File No. 1589
Board Order # 1589-3

October 16, 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 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

(APPLICANT)

AND:

Kenneth James Vause and
Loretta Vause

(RESPONDENTS)

BOARD ORDER

Heard by way of written submissions closing September 12, 2008

Rick Williams, Barrister and Solicitor, for Spectra Energy Midstream Corporation
Kenneth James Vause and Loretta Vause, on their own behalf

[1] This is a reconsideration pursuant to section 26 of the *Petroleum and Natural Gas Act* of the Board's decision in Order 1589-2 with respect to costs of the arbitration process. In that decision, the arbitrator declined to exercise his discretion to make an order for the payment of costs to the Respondents, Kenneth and Loretta Vause (the Vauses) in connection with the Board's arbitration process. (The nature of the original application to the Board by Spectra Midstream Energy Corporation (Spectra), the evidence presented to the arbitrator, and the arbitrator's decision with respect to compensation payable by Spectra to the Vauses for right of entry to lands owned by the Vauses to construct a flowline may be found in Order 420-A.)

[2] In determining whether to make an award of costs in relation to the arbitration proceedings, the arbitrator considered a number of factors including 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 the parties had taken a "realistic approach" in dealing with the issues before the Board. The arbitrator reviewed the party's positions on the issues and considered their relative success with respect to those issues. He reviewed counsel's account and determined that 25 hours was identifiable as directly attributable to the Board's arbitration process and that 25 hours was not an unreasonable amount of time, in all of the circumstances, to be claimed for a two day arbitration. Having considered these various factors, the arbitrator found that, but for other factors subsequently considered, he would have awarded the Vauses $5,000 for their costs of the arbitration.

[3] The arbitrator then considered the Vauses' conduct in relation to the Board's orders and process, including what he characterized as "their ongoing refusal to comply with the Board's orders" and in particular, their refusal to allow Spectra onto the land to commence construction necessitating an application by Spectra in the Supreme Court of British Columbia to enforce the Board's order for entry. The arbitrator declined to exercise his discretion to award any costs for the portion of the Board's process after the mediation "as a result of the Vauses conduct in refusing to comply with the Board's order".

[4] In deciding to review the arbitrator's order for costs in connection with the arbitration, I found that in considering the Vause's conduct subsequent to the arbitration proceedings, the arbitrator had considered an irrelevant factor. The parties' conduct after the arbitration proceedings was not associated with the application to the Board and, therefore, not a relevant consideration in the award of costs relating to the Board's application.

[5] The role of the Board on reconsideration is limited. The purpose of the reconsideration and the Board's role in it will depend, to a certain extent, on the reason for agreeing to exercise the discretion to reconsider a decision in the first place. In the circumstances of this case, I agreed to reconsider on the grounds that the arbitrator had made a clear error of law by considering an irrelevant factor. The purpose of the review, therefore, is to correct the error of law. The purpose of the review is not to substitute my discretion for that of the arbitrator, where the arbitrator's discretion was exercised appropriately on consideration of relevant factors.

[6] The Board's authority to award costs is found in section 47 of the *Administrative Tribunals Act* which provides that the Board may require a party to pay part of the costs of another party in connection with the application. The only direction that is clear from this authority is that the power to award costs is discretionary and that it is limited to "part of the costs of another party" (emphasis added). Payment of total costs, as requested by the Vauses, therefore, is not an option.

[7] Since the Board's decision in Order 1589-2, the Board has made Rules respecting costs which may provide more guidance and direction going forward. These Rules, however, were not in effect at the time the arbitrator made his award in this case and, consequently, could not play into the exercise of his discretion as they will in future applications.

[8] An award of costs is discretionary. But for his consideration of the Vause's conduct following the arbitration, the arbitrator would have awarded $5,000 as payment toward the Vause's costs of the arbitration. The arbitrator considered a number of factors, none of which were irrelevant in my view, in concluding that $5,000 represented an appropriate award in the circumstances of this case.

[9] Spectra argues that other factors went into the arbitrator's decision not to award any costs for the arbitration besides his consideration of the Vause's conduct after the arbitration. In particular, counsel refers to the comments of the arbitrator at page 11 with respect to his concern with "the Vause's ongoing refusal to comply with the Board's Orders" including the initial right of entry order issued by the mediator. While this may be so, I have some sympathy for the fact that, in light of the recent Memorandum of Understanding between the Board and the Oil and Gas Commission (OGC), the Board would likely not have made the entry order it did before the parties had engaged in the OGC's dispute resolution process in an effort a addressing the Vause's concerns with respect to the placement of the flowline. As matters turned out, the Vause's concerns about the placement of the flowline did ultimately get addressed (although after the original entry order was made) with the result that routing of the flowline changed.

[10] The arbitrator's conclusion of $5,000 is significantly lower than the total amount of costs incurred by the Vauses. While some of their original claim clearly related to proceedings before the OGC rather than the Board and would not have been compensable as Board costs in any event, the arbitrator's identification of 25 hours as clearly identifiable Board costs is not only likely on the low side, but is only reimbursed at half of the hourly rate billed by counsel. The award of $5,000 is, therefore, a partial award that already serves to take into consideration various other factors considered by the arbitrator in the exercise of his discretion, and accounts for factors mitigating against an award that would make a more significant contribution towards total costs incurred.

[11] While I might have exercised my discretion differently, I cannot say that the arbitrator's conclusion, but for his consideration of the Vause's post arbitration conduct, was inappropriate. Considering the nature of the costs incurred, the reasons for incurring them, the contributions of counsel or advisors, fairness in the Board's process, whether the parties had taken a "realistic approach" in dealing with the issues before the Board and the parties relative success with respect to those issues, I find that the arbitrator's conclusion that he would have awarded $5,000 is an appropriate award of partial costs in the circumstances. I award costs of the arbitration to the Vauses of $5,000.

ORDER

[12] Pursuant to section 47 of the *Administrative Tribunals Act*, the Board orders Spectra Energy Midstream Corporation to pay Kenneth James Vause and Loretta Vause $5,000 in costs of the arbitration.

For the Board

Cheryl Vickers
Chair