File No. 1589
Board Order # 422 PA

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

BOARD ORDER

I. INTRODUCTION

Spectra seeks entry, occupation and use to the Lands under Section 16(1) of the *Petroleum and Natural Gas Act* (the "*Act*"). Spectra and Mr. and Mrs. Vause failed to reach an agreement, and Spectra applied to the Mediation Arbitration Board (the "Board").

II. BACKGROUND

The Board appointed Mr. Darrel Woods to mediate the dispute.

A pre-hearing conference was held on June 20, 2007. There was a site visit on July 8 and a mediation session on July 9, attended by their parties or their representatives.

The mediation order, issued on July 23, 2007 (the "Mediation Order"), briefly sets out the factual background and reasons for the order. The Mediation Order deals, in some detail, with two preliminary objections made by the Vauses concerning the appropriateness of Board mediation prior to the disposition of the application by the Oil and Gas Commission (the "OGC"). They are of the view that the OGC must approve the application first before a Right of Entry order is granted by the Board. Moreover, they continue to question whether the application is in respect of a "flow line" or a pipeline, the Board's jurisdiction being limited to the former. The Mediator did not accept the objections and proceeded to conduct the mediation.

The Mediator made a number of orders, including the following:

1. Refusing further mediation (section 18(2)(c)).
2. Granting Spectra a right of entry for the purpose of an environmental assessment, an archeological assessment and construction and operation of a "pipeline" as sought in the application (section 19(1)).

.....

5.. Requiring Spectra to serve a copy of the mediation order prior entry.

6. Requiring Spectra to give reasonable notice before entering onto the Lands.

7. Finally, unless the parties agreed in writing within 30 days, ordering the application to proceed to arbitration."

The Mediation Order did not require any security deposit and partial payment to the landowner (Section 19(2)).

The application proceeded to arbitration and the Chair of the Board appointed me as the arbitrator to hear the application.

On September 13, 2007 the Board convened a telephone conference to deal with pre-hearing issues, including hearing dates, submissions from the parties setting out the issues in the arbitration, and timelines for exchange of submissions, reliance documents, and witness lists.

Counsel for the Vauses indicated that the issues raised earlier in the course of the mediation would also be part of their case at the arbitration. I understand that Spectra is prepared to fully address, and provide evidence on, those issues in the course of the arbitration.

III. SUBMISSIONS AND ARGUMENTS

At the September 13 pre-hearing conference, counsel for the Vauses brought up two matters, costs up to and including the mediation, and the effect of the mediator's order. The Board convened a second pre-hearing conference on September 19 to address those issues.

In his reasons for the Mediation Order, the Mediator stated that "both parties agreed this issue would be adjourned" and that an "application for costs may be brought under Rule 25..." Counsel for the Vauses was of the view that the Mediator had agreed to decide on costs up to and including the mediation. From their perspective, the Mediator was better suited to deal with those costs. Spectra did not agree. Its position was that the costs were more appropriately addressed as part of the arbitration. Following brief correspondence between the parties and the Board, the Chair assigned the matter of costs to me to be addressed in the arbitration.

The second issue was the effect of the Mediator's Order.

Spectra was concerned about the delay in accessing to the Lands, both in terms of the delay in getting to arbitration and the continuing refusal of the Vauses to provide access in accordance with the order so the project could continue. Its position was that the Mediator's Order provided an effective Right of Entry Order. The order was made by a quasi-judicial body and must be respected. Counsel for Spectra pointed to an earlier Board decision, ***Terra Energy Corp. v. Meeks***, Board Order No. 409AR, May 16, 2007, for the proposition that the Mediator's Order is effective and capable of enforcement as of the date it is issued. In his view the factual circumstances in that case were similar to those at hand.

The Vauses took issue with the earlier Board decision which, in their view, was wrongly decided. They also, if I understood them correctly, suggested that the scheme of the legislation was inconsistent with mediators' orders being enforceable. In their view, there is a distinction between mediators and the Board. The mediators' orders are not orders of the Board. They denied being in breach of the Mediator's Order. Mr. Vause stated Spectra could enter as soon as it pays costs. They argued that it is not for the arbitrator or the Board to interpret or determine the effects of the Mediator's Order. They did not point to any specific provisions in the Act in support of their positions.

III. ISSUE

The issue before me is whether the Mediation Order is an effective and enforceable Right of Entry Order with respect to the Lands.

IV. RELEVANT STATUTORY PROVISIONS

The relevant provisions of the ***Act*** are the following:

9 (1) A person may not enter, occupy or use land, other than Crown land, to explore for, develop or produce petroleum or natural gas or explore for, develop or use a storage reservoir unless
(a) the person makes, with each owner of the land, a surface lease in the form and content prescribed authorizing the entry, occupation or use,

(b) the board authorizes the entry, occupation or use, or
(c) as a result of a hearing under section 20, the board makes an order specifying terms of entry, occupation and use, including payment of rent and compensation.

18 (1) The chair, or a member the chair designates, must summarily hear representation by or on behalf of the applicant and persons likely to be directly affected, and must act as mediator for the purpose of resolving the complaint specified in the application.

(2) If, after the first mediation hearing, the application is not withdrawn and the complaint or issue specified in the application is not resolved, the mediator may
(a) dismiss the application,
(b) set one or more mediation hearings, or
(c) if the mediator believes that the complaint or issue cannot be summarily resolved by mediation, make an order refusing further mediation hearings.

(3) If an application is made under section 16 (1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

(4) If an applicant alleges in an application made under section 16 (1) that money is due to the applicant, the mediator may, as a result of a mediation hearing, order that the amount the mediator determines be paid to the applicant by the person or persons, and in the proportions the mediator may specify.

(5) An order of the mediator under subsection (4) is not final unless every person directly affected by the order approves of it or the board confirms the order.

19 (1) A mediator may make an order permitting, subject to the terms the mediator may specify in the order, an applicant under section 16 to enter, occupy or use the land for a purpose stated in that section.

(2) Before making an order, a mediator must
(a) require the applicant to deposit with the board security in the amount, form and manner that the mediator considers necessary for the purpose of ensuring that the owners of the land will be paid any amount ordered subsequently to be paid to them,
(b) require the applicant to pay to the owners, as partial payment of the amount subsequently ordered by the board to be paid to them, an amount of money not less than 1/ 2 the amount of security required to be deposited, and
(c) require the applicant to serve a copy of the order on each owner of the land, and direct the manner of service.

(3) Despite subsection (2), the board, on application at any time, may require the applicant to pay to the owners under subsection (2) (b) additional amounts the board considers proper.

(4) In determining an amount of money to be paid, the board is not bound by an order of the mediator under section 18 (4) or by a requirement of the mediator under subsection (2)

20 (1) Unless the application is withdrawn or the applicant and the person who will likely be directly affected by an order approve the order of the mediator, the board must hear representation by or on behalf of the applicant and persons likely to be directly affected by an order, and must arbitrate for the purpose of resolving the complaint specified in the application.

(2) Unless the applicant and the other persons otherwise agree, the board must review an order of the mediator made under section 19, and may confirm or vary the order, subject to the terms it considers proper.

(3) Unless the applicant and the other persons otherwise agree, the board,

(a) if a mediator has made an order under section 18 (4), must review the order, confirm it or vary it in the manner and subject to the terms the board considers proper,
(b) if a mediator has not made an order under section 18 (4), must determine the amount of money to be paid to a person, as rent for occupation or use, or for damage caused, up to the date stated in a certificate of restoration, for the entry, occupation or use, and
(c) may determine the disposition of the amount remaining of the deposit required under section 19 (2) as between the applicant and the owner.

25 (1) If an order is made by the board, the board must provide notice of the order to the applicant and to any other persons directly affected by that order.
(2) If the board makes an order on an application under section 16 (1) (a), the applicant must not enter, occupy or use the land until the owner of the land has received a certified copy of the order.
(3) If the board makes an order authorizing or terminating entry, occupancy or use of land, the applicant for the order must file a certified copy of the order with the registrar of the appropriate land title district, who, on payment of the appropriate fees, must endorse his or her records accordingly.
(4) An order made by the board is effective on the date it is issued by the board unless the order specifies otherwise.
(5) If the board is of the opinion that because there are so many parties to an application or for any other reason it is impracticable to give notice of its final order to all or any of the parties individually, the board may give notice of its final order by public advertisement or otherwise as the board directs.
(6) If the board gives notice under subsection (5) of a final order, the notice must inform the parties where copies of the final order may be obtained.
(7) The board must provide for public access to its orders.
26 (1) An order of the mediator or board granting the right to enter, occupy or use land may be enforced in the same manner as a writ of possession issued by a court.
(2) The board may, on its own motion or on application,
(a) rehear an application before making a determination, and
(b) review, rescind, amend or vary a direction or order made by it, the chair or a board member.

V. ANALYSIS AND DECISION

The purposes of Part Three of the *Act* are twofold. The first is to provide entry, occupation and use of private lands for purposes connected with exploration, development and production or storage of oil and natural gas, allowing subsurface rights holders, for example, oil and gas companies, access to those rights, including, for example, oil and gas rights leased from the Crown. The Crown is the dominant tenant, holding the relevant subsurface rights unless granted by the Crown in the original grant. Subsurface rights holders may obtain access to private land through agreement (9(1)(a)), Board authorization (9(1)(b)) or Board order (9(1)(c)) for the purposes of exploration, development and production of oil and natural gas.

The second purpose is to facilitate that access by setting terms and providing compensation to the surface rights holders (see Sections 9 and 21, ***Terra Energy v.***

Rhyason Ranch Ltd. MAB Order No. 1565, March 5, 2007). Finally, the Board has the power to award compensation for "damages to the land or suffering to the owner" caused by the entry. Occupation and use (Section 16(1)(b)). In my view, the framework of Part Three not only allows, but requires, the Board to balance the interests of subsurface rights holders and surface rights holders.

If an oil and gas company makes an application to the Board under Section 16(1), as in the case at hand, the first stage in the Board's process is mediation. The process contemplated under Section 18 is a summary process. It is generally a confidential process where the mediator seeks to facilitate agreement between the parties on some or all of the issues between them. At the end of conclusion of the mediation, the mediator has the discretion to issue certain orders, including making a Right of Entry order. An order under section 18(4) is not final unless agreed to or confirmed by the Board (section 19(4)). If the mediator "believes," as a result of the mediation, that right of entry should be granted of the he may make an order under section 19 (see ***Arc v. Piper*** MAB Order No. 402MA, 2006).

Under section 19, the mediator has fairly broad powers to make orders. If the mediator makes a right of entry order, he or she has the discretion to specify terms. However, the mediator makes an order under section 19(1) for right of entry, in my view, he or she must require the applicant to pay a security deposit, pay an amount to the landowner, and serve the order on the landowner. Section 19(4) provides specifically that the Board is not bound by a mediator's order under section 18(4).

If the parties fail to reach an agreement in mediation, the legislation provides for arbitration. In fact, unless the application is withdrawn or the parties approve of the mediator's order, the Board is required to arbitrate the dispute (Section 20(1)). Again, unless the parties agree, if the mediator has made an order under Section 19, the Board is required to review the mediator's order and "may confirm or vary the order, subject to terms it considers proper" (Section 20(2)), including the disposition of any amount remaining of the deposit required under Section 19(2) as between the oil and gas company and the land owner. In short, I do not accept the position advanced by the Vauses that I am without power, as they put it, to interpret or change the Mediator's Order. In fact, the legislation expressly provides that I "review" the Mediator's Order and have power to vary it.

Section 26(1) of the ***Act*** specifically states that a Right of Entry "order of the mediator ... may be enforced in the same manner as a writ of possession issued by a court." Moreover, Section 25(4) provides that "an order made by the board is effective on the date it is issued by the board unless the order specifies otherwise." It follows that I do not accept the distinction between a mediator and the Board.

I have considered the parties' submissions carefully, and I see no reason to depart from the Board's decision in the ***Terra v. Meeks*** case, ***above***:

> .... I am of the view that a mediation order is effective and capable of enforcement on the date it is issued. However, while section 18(4) expressly requires Board review and confirmation before being "final" (see also sections 19(4) and 20(3), I do not agree that a mediation order under section 19 is final. I rely upon the express wording of section 20(1) and (2). In other words, unless the parties agree the "board must review an order of the mediator made under section 19, and may confirm or vary the order, subject to the terms it considers proper."

In other words, a mediator's order is effective and enforceable the date it is issued. If the parties do not agree with a mediator's order, it is subject to review and, therefore, not final. If, on the other hand, they agree, it is a final effective and enforceable order.

In this case the Mediator made a Right of Entry Order under section 19(1). The terms of the Order are relatively clear, providing for entry for the purpose of an environmental assessment, an archeological assessment and construction and operation of a "pipeline" as sought in the application. There was no issue that these assessments were not related to the purposes of exploration, development and production of "petroleum or natural gas" (Section 9(1)). While the Order speaks "pipeline," the Mediator in this case considered the provisions of the ***Pipeline Act***, RSBC 1996, c. 364, and the ***Petroleum and Natural Gas Act*** and dismissed the Vauses' preliminary objections. He found that the "for the purposes of this application that the proposal relates to a flow line." Reading the Mediation Order fairly, therefore, there is in my view, no ambiguity on that point.

From the brief reasons for the Right of Entry Order, it appears that Spectra explained the basis for its proposal and discussed alternatives. It also appears that the Vauses' position was that there were better alternatives "such that their property would be

avoided altogether." Apparently, they "did not want to discuss the issues that would arise if there were to be a pipeline on their property, including routing options within their property ..." (Mediation Order, p. 5). Accordingly, there was no opportunity to consider terms of entry or why a Right of Entry Order should not be granted. There is nothing before me to suggest that the Mediator's decision to grant the Right of Entry Order did not arise out of the mediation.

There is no argument that the Mediator did not allow the parties full opportunity to make submissions, including with respect to right of entry. I am, therefore, concerned if the landowners are denying Spectra entry in accordance with the Mediation Order. While counsel for the Vauses denied that they were, Mr. Vause clearly stated that Spectra could enter once they paid for his costs, which I understand to be for his legal costs and his time up to and including the mediation. He also accused Spectra of reading the Mediation Order selectively. With respect, I do not read the Mediation Order to require payment of costs. Nowhere in the Mediation Order is there is a pre-condition that those costs are to be paid prior to entry. Quite the contrary, it states that "both parties agreed this issue would be adjourned" and that an "application for costs may be brought under Rule 25..." The Vauses' position was that the Mediator had agreed to decide on costs up to and including the mediation. There is no support for that view in the Order. The position is also, with respect, inconsistent with the position that Spectra somehow is – selectively reading – or misrepresenting the content of the Order.

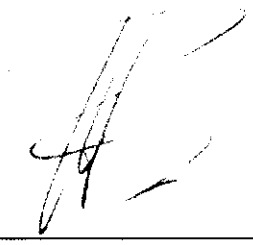
In the pre-hearing conference, the parties did not raise or address the requirements under Section 19(2) of the Act for the payment of a security deposit with the Board or part payment to the land owner in relation to the issue of effectiveness or enforcement of the Mediation Order. The explanation for that may be as the parties indicated to the Mediator, "that they were not concerned as to the issue of security" (Mediation Order, p. 5).

In my view, the Mediation Order is effective and enforceable. Enforcement, however, as suggested by the Vauses, is a matter for the courts, not the Board. As noted in Section 26(1), an order of a mediator or the board for right of entry, occupation and use may be enforced in the same manner as a "writ of possession" of the court. Rule 42(3) of the ***BC Supreme Court Rules*** provide that an order for the recovery or delivery of

the possession of land may be enforced by a writ of possession in Form 47. A writ of possession directs the sheriff to enter the lands and give possession to it to the person entitled to it under the order. It also allows the sheriff to seize and sell goods and chattels to realize the costs, fees and expenses of execution. The registrar of the Supreme Court may issue a writ of possession upon the filing of satisfactory proof of service of the order and that it has not been complied with (Rule 42(12)). In the case at hand, Spectra did not indicate that it was seeking enforcement though the courts at this time.

In short, the Mediation Order is effective and enforceable.

DATED: October 1, 2007, Vancouver, British Columbia



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