inexcusable, but CNRL was surprised when it was notified in the middle of January that counsel was not prepared. As Mr. Hope put it, "the sins of the lawyer should not be visited on the client."

For all the above reasons this hearing will be adjourned on terms.

Timing of the Request to Adjourn:

The Board presently does not have a particular form to apply for adjournments and the Board relies on parties to make their requests by way of a letter to the Board. While Mr. Dellow wrote to the Board on February 2 and 7, 2007, concerning an adjournment his reasons for an adjournment could not be ascertained until he delivered the affidavits late on February 9, 2007, and the Board only became aware of the affidavits on February 9, 2007 because Mr. Strandberg faxed them to the Board along with his submission. This late delivery of material in support of an application is inexcusable and has resulted in unnecessary expense.

This adjournment application consumed roughly .75 days of time and was heard in Fort St. John. While the Board's offices are situate in Fort St. John and the parties are in the Peace area, none of the Board members who arbitrate cases for the Board reside in Fort St. John. If Mr. Dellow had raised his adjournment request in a timely way, the application would have been heard by conference call. Under section 36 of the *Administrative Tribunals Act* the Board has the power to hold hearings by electronic means, and would have scheduled this adjournment application by telephone conference call. As well as unnecessary time and expense to the Blatz's occasioned by an adjournment, the Board has been put to unnecessary expenses for the costs of travel and hearing room rentals.

At the outset of the pre-hearing conference it was envisaged that there be one hearing. If I had not granted the adjournment I would have heard the argument related to jurisdiction and all the evidence in the case. After the completion of the evidence I would have directed my mind first to writing the jurisdictional issue. Given the lateness of the jurisdictional challenge, I would not have adjourned the merits to hear only the jurisdictional argument and issue a ruling. Further, I would not have scheduled the case to hear the Blatz's evidence during the February 12 to 16 time slot, with CNRL's evidence at a later time, as this would be an unfair advantage to CNRL. I accept Mr. Strandberg's submission that it makes no sense to split the issue of liability from damages, particularly given that there is no guarantee that the Board member [6] or counsel for the Blatz's will remain available for two separate hearings and there would be significant overlap in the information between liability and damages and a need to repeat evidence if the issues of liability and damages are split.

TERMS OF THE ADJOURNMENT

I ORDER AND DIRECT AS FOLLOWS:

1. The hearing shall be adjourned on terms.

2. The Board's administrator will consult with the parties concerning dates; however the date will be no sooner than four months from today's date (February 12, 2007). The purpose of this is to ensure that if expert reports are filed, that proper notice is given under the *Evidence Act*, R.S.B.C. 1996, c. 124, which requires thirty days notice [7] for the admission of expert opinion evidence and expert reports.

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[6] My term as Board Chair expires on July 27, 2007, and in January of 2007, I notified the appointing authority that I am not seeking reappointment and will not be available for work as a member or Chair after that date. Mr. Strandberg indicated that he was retained for the hearing and unlikely to remain as counsel if the matter is adjourned.

[7] At the hearing I indicated 60 days, which is the time set out in Rule 40 A of the *Supreme Court Rules*; the time in the *Evidence Act, R.S.B.C. c. 124* applicable to this application is 30 days.

3. The new date will be peremptory on CNRL and will not be further adjourned at the request of CNRL.

4. CNRL shall by March 29, 2007 deliver an amended points of defence which sets out all the facts and issues in answer to the points of claim set out in Tab T of the Blatz's exhibit book. Blatz's have leave to file a reply and if choose to do so must be by April 19, 2007. I am doing so to make sure all the issues are identified in a timely way before the hearing.

5. Any further documents on which CNRL relies at the hearing shall be delivered 60 days before the scheduled hearing date.

6. CNRL shall pay to the Blatz's forthwith after a review by me, if necessary, the costs thrown away by virtue of the adjournment. I may require further written submissions from the parties on the amount of costs, and the basis by which costs will be assessed. However, I will be making the assessment, and not referring this to the Master. I do not accept that the reasoning in the case of *Viens*, as binding me to refer the assessment of costs thrown away to a Master of the Supreme Court of British Columbia. Since the pronouncement of *Viens*, section 27 (the costs provision) in the PNGA has been repealed and section 47 of the *Administrative Tribunals Act* is now in force. Further, *Viens* relied heavily on a decision of the Court of Appeal in *Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd.* (1990), B.C.L.R. (2d) (C.A.), which dealt with costs in a commercial arbitration case. The effect of the decision in *Ridley Terminals* has been overruled by an amendment to section 11(2) the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

7. If the parties can agree on the amount of the costs, I will make a consent order with regard to the amount of costs.

8. CNRL shall provide to the Board by February 26, 2007 a written submission setting out why the Board should not order that CNRL pay the Board's costs or portion of the Board's costs pursuant to section 47(1) (c) of the *Administrative Tribunals Act*, for the costs thrown away for this hearing ("recovery of Board expense application"). The Board has incurred unnecessary expense in this matter because the adjournment application was not made in a timely way. I am concerned that the conduct has been improper in leaving this adjournment application to the last minute, and abusive to the Board's process.

9. If Mr. and Mrs. Blatz wish to make a submission on the issue of recovery of Board expenses from CNRL or the interpretation of section 47(1)(c) of the *Administrative Tribunals Act*, the Blatz's shall provide a written submission to the Board and to CNRL by March 5, 2007 with a final reply by CNRL by March 12, 2007.

10. I make no order for an advance on damages to Mr. and Mrs. Blatz as liability in this case is disputed, and the Board is not going to prejudge the merits of this case by awarding an advance.

11. I make no order for interest and any accruing damages at this time other than to note that this adjournment is caused by the fault of CNRL and its counsel, and that this finding may have some impacts on any compensation ordered by the Board if CNRL is found to be responsible.

12. I remain seized of the costs issue, as well as the scheduling issue, however I will not be the arbitrator who will hear the merits, or the jurisdictional argument.

After I gave my oral ruling, the parties agreed that it would be helpful to have a pre-hearing conference sixty days in advance of the hearing date, and I will give directions to the Board's administrator to arrange this, when the hearing date is scheduled.

In light of this ruling, the parties agreed to an assessment of costs at an oral hearing scheduled for 1:30 p.m. on February 13, 2007 in Fort St. John.

MEDIATION AND ARBITRATION BOARD

DATED THIS 19th DAY OF FEBRUARY, 2007

Paul Love
Board Chair and Arbitrator