File Nos. 1694, 1792, 1801
Board Order No. 1694-4

May 8, 2015

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE NORTH EAST ¼ OF SECTION 10 TOWNSHIP 78 RANGE 16 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

SPECTRA ENERGY MIDSTREAM CORPORATION
(Applicant File 1694)

JAMES NELSON LONDON AND KEIR MARIE LONDON
(Applicants Files 1792 and 1801)

AND:

JAMES NELSON LONDON AND KEIR MARIE LONDON
(Respondents File 1694)

SPECTRA ENERGY MIDSTREAM CORPORATION
(Respondent Files 1792 and 1801)

BOARD ORDER

Heard by written submissions closing April 7, 2015

Rick Williams, Barrister and Solicitor, for Spectra Energy Midstream Corporation
Darryl Carter, Q.C., Barrister and Solicitor, for Jay and Keir London

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INTRODUCTION AND ISSUE

[1] This is an application by the landowners, Jay and Keir London, for their costs in relation to these applications. The Londons claim costs in the amount of $47,365.35. The bulk of this claim is with respect to an account for legal fees and disbursements. They seek to recover the whole of this account, as well as an amount on account of Mr. London's attendance at the arbitration.

[2] The *Petroleum and Natural Gas Act* gives the Board authority to order a party to an application to pay all or part of the actual costs of another party. The issue is whether the Board should require Spectra to pay all or part of the costs claimed by the Londons in the circumstances of this case.

BACKGROUND

[3] The Londons own the Lands described as the NE ¼ Section 10, Township 78, Range 16, W6M, Peace River District. In February 2009, the Londons entered a statutory right of way agreement with Encana Corporation (Encana) granting Encana a right of way over the Lands for the purpose of constructing, operating and maintaining a pipeline or pipelines (the ROW Agreement). In April 2010, Encana assigned the ROW Agreement to Spectra Energy Midstream Corporation (Spectra).

[4] Spectra received a permit from the Oil and Gas Commission (OGC) to construct and operate a pipeline known as the Bissette Pipeline, in part within the right of way covered by the ROW Agreement. Spectra determined it would require additional temporary workspace than that already granted in the ROW Agreement in order to construct the

pipeline. In November 2010, Spectra made a written offer to the Londons respecting compensation for the additional temporary workspace, which the Londons did not accept, and Spectra applied to the Board for a right of entry order (File 1694).

[5] On November 29, 2010 the Board provided the Londons with Notice of a mediation teleconference scheduled for December 13, 2010. The Londons did not attend the scheduled telephone mediation and the Board adjourned the mediation to December 23, 2010 and provided the Londons with Notice of the new date. On December 23, 2010 the Board granted Spectra the right to enter and use a .94 acre portion of the Lands as temporary workspace for the construction of a flow line pursuant to section 159 of the *Petroleum and Natural Gas Act* and made an order for the payment of partial compensation and a security deposit (Order 1694-1). In January, 2011 the Board amended the right of entry order granting Spectra access to an additional 3.61 acres for temporary workspace and increased the partial payment, bringing the total area authorized by the Board as temporary workspace to 4.55 acres, 3.61 acres of which was within an existing lease on the Lands (Order 1694-2).

[6] The Board moved slowly to resolve compensation for the various landowners along the Bissette Pipeline route as Spectra and the landowners worked to resolve compensation without the assistance of the Board. In March 2012, the Board initiated process to actively mediate compensation for the landowners along the Bissette Pipeline route where resolution had not been reached, including these landowners. In June 2012, Spectra offered to pay the Londons $4,445.25 as compensation for the temporary workspace. The Londons did not accept this offer. Following consultation with the Londons with respect to a date for mediation, on June 29, 2012, the Board scheduled a mediation telephone conference for October 3, 2012.

[7] In July 2012, the Londons retained counsel. The Board convened the scheduled telephone mediation on October 3, 2012. The Londons did not attend; counsel attended but did not have instructions to discuss compensation in the Londons'

absence. The Board indicated it would schedule an in-person mediation to discuss compensation if the Londons wished to proceed.

[8] On October 18, 2012, the Londons' filed an application pursuant to section 163 of the *Petroleum and Natural Gas Act* for damages allegedly arising from Spectra's activities on the Lands (File 1792). At the same time, the Londons filed an application pursuant to section 164 of the *Petroleum and Natural Gas Act* against Encana alleging non-compliance with the ROW Agreement (file 1791). By decision rendered January 8, 2013, the Board determined that Encana was not the proper party to an application under section 164 alleging non-compliance with the ROW Agreement and dismissed the application against Encana (Order 1791-1). On January 9, 2013 the Londons filed an application pursuant to section 164 of the *Petroleum and Natural Gas Act* against Spectra alleging non-compliance with the ROW Agreement (file 1801). In the section 163 and 164 applications, the Londons alleged for the first time that the Bissette Pipeline was not a "flow-line" within the meaning of the *Petroleum and Natural Gas Act* and that the Board did not have jurisdiction to grant Spectra right of entry to the Lands.

[9] Spectra sought to have the applications brought against it pursuant to sections 163 and 164 of the *Petroleum and Natural Gas Act* summarily dismissed on the grounds that the Board did not have jurisdiction to hear the applications or grant the remedies sought, or that the Londons were otherwise barred from advancing the claims. By decisions rendered May 14, and June 26, 2014, the Board found it had jurisdiction to hear the applications and declined to summarily dismiss them (Orders 1792/1801-1 and 1792/1801-1Cor). The Board found that the Londons could not challenge that the Bissette Pipeline is a flow line if they wished to pursue a claim pursuant to section 163 of the *Petroleum and Natural Gas Ac*t for damages. As the Londons had not challenged that the Bissette Pipeline was not a flow line when Spectra applied for the right of entry order, and as they did not seek judicial review of the Board's right of entry orders, the Board said it was "not about to go back and consider at this time whether it had jurisdiction in the first place to grant the Right of Entry Orders". The Board found that it had jurisdiction to hear the application under section 163 on the basis that the ROW

Agreement was for a right of entry to construct and operate a flow line, Spectra purportedly exercised that right of entry in constructing the Bissette Pipeline, and Spectra's exercise of that right of entry allegedly caused damage. The Board questioned its jurisdiction under section 163 to provide a remedy unless the Bissette Pipeline is a flow line.

[10] The parties agreed the issue of compensation for the temporary workspace (File 1694) and the Londons' section 163 and 164 applications should all be dealt with at the same time. On May 28, 2014 the Board refused further mediation in all three applications and referred them for arbitration. On August 6, 2014, the Board scheduled all three applications for a two day arbitration hearing on November 27 and 28, 2014 in Dawson Creek and set dates for the production of summary position statements, lists of witnesses, and documents to be relied on at the arbitration.

[11] On October 17, 2014 Spectra offered the Londons $7,500 in full and final settlement of compensation and damages with respect to all three applications. The letter stated:

> Spectra expressly reserves the right to bring this offer, and any prior offers, to the attention of the SRB as part of any costs proceeding. Specifically, in the event that the Londons refuse this offer and are awarded the same or less than the amount of compensation and damages offered following the arbitration, Spectra will take the position that no costs should be awarded to the Londons and will consider whether to seek recovery of its costs.

[12] The Londons did not accept the offer.

[13] In advance of the arbitration, the parties each produced a summary of their claims. Spectra took the position that the Londons should receive $2,750 as compensation for its use of the temporary workspace; the Londons claimed $25,000 in compensation. With respect to the section 163 and 164 applications, the Londons claimed $100,000 in damages and sought an order amending the ROW Agreement to make it clear that construction of the Bissette Pipeline was not authorized by that agreement.

[14] The arbitration proceeded on November 27 and 28, 2014 as scheduled. In closing argument the Londons submitted the Bissette Pipeline was not a "flow line" and that the Board did not have jurisdiction. They withdrew their claim for $100,000 damages. Spectra objected to the Londons raising the jurisdictional issue. The Board determined it would hear the jurisdictional issue, sought further affidavit evidence and convened a teleconference on January 8, 2015 to hear argument.

[15] The Board issued its decision with respect to all three applications on February 24, 2015 (Order 1694-3). The Board determined the Bissette Pipeline was a flowline and that the Board, therefore, had jurisdiction. It dismissed the Londons' section 164 application, and determined that Spectra should pay the Londons $3,360 as compensation for its use of the temporary right of way.

[16] On February 26, 2015 the Londons applied for costs. They seek recovery of $47,365.35: $1,500 for Mr. London's attendance at the arbitration ($750/day x 2 days), $45,486 for legal fees, and $877.35 for disbursements incurred by counsel. In support of the application, counsel has submitted a copy of his account to the Londons dated December 10, 2014.

SUBMISSIONS

[17] The Londons argue that landowners in Surface Rights Board cases ought to be entitled to costs on a solicitor-client basis and that the landowner ought not to be out of pocket. They submit legal costs should not be dependent on whether or not the case advanced by counsel was favourably received. Spectra argues that an award of costs is not automatic and that there is no presumption in favour of the Londons receiving their costs in connection with the applications advanced by them. With reference to the Board's Rules, Spectra submits that, in the circumstances, the Board should not award the Londons any part of the costs claimed.

ANALYSIS

[18] The Board's authority to require a party to pay the costs of another party is found in section 170(1) of the *Petroleum and Natural Gas Act*. The section provides:

> 170(1) Subject to any regulations, the board may order a party to an application under this part or an intervener to pay any or all of the following:
>
> a) all or part of the actual costs incurred by another party or intervener in connection with the application;

[19] Section 168 provides a definition of "actual costs" that includes "actual legal fees and disbursements" and "an amount on account of the reasonable time spent by a party in preparing for and attending a board proceeding".

[20] The Londons argue that landowners in Surface Rights Board cases ought to be entitled to costs on a solicitor-client basis. The Board's legislative authority to make an award of costs, however, establishes no such entitlement. An award of costs is not automatic. The use of the word "may" in section 170 of the *Petroleum and Natural Gas Act* gives the Board the discretionary power to make an award of costs and the discretion to require a party to pay "all or part" of the costs of another party. Whether a party is to receive any or all or part or their costs is entirely at the Board's discretion. It is contrary to the clearly expressed legislative intent that the Board has the discretion to require a party to pay costs and the discretion to make an award for all or part of a party's costs to suggest that there is either an entitlement to costs or that any entitlement should be on a solicitor and client basis.

[21] The Londons refer to various authorities in support of their submission that landowners in Surface Rights Board cases ought to be entitled to costs on a solicitor and client basis. None of these authorities relate to the Surface Rights Board's authority under the *Petroleum and Natural Gas Act*. They refer either to applications

before the National Energy Board and the costs provisions provided for in the *National Energy Board Act*, or they refer to expropriation proceedings under the Alberta *Expropriation Act*. The legislative provisions with respect to the entitlement to costs and awarding costs payable by one party to another are different than the legislative provisions from which this Board receives the discretionary authority to make orders for costs.

[22] The Board has enacted Rules respecting costs. Rule 18(2) provides a presumption in favour of a landowner receiving costs incurred in relation to the mediation process for a right of entry application as follows:

> 18(2) …,unless otherwise ordered by the Board, in an application under section 158 of the Act, the person who requires a right of entry shall pay the landowner's costs in relation to mediation of the application.

[23] The presumption in favour of the landowner does not extend to the arbitration of an application under section 158, nor does it extend to applications other than those for right of entry and to determine the appropriate compensation payable to the landowner arising from the right of entry.

[24] The *Petroleum and Natural Gas Act* sets up a two stage process for the resolution of applications. The parties are required to participate in mediation and it is only when the mediator believes that an application cannot be resolved by mediation that an application is referred to arbitration. The Board's rule establishing a presumption in favour of landowners receiving their costs for the mediation process in a right of entry application acknowledges the compulsory nature of a right of entry. But, by limiting the presumption in favour of a landowner receiving their costs to the costs incurred in the mediation process, it is intended to encourage resolution of disputes at the mediation stage and discourage unnecessary process where compensation ought reasonably to be resolved at the mediation stage.

[25] A person requiring a right of entry should expect to pay a landowner's costs in relation to the mediation process for a right of entry application and with respect to the compensation payable as a result of the right of entry, and landowners may expect to recover their costs of the mediation process to determine the compensation payable. In that way, where reasonable offers are made and accepted, landowners will not be out of pocket and right holders will not be required to pay costs beyond those associated with the mediation process. But if the parties cannot resolve compensation through mediation, and the Board is required to arbitrate the compensation payable, the same expectations do not apply. A landowner who does not accept a reasonable proposal forcing a right holder into an expensive arbitration process, may not be able to recover their costs of the arbitration process. But a right holder who does not offer reasonable compensation thereby forcing a landowner into an expensive arbitration process, may well be required to pay a landowner's costs which could include full legal fees and disbursements, expert fees and disbursements and an amount on account of the landowner's time and reasonable expenses. It is, therefore, in both parties' interest to take full advantage of the mediation process to try to resolve a dispute without the extra costs associated with arbitration. In an application for costs associated with the arbitration process, the Board will consider the factors set out in its Rules.

[26] Rules 18(3) provides that an application for costs must be in writing and must include reasons to support the application, a detailed description of the costs sought, and copies of invoices or receipts for disbursements. If disputes are not resolved at the arbitration stage then the Board will exercise its discretion in making an order for the payment of a party's costs. Rule 18(4) sets out the factors the Board will consider as follows:

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; the reasonableness of any costs incurred;
f) any other factor the Board considers relevant.

[27] The Londons' application is in writing but does not provide reasons supporting the application. The application does not include adequate detail for the costs sought in that it does not indicate the time spent by counsel for each entry to assess the reasonableness of the claim. It does not include copies of receipts for disbursements.

[28] As to the reasons for incurring costs, the application and associated invoice does not provide sufficient information to enable to the Board to assess which work was in relation to these applications, as opposed to the application against Encana, or to distinguish work associated with Spectra's application and the determination of compensation as opposed to the Londons' sections 163 and 164 applications. Although the invoice does not clearly distinguish work that may have been associated with the mediation process or efforts at resolution, the dates of entries suggest the bulk of the work is in relation to the arbitration process for all three applications.

[29] As to the Londons' conduct, acting through counsel, they claimed $25,000 in compensation and $100,000 for damages, but provided no evidence at the arbitration to support loss or damage, and withdrew the damage claim in final argument. As well, in final argument, the Londons advanced without warning the issue of the Board's jurisdiction. They declined to take advantage of the mediation process despite the Board's efforts to convene a mediation.

[30] The Londons were unsuccessful on every issue. On the issue of compensation, the Board ordered more than that advocated by Spectra at the hearing, but far less than that claimed by the Londons. Spectra provided an offer in excess of that awarded by the Board as early as June 2012 prior to the current claim for costs having been incurred. The Londons declined this offer. Spectra made another offer in advance of the arbitration with clear advice as to the position it would take on costs if the Board awarded less. The Londons declined to accept the offer, forcing the issue to arbitration. Ultimately, the Board ordered compensation in an amount less than half of that offered by Spectra.

[31] Considering all of the circumstances of this case, we decline to exercise our discretion to require Spectra to pay any of the Londons' claim for costs. Having made reasonable offers on compensation in an effort at avoiding the arbitration process that exceeded the Board's award, with clear advice as to the position it would take on costs if the Board awarded less, it would be unfair to ask Spectra to pay the costs to arbitrate a matter that could have and should have been settled. It would be unfair to have Spectra pay the costs to advance and arbitrate a claim for damages for which no evidence was ultimately tendered, and which was withdrawn at the last minute. It would be unfair to ask Spectra to pay the costs to advance and arbitrate a claim to amend the ROW Agreement, which the Board found to be without merit. These are not applications in which a landowner is compulsorily required to participate, and for which in the absence of a meritorious claim, inappropriate conduct worthy of sanction on the part of the other party, or other extenuating circumstances, there should be any expectation of automatic cost recovery.

[32] The Board acknowledges that a right of entry is a compulsory process, and acknowledges that in responding to an application for a right of entry and in determining the compensation payable as a result of a right of entry, a landowner ought to be made whole. But that principle does not mean that a landowner, or their counsel, may use the dispute resolution processes provided in the *Petroleum and Natural Gas Act* to recover costs that are not reasonably and necessarily incurred, or to benefit from requiring process that is neither reasonable nor necessary to ensuring a landowner is made whole. The legislation provides the means for parties to resolve issues of compensation expeditiously and fairly in accordance with applicable law. The discretion given to the Board to require a party to pay the costs of another party may be applied to ensure that disputes are resolved expeditiously and fairly without more process than reasonably necessary to ensure an appropriate outcome.

ORDER

[33] The application for costs is dismissed.

DATED: April 8, 2015

FOR THE BOARD

Cheryl Vickers, Chair

Howard Kushner, Member