

File No. 1592
Board Order # 1592-1

December 18, 2008

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
Section 8, Township 88, Range 18, W6M, Peace River District
(The "Lands")

BETWEEN:

Roseland Creek Farms Ltd.

(APPLICANT)

AND:

Pengrowth Energy Trust

(RESPONDENT)

BOARD ORDER

Heard by written submissions: From the Applicant dated November 6 and December 1, 2008
From the Respondent dated November 19, 2008

Panel: Darrel Woods

INTRODUCTION

[1] This is an application by both parties for payment by the other party of their costs relating to mediation.

BACKGROUND

[2] Roseland Creek Farms Ltd. (Roseland) applied to the Board for mediation and arbitration pursuant to section 16(1)(b) of the *Petroleum and Natural Gas Act (PNG Act)* in July 2007 seeking damages from Respondent, Pengrowth Energy Trust (Pengrowth), related to an oil spill and the alleged construction of a landfarm facility in the absence of a land use agreement between the parties for the landfarm.

[3] Due to the absence of the landowner from the country, I conducted the mediation by telephone conference. During the pre-mediation telephone conferencing, both parties indicated they would seek costs from the other party.

[4] On October 31, 2008 I made an order refusing further mediation and retaining jurisdiction to deal with the issue of costs relating to the mediation.

THE RULES

[5] Rule 10(7) of the Rules of the Mediation and Arbitration Board provides that the mediator may make an order for a party to pay costs to another party or to the Board. Rule 16(3) requires that an application for costs be in writing, and include:

- (a) reasons to support the application;
- (b) a detailed description of the costs sought; and
- (c) copies of any invoices or receipts for disbursements

[6] Rule 16(4) provides that in making an order for the payment of a party's costs, the Board will consider

- (a) the reasons for incurring costs;

- (b) the contribution of counsel and experts retained;
- (c) the conduct of a party in the proceeding;
- (d) whether a party has unreasonably delayed or lengthened a proceeding;
- (e) the degree of success in the outcome of a proceeding;
- (f) the reasonableness of any costs incurred;
- (g) any other factor the Board considers relevant.

THE PARTIES' CLAIMS FOR COSTS

[7] Roseland's claim dated November 6, 2008, sets out a table with the date, description of activity and length of time spent on each activity. I understand this claim reflects time spent by Roseland's shareholders rather than that of third parties. The total claim is \$5,670 calculated as 94.5 hours at \$60.00 an hour.

[8] Pengrowth's claim under cover of letter dated November 19, 2008, is for \$6,316 being the amount charged by a third party consultant, W6M Land Ltd. (W6M). Pengrowth provides 4 accounts from W6M setting out the services incurred for a land consultant and land administrator whose time is charged at \$85 and \$75 an hour respectively. The accounts include nominal disbursements of less than \$30 and GST. Pengrowth indicates it is not submitting a claim at this time for the participation of in house legal counsel and various employees in the matter although Pengrowth estimates these in house costs at approximately \$6900 at \$60 an hour.

[9] In response to Roseland's claim Pengrowth submits:

- (a) Roseland initiated the action without even minimal research conducted to substantiate the claim;
- (b) Pengrowth has had to provide the documentation and evidence to educate the Board and Roseland on the accepted practice of soil remediation;
- (c) costs in this matter are different from when an entry is required; and
- (d) Roseland did not meet the requirements of Rule 16(3) in that it did not provide:
 - (i) reasons to support the application,
 - (ii) detailed description of costs sought and
 - (iii) copies of invoices or receipts for disbursements.

[10] Pengrowth asks that Roseland's claim for costs be dismissed.

[11] In response to Pengrowth's claim, Roseland submits that, like Pengrowth, it has incurred other costs not claimed in this application. Roseland questions Pengrowth's need to employ third party agents when Pengrowth has its own staff who could deal with this case.

ANALYSIS AND DECISION

[12] I will first address the factors listed in section 16(3) of the Rules.

[13] Pengrowth submits it was necessary to engage the services of W6M to compile lease history and analyze the current regulations and landowner documents, and to participate in conference calls to establish the claim put forward by Roseland was unnecessary and unjustified. I find this explanation together with the details in the invoices submitted, provides sufficient reasons in support of Pengrowth's application.

[14] Roseland has prefaced its list of costs with an application form stating "Please see 'Statement of Claim' and issues discussed in previous mediation hearings." I find, for the purposes of this mediation, this reference to the claims that Roseland has made in conjunction with the details of time spent provide sufficient reasons in support of Roseland's application.

[15] Each party has provided a description of the items for which it is seeking costs.

[16] Pengrowth submits invoices for the costs it has incurred for third party services. There is no need for Roseland to do the same as Roseland has not claimed for third party services, only for those of its own shareholders, nor has it claimed disbursements.

[17] With respect to the details, Roseland's application sets out the date of an event for which a charge is made, a description of the activity and the amount of time associated with that activity. It has at least as much as detail as that provided by Pengrowth. In my opinion the descriptions of both parties are sufficient for this application.

[18] Rule 16(4) sets out the factors I must consider in determining whether either party should be required to pay all or part of the costs incurred by the other.

Reasons for incurring Costs

[19] In its letters of November 19, 2008, Pengrowth argues that it has had to incur costs to establish that the claim of Roseland was "unnecessary and unjustified" and that "...throughout the Mediation process it has been Pengrowth Corp. providing all the documentation and evidence..."

[20] Each party has had to educate themselves, the Board and each other about the circumstances resulting in and arising out of Roseland's claim. They have needed to respond to and be prepared to participate in the related Board processes including pre-hearing conferences and mediation sessions. While it may have been possible for Pengrowth to have used 'in house' expertise for its services, presumably there would have been costs associated with using these resources.

Contribution of counsel and experts

[21] Neither party presented costs for the use of counsel. Pengrowth claimed to use the services of W6M staff owing to their knowledge of some of the subject matter, but the staff did not present evidence as independent experts.

Conduct of a party

[22] There was no element in the conduct of either party that would have a bearing on costs.

Unreasonable delay or lengthening of proceeding

[23] In my opinion, neither party has unreasonably delayed or lengthened the mediation process.

[24] There were some delays due to rescheduling when Roseland's representative had technical difficulties in communicating but these were events beyond Roseland's control.

[25] By fax dated January 6, 2008 Roseland, for specified reasons asked that the mediation process be placed on hold. This was in part to have soil and water samples taken after spring break up to provide more information about the state of the contamination from the spill. By letter dated January 8, 2008 Pengrowth stated that it wanted to proceed with the mediation. My minutes of the telephone conference held January 24, 2008 indicate that the parties agreed that they would attempt to resolve outstanding issues between them by email communications.

[26] By letter dated June 26, 2008, Pengrowth, in response to an inquiry from the Board as to the status of the matter, indicated that it wished to proceed. There appears to have been a delay of approximately two weeks in the Board being able to communicate with Roseland for purposes of setting up a pre hearing conference, but no evidence of substantive delay.

[27] The application took some time to get to mediation as the Board raised some jurisdictional issues.

Degree of success

[28] This application did not resolve at mediation; in a sense, neither party has been successful. At the pre-hearing conference of September 11, 2008 Roseland advised that it would not be providing evidence relating to the issues of damages to land outside the leased area or groundwater contamination. I determined the Board did not have jurisdiction to deal with an issue with respect to whether there had been a change of use under the lease.

Reasonableness of costs

[29] I note that in terms of the time charges presented to the Board, Roseland listed 94.5 hours and Pengrowth listed 69.3 hours. The total costs sought by each party are quite similar.

Other relevant factors

[30] There are no other factors that in my opinion would favour the claim for costs of one party over the other.

Conclusion

[31] In the circumstances, I find that each party should bear their own costs of the mediation.

ORDER

[32] Each party shall bear its own costs of the mediation process.

Dated: December 18, 2008

FOR THE BOARD



Darrel Woods
Board Member