

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

Date: February 19, 2007

**FILE NO. 1556
Board Order No. A416**

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 N1/2 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
L.G. Dellow, for Canadian Natural Resources Limited

**Reasons for Adjourning the Costs Hearing Scheduled for February 13, 2007
Oral Reasons given on February 13, 2007
Written Reasons given on February 19, 2007**

There is an application by Mr. and Mrs. Blatz against Canadian Natural Resources Limited ("CNRL") for damages under section 16 (2) of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361 ("*PNGA*") before the Board and this was scheduled for a five day hearing commencing on February 12, 2007.

On February 12, 2007, I heard an application by Mr. Hope, counsel retained by CNRL or by Mr. Dellow, to speak to CNRL's application to adjourn the hearing. This was a

contested adjournment application, which involved cross-examination of a witness from CNRL and was vigorously and well argued by counsel. I decided to adjourn the arbitration hearing on terms. I have issued a separate order setting out the terms of the adjournment and my reasons for adjourning the hearing.

One of those terms of the adjournment was an order that CNRL pay the “costs thrown away by the Blatz’s by virtue of the adjournment.” The purpose of the hearing on February 13, 2007, was to hear evidence and argument regarding the amount of costs and the method by which I should assess costs. At the outset of this hearing I briefly adjourned so that counsel could have an opportunity to canvass the possibility of settling this issue, and indicated if an agreement could be reached I would issue a consent order. Counsel were unable to settle the costs issue.

The burden of proof of the amount of costs thrown away was on the Blatz’s on a balance of probabilities. I indicated that process to be followed for the costs assessment would be that counsel for each party, commencing with the Blatz’s, would have an opportunity to give an opening statement on the quantum and method of assessing costs. I would then hear any oral evidence from the applicants, which would be subject to cross-examination by counsel for CNRL and re-examination by counsel for the Blatz’s. Once the Blatz evidence was concluded CNRL could give evidence if it chose in a similar manner.

During the course of opening statements, the costs claim of the Blatz’s was marked as Exhibit “3”. The claim for costs was a total of \$29,493.51 and costs are sought on an indemnity basis. Counsel for the Blatz’s proposes to give evidence on his fees, and call Mr. and Mrs. Blatz to give evidence. A significant portion of that claim (\$16,387.50) was a claim by the Blatz’s, over and above counsel fees, for “their costs or fees” in assisting in the preparation of the matter, and meeting with counsel. The claim appears to be based on time spent or on opportunity costs. A portion of the fees was a claim for fees by an earlier counsel for the Blatz’s, Darryl Carter, and fees and disbursements for Mr. Strandberg. The costs claim for counsel fees, disbursements and taxes is \$12,669.23. At this stage I am not going to set out the full opening statements. There was a request for reconsideration by counsel for CNRL which I denied, followed by an adjournment request that I granted. When I hear the evidence and argument on the merits I will set out a more full discussion of the costs arguments.

Refusal to Reconsider the Costs Decision:

I refused to reconsider my order for costs thrown away, because an order for costs was an integral and essential part of my decision to grant the adjournment yesterday. I note also that counsel for Mr. Dellows and CNRL conceded at the adjournment application on February 12, 2007 that an order for costs thrown away was appropriate, but that there was a significant question as to the amount of costs, and the process by which costs should be assessed. CNRL argued that costs should be limited to costs under the British Columbia Supreme Court Rules, and costs should be assessed by a Master. While today, counsel for CNRL argued that there should not be an assessment of costs thrown away for a variety of reasons including a possible lack of jurisdiction, in my view even on the Respondent’s

argument the Board would have jurisdiction with respect to damages on the parcel on which the installation is situated, whether there are damages is a separate question. I expressly make no ruling on the jurisdictional arguments as this will be dealt with at a separate time.

I ordered that this costs hearing be adjourned, with a schedule for written submissions on an issue, followed by a resumption of an oral hearing. I ordered this matter to be adjourned because given the amount of the claim, the novelty of the claims presented, the importance of the costs issue generally, the lack of timely notice of the claim and disclosure of documents by the Blatz's, I was not prepared to force counsel for CNRL to "wing" a cross-examination of the witnesses presented by the Blatz on a \$29,493.51 issue.

In saying a "lack of timely notice", I do not wish to attribute fault to any party. In my view it was optimistic for both Mr. Dellow and Mr. Strandberg to think that this costs hearing could take place if I remained in Fort St. John the next day to hear a costs application, given the size of the costs claim and the nature of the issues.

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:

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.*

In applying section 39, the ultimate test is whether an adequate hearing can be held. The Board's decision is a discretionary decision and involves a balancing of the factors in section 39(2). In my view CNRL could not have an adequate hearing as required by section 39(1) of the *Administrative Tribunals Act* if forced to proceed with a costs application for an amount claimed of \$29,493.51 with Mr. Dellow having less than twenty four hours to consider the documents, given the size of the costs claim and the novelty of the issues presented. I note also that fresh documents were handed by Mr. Strandberg to Mr. Dellow on the Blatz's time during the course of the costs hearing.

Had the costs claimed in these proceedings been simply a claim for costs for lawyers' fees and disbursements thrown away, this costs claim could have proceeded, with cross-

examination of Mr. Strandberg on February 13, 2007. The large claim presented by Mr. and Mrs. Blatz for "their time" raises novel legal issues as well as had the potential to be a lengthy hearing and extremely unfair hearing.

In summary, there is a good reason to adjourn this matter and I see no negative impacts on the Blatz's, with a strong negative impact on CNRL who will be required to pay costs thrown away. The balance of the issues in this matter can be dealt with in a timely manner without unreasonable delay. The issue of whether the Blatz's should be paid for their time, is a novel issue, may have implications beyond this particular case, and there is a public interest in having this point well presented and well argued.

I indicated that I wanted written submissions on the issue of whether:

Is a litigant who is represented by counsel entitled as "costs thrown away" to compensation for their "own time spent" in preparing for a hearing?

Counsel for the Blatz's agreed to provide written submissions, including any authorities, to the counsel for CNRL and the Board by Friday February 16, 2007. Counsel for CNRL agreed that he would provide written submissions, including any authorities by February 28, 2007. Counsel for the Blatz's will provide any reply submission by March 14, 2007.

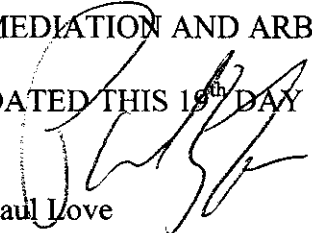
The Board will fix a date for resuming the costs hearing after it receives the written submissions. I will consider the written submissions, and if I conclude that there is a basis for me to consider a claim by the Blatz for "their time", I will hear oral evidence from them. If I conclude that there is no basis to consider a claim by Blatz's for "their time", I will hear any other oral testimony on other aspects of the costs claim. Any costs decision will be issued in a written form and published on the Board's website.

I have made no decision on whether there is an entitlement to costs for the adjournment of the costs hearing on February 13, 2007, but I will consider this as part of my costs thrown away ruling.

If either of the parties changes counsel, the parties and departing counsel will provide the other party and the Board with a new address, fax and telephone numbers. If there is a change of counsel and a request to adjust the dates for submissions, I will consider that request.

MEDIATION AND ARBITRATION BOARD

DATED THIS 19th DAY OF FEBRUARY, 2007


Paul Love
Board Chair and Arbitrator