File No. 1589
Board Order
No. 1589-2

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED
AND IN THE MATTER OF NE ¼ of Section 31 Township 79 Range 16, W6M,
Peace River District, except Plans H903 and PGP38729
(The "Lands")

BETWEEN:

SPECTRA ENERGY MIDSTREAM CORPORATION.
("Spectra")

("APPLICANT(S)")

AND:

KENNETH JAMES VAUSE AND
LORETTA VAUSE
(the "Vauses")

("RESPONDENT(S)")

ARBITRATION ORDER

Appearances:

Mr. Rick Williams, counsel for Spectra Energy Midstream Corporation
Mr. Darryl Carter, counsel for Kenneth James Vause and Loretta Vause

ORDER

I. INTRODUCTION

This decision deals with the application for costs made by Mr. and Mrs. Vause in connection with Spectra's application under Section 16(1) of the ***Petroleum and Natural Gas Act*** (the "***Act***" or "***PNGA***") seeking entry, occupation and use to the Lands, filed April 4, 2007.

II. BACKGROUND

I do not intend to set out the facts in detail and refer to the facts set out in the Board's decision on the merits (***Spectra Energy Midstream Corporation v. Kenneth James Vause and Loretta Vause***, MAB Order No. 420A, December 11, 2007 ("***Spectra v. Vause***").

Spectra is engaged in the construction of an underground sour gas flowline connecting certain well sites with Spectra's compressor site and gas plant. Spectra required a right of way from the affected landowners, who all, with the exception of the Vauses, entered into right of entry agreements with the company.

Following initial meetings between the parties, Spectra filed an application for right of entry with the Board The Vauses did not agree with Spectra's proposed routing of the flowline. In particular, they were concerned that the proposed flowline would take a jog down through their field rather than following the property line.

After a pre-hearing conference, the Board scheduled a site visit and a mediation session on July 8 and 9, 2007. At the mediation, the Vauses made two preliminary objections. They were of the view that the Oil and Gas Commission (the "OGC") had to approve Spectra's application prior to mediation. They also asserted that the flowline was a pipeline outside the Board's jurisdiction, because it did not meet the definition of a "flow line" under the ***Pipeline Act***, RSBC 1996, c. 364. The mediator did not agree, dismissed the objections and issued an order on July 23, 2007, granting Spectra a right of entry for the purpose of an environmental assessment, an archaeological assessment and construction and

operation of a "pipeline." The mediator also ordered the matter to proceed to arbitration.

After the mediation, Spectra sought entry to the Lands for the purpose of soil sampling. However, the Vauses took the position that the mediator's order was not enforceable until it had been confirmed in arbitration. In an August 15, 2007 letter, their counsel wrote that the "Order is only a mediator's order.... Therefore there is no order ... authorizing Spectra to enter the land." Later that month, the Vauses' counsel reiterated this position.

In response Spectra applied to the Board for a determination that the mediation order was enforceable. In ***Spectra Energy Midstream Corporation v. Kenneth James Vause and Loretta Vause***, MAB Order No. 422PA, October 1, 2007, I decided that the mediator's order, though not final, was effective and enforceable.

In September, the Vauses proposed an alternate routing of the flowline, which in their view would have "less impact on the property." The Vauses confirmed that in writing on October 4. They also confirmed that the "only outstanding issues will be that of costs and compensation."

On September 21, Spectra offered to settle the matter for $15,500. Spectra says that the Vauses did not make any counter proposals other than it would have to be in excess of $50,000. The Vauses do not deny this, but say that Spectra's proposal was based on "land at a 26 year old price," and based on an alternate routing that might not be approved by the OGC. Spectra advised the OGC of the changed routing on October 19.

In the meantime, Spectra filed its "statement of points" with the Board, offering $13,407.50 plus costs to be determined at a later date. On October 10, the Vauses submitted their "points of defence" suggesting that the appropriate amount was in excess of $80,000, annual rent of $6,179.50, and all of their legal and personal costs. In its October 19 reply, Spectra revised the offer to $15,539.63 based on the revised route, with costs to be determined at a later date. The revised route added some $65,000 - $70,000 to the project costs, including payments to another landowner who was not affected by the initial route.

At the arbitration, there were three main issues between the parties. The first was whether the Board had jurisdiction to deal with Spectra's application. That, in turn, depended on the whether the pipeline in question was a "flowline". If the application was within the Board's jurisdiction, the second issue was the amount of compensation the Vauses' were entitled to. The third main issue was the Vauses entitlement to costs, including legal and personal costs. By agreement, the latter issue was deferred pending a decision on the merits.

The Board held a hearing in Fort St. John, British Columbia on October 29 and 30, 2007. I issued a decision on jurisdiction and compensation on December 11, 2007 (***Spectra v. Vause***).

In my view, the pipeline was a "flowline" within the Board's jurisdiction and I determined the compensation issues under Section 21 of the ***PNGA***.

With respect to compensation issues, the parties were far apart. The table below illustrates the differences.

Land: 7.27 acre	**Spectra**	**Vauses**
Loss of land value	n/a	$50,000
Right of way	$ 950/acre	$ 2,000/acre $ 850 (annual)
Crop loss	$ 275/acre (2.5 years)	$ 275 - $440/acre (6 years)
Re-seeding	$ 300/acre	$ 350/acre
Nuisance/disturbance	$ 200/acre	$12,000
Approximate totals Year 1	$15,525	$81,900

Spectra based the payment for the right of way on "industry practice," which had also been accepted by other landowners in this project. The Vauses challenged the "industry practice" that had been in place since the 1980's. In my arbitration award, I decided that the "industry practice" failed to take into account the buying power of the dollar and increased that amount by 50% to $1,425/acre.

The Vauses also argued that they were entitled to annual payments for the duration of the flowline, $50,000 for the loss of value to the land and $12,000 on account of nuisance and disturbance. They were not successful on those points.

In the arbitration award, I made the following compensation orders:

> "1. Upon payment by the Applicant to the Respondents of the following amounts, calculated on the basis of 7.27 acres:
>
> a. Right of way (acres@$1,425/acre): $10,359.75
> b. Crop loss ($275/acre for 2.5 years): $4,998.13
> c. Re-seeding ($350/acre): $2,544.50
> d. Nuisance/disturbance ($200/acre): $1,454.00

> the Applicant shall have entry to, occupation and use of the Lands for the purposes of construction and operation of a pipeline.
>
> 2. The mediator's order for entry, occupation and use of the Lands is confirmed, except as varied to reflect the new routing of the pipeline as agreed between the parties."

This order did not include the Vauses' substantial claim for legal and personal costs.

Following the arbitration award, Spectra notified the Vauses that it intended to come onto the Lands to commence construction. The Vauses told Spectra that "there will be absolutely no entry allowed on our property as we are applying for a judicial review." They noted that [c]osts and compensation are still outstanding." Only after Spectra had commenced an action in the Supreme Court of BC to enforce the December 11 arbitration award was it permitted onto the Lands.

After the arbitration, the parties attempted to reach an agreement with respect to costs but were unable to do so. Accordingly, an application was made to the board for a determination.

The Vauses claim a total of $38,330.58 legal costs and disbursements. They also claim $7,294.92 on account of their personal costs, on the basis of $100 per hour, and expenses from their first encounter with Spectra's representatives in January 2007.

III. ISSUES

There are two issues:

1. Whether, in the circumstances, the Vauses are entitled to compensation for the legal costs and disbursements, and if so, how much and for what?
2. Whether the landowner is entitled to reimbursement for the time spent and expenses incurred dealing with the subject matter of the application?

IV. ANALYSIS AND DECISION

Section 47 of the ***ATA*** provides the Board with the discretion to award costs:

> 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:

(a) requiring a party to pay part of the costs of another party or an intervener in connection with the application,

In my view, the Board's costs awards are guided by principles that include the following (***Rhyason Ranch***):

1. Generally, costs must provide partial indemnity to the surface rights holder for reasonable and necessary representational costs, including legal fees and disbursements, in connection with the application;
2. However, those costs must also encourage parties before the MAB to make reasonable offers to settle their disputes, encourage them to narrow the issues in dispute, and discourage improper or unnecessary steps in the litigation.

I turn first to the Vauses' claim for their personal time and expenses. In the past, the MAB made such awards, although – as far as I am aware, and I have not been referred to any authority to the contrary – never in amounts even close to the Vauses' claim of $7,294.92 plus substantial legal costs. They say that ***Rhyason Ranch*** was wrongly decided – the adjudicator favoured operators over landowners – and that there is "no good reason" to depart from the Board's interpretation of the word "costs" under Section 27 of the ***PNGA***

It is certainly open to the Vauses to show that this decision was wrongly decided or does not apply to the circumstances of the cases at hand. However, they have neither provided any basis in statutory construction nor authorities in support of their argument on this point. While administrative tribunals, such as this Board, are not bound by *stare decisis*, I am of the view that I ought not to depart from previous Board authority without good reason. My jurisdiction is based on the current legislation, Section 47 of the ***ATA*** and, in my view, the word "costs" means "legal costs" (***BC Vegetable Greenhouse I, LP v. BC Vegetable Marketing Commission***, BC Farm Industry Review Board, May 20, 2005, para. 23). In short, the Vauses claim for personal time and expenses is denied.

I now turn to the Vauses' claim for legal costs and disbursements. The claim is substantial, $38,330.50, including taxes and disbursements of $1,279.98. Their counsel billed them for 87.4 hours between May 31 and December 13, 2007 at the rate of $400.00. Counsel rendered his first account, for the period May 31 to July 9 up to and including the mediation, 25.6 hours, in the amount $11,011.07 on July 10. The second account, covering the balance of the time, 61.8 hours, in the amount of $27,319.51

The burden to prove that the costs claimed are necessary and reasonable rests with the party claiming the costs, *i.e.* the Vauses. Some of the entries on the

accounts are not particularly informative, indicating communications with various persons, some of whom are known to be involved in this matter. A few hours claimed clearly appears to be related to a process before another administrative body, the Oil and Gas Commission. However, I am left with considerable doubt as to the nature of the charges and whether they are, in fact, "connected with the application" or related to other matters. Mr. Vause's statement, in a statutory declaration filed with the application for costs, that the "time, expenses and legal costs ... are reasonable and accurate" does little to remedy or alleviate those concerns.

All the same, it is clear that the Vauses did, in fact, incur costs in connection with the Board's "application." Of the 25.6 hours on the first account, 12.5 hours are clearly identified as relating to preparation for and attending to the mediation; of the 61.8 hours on the second, about 25 hours are related to conference calls, preparation, review of statements of points, drafting of statements of points (in response), preparation for a two day arbitration, attending to the arbitration, obtaining client instructions and preparing final argument.

Essentially, the Vauses seek full indemnity for their legal costs. They argue that the ***PNGA*** is expropriation type legislation, and that they are entitled to the legal costs on a client and solicitor basis because of the "forced taking" of their property (***Cochin Pipelines Ltd. V. Rattray*** (1980), 22 LCR 198 (Alta. CA); ***Robertson et al. v. Calgary Power Ltd.*** (1981), 22 LCR 210 (Alta. CA); Eric CE Todd, ***The Law of Expropriation and Compensation in Canada*** (Carswell, 1992, 2nd ed). ***Rhyason Ranch*** ignored the ***Cochin Pipelines*** line of cases, which protects landowners.

Unfortunately, the Vauses do not address Section 47 of the ***ATA*** in any substantive manner. As noted by Spectra, there is no provision in the ***ATA*** for "client solicitor costs." "Client solicitor costs" or "special costs" (in British Columbia) are meant to provide higher indemnity than "ordinary costs" based on the Supreme Court tariff (***Bradshaw Construction Ltd. v. Bank of Nova Scotia*** (1991), 54 BCLR (2d) 309, affd (1992), 73 BCLR (2d) 212 (CA)). However, Rule 57 (Costs) of the BC Supreme Court Rules does not apply to the Board's proceedings (see J.L.A. Sprague, ***The Annotated Administrative Tribunals Act***, Toronto, Ont.: Carswell, 2005).

Cochin Pipelines arose out of an appeal of an arbitrator's award under the ***Railway Act***, RSC 1970, C R-2, which provided broadly that he "ascertain compensation in such way as he deems best." The Alberta Court of Appeal adopted, without any analysis, the rule expressed by the arbitrator that the landowner ought not to be out of pocket, and that costs be awarded on a client solicitor basis. In ***Robertson***, the Alberta Court of Appeal applied the principle in the context of an appeal from decisions made by the Surface Rights Board. The court applied the Alberta ***Expropriation Procedure Act***, RSA 1970, c 130, which

provided for "the costs of an incidental to the application" and on appeal "such directions as [the court] considers just." Despite the similarity in the statutory language to the now repealed Section 27 of the ***PNGA***, these cases do not appear to have had any impact in the Board's past decisions. In any event, the statutory language under the ***ATA*** is different from the legislation considered by the Alberta courts in ***Cochin Pipelines***. In my view, these cases are of little assistance here.

In any event, the Vauses' argument with respect to whether or not the ***PNGA*** is expropriation type legislation is misdirected. Even under expropriation legislation in BC, landowners are not provided full indemnity. Normally, in proceedings under the ***Expropriation Act***, RSBC 1996, c. 125, a landowner is entitled to "costs necessarily incurred" based on a tariff (***Compensation Action Procedure Rule***, BC Reg 100/2005). The landowner may be entitled to "actual reasonable legal costs" if the amount awarded exceeds the amount paid by 115% or some or all of the costs in the court's discretion even if amount awarded is less."

It is clear from the language of Section 47 – "requiring a party to pay part of the costs of another party ... in connection with the application" – that the ***ATA*** contemplates less than full indemnity, whether characterized as client solicitor costs or not. In other words, I have the discretion to award costs as long as the amount awarded is less than 100 per cent of that party's costs. As noted in ***Rhyason Ranch***, landowners may generally expect "partial indemnity for reasonable and necessary representational costs" and, in my view, it would be the rare and exceptional case where the Board would award close to actual legal costs. I do not see anything on the facts of this case that would entitle the Vauses to that. I am of the view that they are entitled to reasonable and necessary legal costs for part of the MAB process.

I turn first to the costs up to and including the mediation stage. I note that the Vauses take exception to the Board's emphasis on mediation as set out in ***Rhyason Ranch***. In their view that emphasis favours operators over landowners. With respect, I disagree. Given the emphasis in the ***Act***, and by the Board, on mediation and voluntary dispute resolution, a surface rights holder may well expect a greater proportion of reasonable and necessary costs associated with the mediation stage in the MAB process. In my opinion, this will encourage both parties to adopt reasonable positions early on in the process and discourage unnecessary litigation.

In my view, the 12.5 hours appear to be attributable to the board's mediation process and, thus, connected with the application. As well, 2 hours for client instructions and investigation of the case is reasonable. I am of the view that an hourly rate of $400 is certainly at the high end, considering the factors discussed

in ***Rhyason Ranch***, p. 11. In the circumstances, I am prepared to award $3,500.00 up to and including the mediation plus disbursements up to this point in the amount claimed of $156.67

I add, at this point, that I do not accept Spectra's assertion that the accounts were never intended to be paid. The statement by counsel for the Vauses that he has not been paid by his clients and does not "expect payment until they ... received funds from the company" does not, in my view, show that he has rendered an account that was not intended to be paid. On their face, the accounts are represented to be "payable on receipt." In the case relied upon by Spectra, ***AEC Oil & Gas v. Nobbs***, MAB Order No. 325A (Costs), May 21, 2002, there was "no evidence that the account was paid or intended to be paid." Counsel in that case also did not attend the mediation or arbitration. That cannot be said here. I would be reluctant to accept the inference that counsel, as an officer of the court, would knowingly put forward accounts designed to deceive the Board.

I now turn to the legal costs incurred after the mediation up to and including the arbitration hearing. At this stage, the Board will more closely scrutinize the conduct of the parties, including such factors as the nature of the costs incurred, the reasons for incurring them, the contributions of counsel or advisors, fairness in the Board's process, and whether parties have taken a "realistic approach" in dealing with the issues before the Board. The degree of success in outcome may provide some measure or indication of whether parties adopted a "realistic approach."

The Vauses complain that Spectra did not negotiate in good faith before filing an application with the Board, based on incomplete information. They say they were willing to negotiate on the basis of the "re-routed" proposal. They point out that Spectra's settlement proposal of $15,500 "all in" was less than the Board's compensation award. Spectra, on the other hand, says that the Vauses should not be awarded any costs because they took unrealistic positions, rejected reasonable offers and refused to negotiate compensation. Even after Spectra changed the routing of the flowline at a substantial cost, the Vauses demanded $80,000, annual rent of more than $6,000, and 100% of their legal and personal costs.

The jurisdictional and compensation issues were not, in and of themselves, in my opinion, unreasonable to raise on behalf of the landowner. While I decided the jurisdictional argument in favour of Spectra, and that the pipeline was a flowline within the Board's jurisdiction, the issue was properly raised.

Contrary to the Vauses' assertion, the ***Rhyason Ranch*** case does not prevent landowners from challenging "industry standards." Overall, the Vauses went into

the arbitration with a position that was not "realistic," particularly given Spectra's agreement to change the routing of the flowline. The Vauses also argued that they were entitled to annual payments for the duration of the flowline, $50,000 for the loss of value to the land and $12,000 on account of nuisance and disturbance. They were not successful on those claims. More importantly from a cost standpoint, there was very little basis in the evidence in support of those claims. While I appreciate the Vauses criticism of the ongoing reliance on "industry standard" – Spectra's proposal for the right of entry was based on "land at a 26 year old price" – they successfully challenged the "industry practice" that was in place since the 1980's and I increased that amount by 50% to $1,425/acre.

While Spectra correctly notes that the arbitrated award is less than 20% of what the Vauses had demanded, my decision increased the payment to the Vauses from the $15,525.00 offered to $19,356.38, or by approximately 20% This order did not include the Vauses' substantial claim for legal and personal costs.

Of particular importance in that regard, is the role of the so-called" industry standard" for a right of way for pipelines. Spectra based the payment for the right of way on "industry practice," which had also been accepted by other landowners in this project. As noted in ***Rhyason Ranch***, p. 14, there is considerable merit in "industry standards." They provide a measure of predictability, uniformity and, perhaps, fairness between landowners. All the same they must be subject to challenge lest they become inflexible, "one-size fits all", boilerplate. As well, they must also reflect changing circumstances.

Regardless of the particulars of the account, Counsel clearly would have been engaged in preparing and attending to the pre-arbitration conferences, reviewing Spectra's statement of points, preparation of the Vauses' statement of points (in response), preparation for the hearing, attending to the arbitration, 25 hours claimed and directly attributable to the Board's process are not an unreasonable amount of time, in all of the circumstances, for a two day arbitration.

Based on the general principles set out above that the landowner is entitled to a measure of indemnity for reasonable and necessary legal costs, while encouraging a mediated or negotiated resolution, I am inclined to conclude that the Vauses would, in the absence of factors indicating otherwise as discussed below, be entitled to costs for the arbitration stage and I would have awarded $5,000.

As mentioned earlier, the Board's power to award costs is discretionary. In this case, I was concerned about the Vauses' conduct in relation to the Board's orders and its process. Spectra says that costs are inappropriate because of the "blatant contempt" of the Board's processes displayed by the Vauses.

The mediator's order on July 23, 2007, granted Spectra the right of entry for the purpose of an environmental assessment, an archaeological assessment and construction and operation of a "pipeline." After the mediation, Spectra sought entry to the Lands for the purpose of soil sampling. The Vauses took the position that the mediator's order was not enforceable until it had been confirmed in arbitration, despite an earlier decision of this Board on this point (***Terra Energy Corp. v. Meeks***, Board Order No. 409AR, May 16, 2007), necessitating an application to the Board (***Spectra Energy Midstream Corporation v. Kenneth James Vause and Loretta Vause***, MAB Order No. 422PA, October 1, 2007)

While I would not have awarded any costs to the Vauses in connection with this conduct, I am more concerned with the Vauses ongoing refusal to comply with the Board's orders, particularly after Spectra had agreed to change the routing at substantial costs. Following the arbitration award, Spectra notified the Vauses that it intended to come onto the Lands to commence construction. The Vauses told Spectra that "there will be absolutely no entry allowed on our property as we are applying for a judicial review." They noted that [c]osts and compensation are still outstanding." Only after Spectra had commenced an action in the Supreme Court of BC to enforce the December 11 arbitration award was it permitted onto the Lands. An application for judicial review was not commenced

In short, as a result of the Vauses conduct in refusing to comply with the Board's order, I decline to exercise my discretion to award costs for the portion of the Board's process after the mediation.

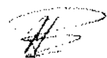
VI. DECISION

THEREFORE THE BOARD MAKES THE FOLLOWING ORDERS:

1. Spectra must pay legal costs and disbursements to Mr. James Vause and Loretta Vause in the amount of $ $3,656.67. The amount is payable no later than 30 days from the date of this order unless the parties agree otherwise.

MEDIATION AND ARBITRATION BOARD

DATED THIS 23 DAY OF APRIL, 2008



IB S. PETERSEN,
VICE-CHAIR