Date: 20080104

Docket: T-1826-06

Citation: 2008 FC 12

Halifax, Nova Scotia, January 4, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALLIANCE PIPELINE LTD.

Appellant

and

VERNON JOSEPH SMITH

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an appeal by Alliance Pipeline Ltd. (the appellant), pursuant to section 101 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 (NEBA) from a decision and award of the Pipeline Arbitration Committee (the PAC) dated September 18, 2006.

[2] The appellant in its Memorandum of Fact and Law requests that the Court:

1. Set aside the portions of the award related to the cost claims in their entirety; and

2. Grant costs of the present appeal to the appellant.

[3] The respondent seeks an order dismissing the appeal, with costs of the appeal to the respondent.

Background

[4] In 1999, the appellant constructed a pipeline route across a portion of the respondent's farmland. Despite a series of agreements between the parties with respect to the project, a dispute arose regarding the reclamation of a portion of the land used for the pipeline. The appellant disputed the respondent's contention that it was necessary to apply manure to the entire right-of-way.

[5] Despite the disagreement, the respondent began the reclamation work and applied manure to the right-of-way in June and July 2000. The respondent submitted an invoice to the appellant for $9,829. The appellant rejected the invoice and made a counter-offer of $2,500. The respondent rejected the counter-offer and sent the appellant a second invoice on December 15, 2000 for $16,819. The respondent also demanded that the appellant make additional payments in order to access the right-of-way.

[6] On August 8, 2001, the respondent issued a notice of arbitration pursuant to subsection 90(2) of NEBA, requesting compensation for the reclamation work performed in June and July 2000. On September 24, 2001, the appellant served its reply to the notice of arbitration, and argued

that the damages claimed by the respondent were covered by the release agreements entered into by the parties.

[7] A hearing was held before a Pipeline Arbitration Committee (the previous PAC) on May 6, 2003, and the decision was held in reserve. The PAC lost quorum when Mr. Justice John Gill was appointed to the Alberta Court of Queen's Bench, and no decision was ever rendered with respect to the first hearing. Meanwhile, on July 10, 2003, the appellant filed a statement of claim in the Alberta Court of Queen's Bench seeking among other things:

1. An injunction against the respondent from interfering with the appellant's rights to unhindered access onto the easement;

2. A declaration that the releases entered into between the parties included any and all claims that the respondent had against the appellant up to November 1, 1999; and

3. An order directing the previous PAC not to render a decision until such time as the matter of the releases could be determined.

[8] The application for an injunction was dismissed by Justice Nation, and party and party costs of the injunction application were paid by the appellant to the respondent. The appellant eventually discontinued the action in March 2005, and paid the respondent's party and party costs of the action. The respondent's counsel issued accounts totalling $20,788.54 with respect to the litigation. The party and party costs paid by the appellant totalled $4,565.97, and the amount of litigation costs at issue is $16,222.57.

[9] A second PAC was appointed in August 2005, and the respondent amended his notice of arbitration on November 14, 2005 and again on January 20, 2006. The amended notice of arbitration asserted the same claims that had been before the previous PAC, together with additional relief. The additional relief claimed included the costs of the previous hearing and costs of the action commenced by the appellant in July 2003.

[10] The appellant served its amended reply on December 22, 2005, and the second hearing of the PAC was held on March 22 to 24 and April 3 to 4, 2006. The decision of the PAC was issued on September 18, 2006. This is the judicial review of certain elements of the award portion of the PAC decision.

Reasons of the PAC

Jurisdiction

[11] At pages 3 and 4 of its decision, the PAC stated the following with respect to its jurisdiction to determine compensation matters:

> It is clear from these provisions that once a Notice of Arbitration is served on a Pipeline Arbitration Committee that Committee must determine all compensation matters referred to in it. See section 91:
> […]
> If a party feels that the Minister has referred a Notice of Arbitration that includes matters outside of the jurisdiction of a Pipeline Arbitration Committee, the objecting party should seek judicial review. See: *Balisky* v. *Canada*, infra, where a judicial review determined whether a matter was appropriate for determination by a PAC.

Costs of Action

[12] At pages 24 and 25 of its decision, the PAC stated the following in considering whether to award any costs with respect to the action commenced by the appellant in 2003:

> Before this Committee, Mr. Smith is seeking his solicitor-client costs regarding the injunction action and motion, net of recovered taxable costs.
>
> Mr. Smith's claim can be regarded as one for compensation for damages (the solicitor-client costs he incurred in his dealing with Alliance seeking compensation), or as a claim for costs.
>
> The Alliance Statement of Claim and interim injunction application arose out of Mr. Smith's denial of access across his non-PROW land. We conclude that he refused access without advance compensation because of his experience with Alliance in attempting to obtain compensation for the cost of the reclamation work he did. In that sense, and in any event, the legal actions are directly related to Mr. Smith's attempt to obtain compensation for Alliance's proposed activities directly related to the inspection, maintenance or repair of the pipeline.
>
> Mr. Smith's solicitor-client costs for the litigation are payable to him as compensation for damages suffered as a result of the operations of Alliance and it is proper and reasonable for this Committee to consider the expense and inconvenience to which Mr. Smith was put in the circumstances.
> […]
>
> Mr. Smith's out-of-pocket expense for legal fees is claimed in the Notice of Arbitration. A Pipeline Arbitration Committee is required to determine all compensation matters referred to in a Notice of Arbitration. In awarding Mr. Smith compensation for his net out-of-pocket legal fees, this Committee concludes that the expense made necessary by the operations of the company amounts to "damages' and is proper to consider in the circumstances. Indeed, S. 98(3) directs that we include provision in our award for the matters referred to in S. 96 [*sic*] (2)(b) to (f). We are therefore required to make provision for "compensation for all damages suffered as a result of the operations of the company." Clearly, the Alliance attempt to access the ROW across Mr. Smith's other land, and the resulting

> litigation, were the operations of the company. Mr. Smith's out-of-pocket expenses were part of the result.
>
> Mr. Smith is awarded $16,222.57 for his net legal fees, disbursements and GST.
>
> Alternatively, this Committee finds that Alliance must pay Mr. Smith's solicitor-client costs (net of taxable cost recoveries) for the litigation including the change of venue and the interim injunction applications. We find that the costs were reasonably incurred in asserting Mr. Smith's claim for compensation. They are therefore recoverable pursuant to s.99 which provides that "the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation."
>
> Alliance argued that the matter of costs was res judicata, having been dealt with in the litigation itself. However, Nation J. did not deal with the provisions for costs set out in the Act. Subsections (1) and (2) of section 99 of the Act gives this Committee direction and discretion regarding costs. Our award exceeds 85% of the amount of compensation offered by Alliance, with the result that the Alliance must pay legal, appraisal and other costs determined by the Committee to have been reasonably incurred by Mr. Smith in asserting his claim.
>
> Even if the compensation awarded to Mr. Smith did not exceed 85% of the Alliance offer, we would exercise our discretion and award the costs claimed.

Costs of Previous Proceeding

[13] At pages 27 and 28 of its decision, the PAC stated the following in considering whether to award any costs with respect to the previous proceeding:

> Alliance refers this Committee to the decision of the British Columbia Court of Appeal in *P.Z. Resort Systems Inc.* v. *Ian MacDonald Library Services Ltd.* (1987), 39 D.L.R. (4th) 626. [...] The Court had to decide the consequence of setting aside the award. The Court referred to leading texts concerning commercial arbitration and concluded that there were three possible consequences.

First, the proceedings revert to a point immediately before the publication of the award and parties continue with the arbitration from that point in time. Second, the entire arbitration is frustrated and the process must start from the very beginning and the parties have to re-engage the process. Third, the parties' agreement to arbitrate survives, but the actual arbitration must start again.

[…]

The distinction between the second and third option lies in the agreement to arbitrate. If the agreement to arbitrate was a specific agreement to arbitrate before a named arbitrator, then the entire proceedings are nullified including the agreement to arbitrate. But, if it is general agreement to arbitrate, then the agreement to arbitrate survives and the parties simply retrace the steps to their position immediately prior to the nullified action.

In the proceeding before the Previous PAC there was no award and that committee lost its quorum and could not render a decision because section 93(1) of the Act required three members of an Arbitration Committee to perform any function of the committee. The Minister of Natural Resources appointed a new arbitration committee. This Committee was supplied with the original Notice of Arbitration and Reply to Notice of Arbitration. The parties submitted to this Committee an Amended Notice of Arbitration and an Amended Reply to the Notice of Arbitration.

This Committee finds that the first proceeding is governed by the third option and the portion of the proceeding which has been nullified was the involvement of the Previous PAC.

Each party must therefore absorb the costs of actual appearances before the Previous PAC and correspondence with the Previous PAC.

Therefore, Mr. Smith is not entitled to recover $5,000.00 of his counsel's May 14, 2003 account. Mr. Smith's claim for compensation for his time in attending the hearing before the Previous PAC and travel time to attend the hearing is denied.

Similarly, legal fees and disbursements subsequent to the Previous PAC's hearings dealing specifically with Previous PAC will be deducted from the accounts dated September 3, 2003, October 20,

> 2003, February 2, 2004, September 2, 2004, April 8, 2005 and May 20, 2005 in the total sum of $500.00.

[14] At page 29 of its decision, the PAC summarized the award, in part, as follows:

> This Committee awards to Mr. Smith the following amounts:
>
> […]
>
> - $1,800. for the September 2000 trespass. (See page 17.)
>
> […]
>
> - $16,222.57 for his net legal fees, disbursements and GST regarding the Queen's Bench action and injunction application. (See page 25.)
> - Legal fees and disbursements of the arbitration proceedings, except for those directly related to attendance at the first hearing and subsequent correspondence regarding the status and effect of the first hearing after its loss of quorum. (See page 28.)
>
> […]

Issues

[15] The appellant submitted the following issues for consideration:

1. Did the PAC err in finding that it had jurisdiction over the costs claims, and in failing to strike the costs claims from the amended notice of arbitration?

2. If it had jurisdiction to consider the costs claims, did the PAC err in law in awarding costs of the action?

3. If it had jurisdiction to consider the costs claims, did the PAC err in law in awarding costs of the first hearing?

[16] The respondent submitted the following issue for consideration:

If the PAC had jurisdiction to consider the costs claims, was its award reasonable in the circumstances?

[17] I would rephrase the issues as follows:

1. Did the PAC err in finding that it had jurisdiction to consider costs claims?

2. If the PAC had jurisdiction, did it err in awarding costs of the action?

3. If the PAC had jurisdiction, did it err in its determination regarding the costs associated with the first hearing?

Appellant's Submissions

Jurisdiction

[18] The appellant submitted that the PAC erred in finding that absent judicial review of the Minister's decision to refer the Notice of Arbitration to the PAC, the PAC was effectively powerless to determine its own jurisdiction and was bound to adjudicate any allegation contained in the notice of arbitration.

[19] The appellant submitted that *Balisky* v. *Canada (Minister of Natural Resources)*, [2003] F.C.J. No. 341, (2003) 239 F.T.R. 159, did not stand for the proposition that the PAC could not consider its jurisdiction when adjudicating claims raised in a notice of arbitration. It was submitted that the notion of summary and expeditious process militated in favour of the determination of jurisdictional issues in the first instance by the PAC, subject to a right of appeal.

[20] The appellant submitted that the PAC's view of the matter was inconsistent with section 101 of NEBA, which states that a decision of an arbitration committee on a question of jurisdiction may be appealed to the Federal Court. While section 97 of NEBA stated that the PAC must consider all compensation matters referred to in a notice of arbitration, it was submitted that the provision should be read in light of section 84, which defines the "compensation matters" to which the arbitration provisions of NEBA apply.

[21] The appellant submitted that PAC's view of the matter was inconsistent with Rules 22(b) and 41 of the *Pipeline Arbitration Committee Procedure Rules*, S.O.R./86-787 (the Rules). Rule 22(b) states that the PAC may direct the parties to consider the necessity of amending the notice of arbitration. Rule 41 states that in certain circumstances, the PAC may order an amendment to a pleading.

[22] The appellant noted that it had applied under the Rules to strike the costs claim. The PAC did not consider the application as a preliminary matter, and deferred it to the end of the hearing. The appellant submitted that the PAC erred in either dismissing or failing to consider the application

on the basis that it was bound to adjudicate all of the claims in the amended notice of arbitration. The appellant submitted that the PAC's view was inconsistent with other PAC decisions, which had addressed the issue of jurisdiction (see *Piper* v. *Alliance Pipeline Ltd*. (5 September 2003), Pipeline Arbitration Committee).

Costs of Action

[23] The appellant submitted that the PAC had no statutory jurisdiction to award the costs of an action conducted in the Court of Queen's Bench of Alberta. Section 21 of the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31, gives the Court sole discretion to award costs of any matter taken before it, subject only to a right of appeal (see Rule 601 of the *Alberta Rules of Court*, Reg. 390/1968). The appellant submitted that the expenses, charges and fees claimed by the respondent in relation to the action were "costs" as defined by the Rules, and were within the exclusive jurisdiction of the Alberta Court. It was submitted that the PAC erred in awarding costs of the action: (1) as damages contemplated by subsection 98(3) of NEBA; or (2) as costs "reasonably incurred in asserting the respondent's claim for compensation", under section 99 of NEBA.

(i) Damages

[24] The appellant submitted that the PAC cited the wrong sections of NEBA in finding that the amounts were compensable as damages (see subsection 98(3) and paragraphs 86(2)(b) to (f) of NEBA), since the provisions did not address claims for compensation for damages. It was submitted that the sections addressed the necessary provisions of any agreement to take land from a landowner, and situations where a company has acquired land from a landowner where the amount

of compensation had not been agreed upon. It was submitted that these provisions did not apply to the case at hand, since the parties had agreed on the compensation to be paid for the easement and the temporary workspace.

[25] The appellant submitted that the PAC's jurisdiction with respect to claims in the notice of arbitration was set out in section 84 of NEBA. Section 84 was not considered in the PAC decision. Paragraph 84(a) of NEBA states:

84. The provisions of this Part that provide negotiation and arbitration procedures to determine compensation matters apply in respect of all damage caused by the pipeline of a company or anything carried by the pipeline but do not apply to	84. Les procédures de négociation et d'arbitrage prévues par la présente partie pour le règlement des questions d'indemnité s'appliquent en matière de dommages causés par un pipeline ou ce qu'il transporte, mais ne s'appliquent pas:
(a) claims against a company arising out of activities of the company unless those activities are directly related to	a) aux demandes relatives aux activités de la compagnie qui ne sont pas directement rattachées à l'une ou l'autre des opérations suivantes:
(i) the acquisition of lands for a pipeline,	(i) acquisition de terrains pour la construction d'un pipeline,
(ii) the construction of the pipeline, or	(ii) construction de celui-ci,
(iii) the inspection, maintenance or repair of the pipeline;	(iii) inspection, entretien ou réparation de celui-ci;

[26] The appellant submitted that the respondent incurred its costs in the defence of an action; therefore section 84 precluded the award of the costs of the action. It was submitted that it could not

have been Parliament's intent to create an arbitration scheme whereby the costs of litigation between a company and a landowner was compensable under NEBA.

<u>(ii) Costs reasonably incurred in asserting the claim for compensation</u>

[27] The appellant noted that section 99 of NEBA defined the PAC's ability to award costs:

99.(1) Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation.	99.(1) Si l'indemnité accordée par le comité d'arbitrage est supérieure à quatre-vingt-cinq pour cent de celle qu'elle offre, la compagnie paie tous les frais, notamment de procédure et d'évaluation, que le comité estime avoir été entraînés par l'exercice du recours.
(2) Where the amount of compensation awarded to a person by an Arbitration Committee does not exceed eighty-five per cent of the amount of compensation offered by the company, the legal, appraisal and other costs incurred by that person in asserting his claim for compensation are in the discretion of the Committee, and the Committee may direct that the whole or any part of those costs be paid by the company or by any other party to the proceedings.	(2) Si, par contre, l'indemnité accordée est égale ou inférieure à quatre-vingt-cinq pour cent de celle offerte par la compagnie, l'octroi des frais visés au paragraphe (1) est laissé à l'appréciation du comité; celui-ci peut ordonner que les frais soient payés en tout ou en partie par la compagnie ou toute autre partie.

[28] It was submitted that section 99 did not apply to the respondent's costs of the action because: (1) the respondent was not asserting any claim to compensation in the action, he was the defendant and did not counterclaim; (2) section 99 speaks of costs incurred in advancing one's claim for compensation, which could only mean the claim for compensation made in the arbitration itself; (3) the costs of the action were incurred in defending the action, and not in any arbitration proceeding; and (4) the PAC did not hear the matters in respect of which the costs were incurred and was not in a position to assess the reasonableness of the costs.

[29] In the alternative, if the PAC had jurisdiction to award costs of the action, it was submitted that the matter was *res judicata* and could not be re-litigated.

Costs of First Hearing

[30] The appellant submitted that the PAC had no jurisdiction to award costs of the first arbitration, and that its award of a portion of those costs was an error of jurisdiction and law. The appellant noted that pursuant to section 99 of NEBA, the power to award costs was premised upon the issuance of an award. It was submitted that the loss of quorum in the case made the previous PAC unable to render any award, and that the power to award costs of the hearing before the previous PAC died with the quorum.

[31] The appellant noted that the PAC was not in a position to: (1) determine what award would have been made by the previous PAC; (2) assess the reasonableness of the costs claimed in light of

all of the circumstances of the first hearing; or (3) determine what, if any, exercise of discretion the previous PAC would have implemented in considering the costs of the prior hearing.

[32] The appellant submitted that the PAC committed an error in law when it determined that “the first proceeding [was] governed by the third option and the portion of the proceeding which had been nullified was the involvement of the previous PAC”. It was submitted that pursuant to *P.Z. Resort Systems Inc.* above, it was the overall effect on the proceedings that determined whether or not a “nullity” had resulted from the setting aside of the arbitral award.

[33] The appellant noted that in the case at hand, a new PAC was struck to re-hear the matter. The arbitration process began afresh, with the filing of an amended notice of arbitration that set out additional claims. It was submitted that the parties did not derive any benefit from the first hearing, nor were the issues reduced during the first hearing. In addition, all of the evidence was called afresh before the new PAC. It was submitted that the parties were “left in the same position as they were before the reference” and fought “the whole matter again from the commencement” as described in *P.Z. Resort Systems Inc.* above.

<u>Paralysis of Previous PAC</u>

[34] The appellant noted the respondent’s allegation that the action had “paralyzed” the previous PAC. It was submitted that this allegation was inconsistent with the correspondence received from the remaining members of the previous PAC following Justice Gill’s judicial appointment, which confirmed that the previous PAC was prepared to proceed, if possible, to render a decision in the

case. In addition, the previous PAC had not rendered any decision with respect to 19 other landowners, and there was no suggestion that there was any litigation between those landowners and Alliance Pipeline Ltd.

Respondent's Submissions

[35] The respondent conceded that the standard of review on questions of jurisdiction was correctness, and that the appropriateness of the PAC's award was subject to review on the standard of patent unreasonableness (see *Bue* v. *Alliance Pipeline Ltd.,* 2006 FC 713). It was submitted that the PAC was correct in finding that the cost claims were within its jurisdiction and that its award was not patently unreasonable.

[36] The respondent reviewed the principles of statutory interpretation and noted that the ordinary meaning of the words used by the legislators was to be preferred. It was noted that the PAC had relied upon *Balisky* above, which set out the purpose of the arbitration provisions of NEBA:

(a) providing a summary and expeditious procedure for the determination of compensation to affected landowners;

(b) providing for full compensation to landowners for damages sustained, with the object of keeping them whole; and

(c) providing an opportunity for a full hearing of the issues between the parties.

Jurisdiction to Hear Cost Claims

[37] The PAC found that having been served with a notice of arbitration, it had to determine all compensation matters referred to in the notice (see subsection 97(1) of NEBA). The PAC concluded that if a party felt that the Minister had referred a notice of arbitration that included matters outside the jurisdiction of the PAC, the objecting party should seek judicial review of the Minister's referral (see subsection 91(2) of NEBA). It was submitted that it was within the jurisdiction of the PAC to determine the cost claims and that its interpretation of the legislation was correct.

[38] The respondent noted the Court's recognition that the Minister was a tribunal of competent jurisdiction when making determinations pursuant to section 91 of the NEBA. The Court also confirmed that: (1) section 91 imposed a requirement upon the Minister to ascertain whether a claim was one for which compensation was provided by statute; and (2) the Minister's decision could be judicially reviewed (see *Maritimes and Northeast Pipeline Limited Partnership* v. *Elliott*, [2004] 3 F.C.R. 612, (2004) 238 D.L.R. (4th) 358 (F.C.) affirmed in 2005 FCA 229). The respondent submitted that *Balisky* and *Bue* above, supported the PAC's conclusion that it had jurisdiction to hear the cost claims.

Costs of First Hearing

[39] The respondent submitted that the appellant had misstated the nature of the costs awarded to the respondent as "costs of the first hearing." It was submitted that the PAC had parsed out those costs that related exclusively to the first hearing and did not award such costs to the respondent.

The respondent submitted that the costs that were awarded recognized that the arbitration process had been lengthy, and that reasonable costs of the process extended from the formulation of the claim in 2000 to the 2006 hearing.

[40] The PAC's summary of the award indicated that legal fees and disbursements of the arbitration proceedings were awarded to the respondent, except for those directly related to attendance at the first hearing, and subsequent correspondence regarding the status and effect of the first hearing after its loss of quorum. It was submitted that the award was consistent with NEBA and the purpose of the statute.

[41] The respondent submitted that subsection 99(1) of NEBA referred to costs incurred by a claimant in asserting his or her claim for compensation and did not limit the costs to those of a single proceeding. The respondent noted that the PAC was provided with detailed accounts of the respondent's costs. The decision of the PAC with respect to costs issued in November 2006 considered the accounts and gave reasons for the award of costs to the respondent. It was submitted that the award was not patently unreasonable.

<u>Costs of the Action</u>

[42] The respondent submitted that the Committee had the jurisdiction to award costs of the action to the respondent, either as a component of the compensation award or of the costs award.

(i) Costs of the Action as Damages

[43] The PAC found that the action was a direct result of Smith's refusal to allow the appellant access to the pipeline across his land without prior compensation. It was submitted that the appellant's actions on the land were directly related to the maintenance of the pipeline. The respondent submitted that he had suffered a loss in the form of legal expenses, which he would not have suffered otherwise, and that the loss was compensable under NEBA.

[44] The respondent submitted that the PAC was entitled to consider relevant factors in making a determination as to compensation (see *Bue* above). It was submitted that the appellant's purposes in commencing the action were relevant considerations for the PAC in assessing the compensation claimed by the respondent.

(ii) Costs Incurred in Asserting Respondent's Claim

[45] In the alternative, it was submitted that the PAC was correct in determining that the respondent's costs of the action could be treated as costs pursuant to subsection 99(1) of NEBA.

[46] The respondent noted that in its plea for relief in the action, the appellant sought: (a) an injunction against the respondent; (b) a declaration that Smith had released the claims against the appellant; and (c) an order directing the PAC not to render a decision. It was noted that the releases had been included in the appellant's reply to the respondent's original notice of arbitration; however, at the hearing before the previous PAC, the appellant's counsel abandoned the suggestion

that the claims advanced by Smith were released and withdrew all of paragraph 9 and the last sentence of paragraph 11 in reply.

[47] The respondent submitted that a finding by the Alberta Court of Queen's Bench that the claims argued before the previous PAC had been released by the respondent would have rendered the arbitration process and first hearing moot. It was submitted that in order to successfully assert his claim for compensation, the respondent was forced to defend the action.

[48] The respondent submitted that he should not be held responsible for the fact that no action was taken by the appellant in respect of these matters prior to the discontinuance of the action in March 2005. It was submitted that in applying section 99 of NEBA, arbitration committees and the Courts should seek to prevent pipeline companies from holding landowners ransom by pursuing parallel legal proceedings in the courts and attempting to circumvent the provisions of NEBA.

[49] The respondent submitted that the award of the PAC was within its jurisdiction, and that the amount was appropriate, as it was based upon evidence placed before the PAC and was addressed by counsel.

Analysis and Decision

Standard of Review

[50] As instructed by the Federal Court of Appeal in *Sketchley* v. *Canada* (Attorney General), [2005] F.C.J. No. 2056), a reviewing court must refrain from adopting the standard of review used by other judges reviewing decisions of the decision-maker under the same legislative provision. As such, I will begin my analysis by engaging in my own assessment of the pragmatic and functional analysis in order to determine the level of deference owed to the PAC in these circumstances.

Privative Clause

[51] Section 101 of NEBA provides a partial privative clause as only decisions involving questions of law or jurisdiction can be appealed to the Federal Court within thirty days of the decision.

Nature of the Question

[52] The appellant appears to have raised two separate questions. Firstly, the appellant raised a question of jurisdiction that is whether or not the PAC erred in finding that it had jurisdiction over the costs claims. Issues of jurisdiction are questions of law, and merit the lowest level of deference. The second question raised by the appellant was whether the PAC erred in its awarding of costs. In the circumstances of this case, this question is one of mixed fact and law because it involves the interpretation of sections 84 on compensation and 99 on costs and their application to the facts of this case. Questions of mixed law and fact warrant a mid-level of deference.

Relative Expertise

[53] With regards to the question of jurisdiction, this Court has greater expertise than the PAC, I note that the PAC is an *ad hoc* committee and is not specialized (*Bue* above at paragraph 5). With regards to appropriateness of the cost awards, it is the PAC role to determine issues of compensation and costs. As such, the PAC presumably has somewhat of an expertise in determining cost awards.

Purpose of the Legislation and Provision

[54] At the heart of this case is the interpretation of sections of the NEBA dealing with award for compensation and costs. The purpose of these sections is to allow PAC to settle disputes and make determinations on financial compensation.

[55] In conclusion, I am of the opinion that the appropriate standard of review for the question of jurisdiction is one of correctness. As for the question of cost awards, I believe that it is reviewable on a standard of reasonableness. I find support for both of these determinations in *Bue* above at paragraph 5.

Issue 1

Did the PAC err in finding that it had jurisdiction over the costs claims?

[56] The compensation, interest and costs requested by the respondent in his amended notice of arbitration included: (1) costs of the action commenced by the applicant in July 2003, and (2) costs of the hearing before the previous PAC. The PAC reviewed the relevant sections of NEBA and

found that once a notice of arbitration was served on a PAC, that PAC was obligated to determine all compensation matters set out therein (see subsection 97(1) of NEBA).

[57] The PAC also concluded that where a party felt that the Minister had referred a notice of arbitration that included matters outside of the jurisdiction of a Committee, the objecting party should seek judicial review of the Minister's referral. The PAC acknowledged the appellant's application to strike the disputed cost claims, and noted that the hearing proceeded without prejudice to that application.

[58] At paragraph 25 of *Bue* above, Justice Campbell stated the following with respect to the obligation of a PAC to deal with the compensation matters referred to in a notice of arbitration:

> Pursuant to s.97(1) of the NEB Act, the Committee was required to deal with all compensation matters referred to in the notices of arbitration served. By an Amended Notice of Arbitration each of the Landowners stated the nature of the decision sought from the Committee as follows:
> […]

[59] Similarly, in *Balisky* above, Justice Rothstein stated the following at paragraph 22:

> Subsection 97(1) of the Act confers on an arbitration committee the jurisdiction to determine all compensation matters referred to in a notice of arbitration. In determining compensation matters, the arbitration committee shall consider a number of listed factors where they are applicable, as well as such other factors as it considers proper in the circumstances […]

[60] The PAC also relied upon paragraph 91(2)(b) of NEBA in support of its position, which provides that the Minister shall not take any action under subsection (1) where the Minister is

satisfied that the matter referred to in a notice of arbitration served on the Minister is a matter to which the arbitration procedures set out in Part 5 of NEBA do not apply. As a result, the PAC concluded that an aggrieved party could seek judicial review of the Minister's referral of a notice of arbitration to a PAC.

[61] In my view, the PAC was correct in finding that it had jurisdiction to consider whether to award the disputed cost claims. The legislation and case law suggests that the PAC must consider all of the compensation matters set out in the notice of arbitration. I believe that once the PAC considered the matters in the notice of arbitration, it could then proceed to determine whether the matters warranted relief.

Issue 2

If the PAC had jurisdiction, did it err in awarding costs of the action?

[62] *Res Judicata*

[63] The appellant submitted that regardless of the PAC's jurisdiction, the matter of the costs of the action was *res judicata*, in that it had already been decided by Justice Nation. The PAC addressed this argument as follows:

> Alliance argued that the matter of costs was *res judicata*, having been dealt with in the litigation itself. However, Nation J. did not deal with the provisions for costs set out in the Act. Subsections (1) and (2) of section 99 of the Act give this Committee direction and discretion regarding costs. Our award exceeds 85% of the amount of compensation offered by Alliance, with the result that Alliance must

> pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by Mr. Smith in asserting his claim.

[64] Given the wording of section 99, it appears that the PAC may award all legal costs that are reasonably incurred by an individual in asserting his or her claim for compensation. However, the appellant argues that since Justice Nation issued an order as to costs with respect to the litigation, the matter is subject to the doctrine of *res judicata*. In my view, the matter was not necessarily *res judicata*, given the authority of the PAC under section 99, and the limited cost order issued by Justice Nation.

[65] As such, I will proceed to address the PAC's award of the costs of the action to the respondent. As noted above, the respondent's counsel issued accounts totalling $20,788.54 with respect to the litigation. The party and party costs paid by the appellant totalled $4,565.97, and the amount of litigation costs at issue is $16,222.57.

[66] The PAC determined, in the alternative to its award under section 84 that the costs of the action could be awarded to the respondent as costs reasonably incurred in asserting his claim for compensation. Pursuant to section 99 of NEBA:

99.(1) Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the	99.(1) Si l'indemnité accordée par le comité d'arbitrage est supérieure à quatre-vingt-cinq pour cent de celle qu'elle offre, la compagnie paie tous les frais, notamment de procédure et d'évaluation, que le comité estime avoir été entraînés par l'exercice du recours.

Committee to have been reasonably incurred by that person in asserting that person's claim for compensation.	
(2) Where the amount of compensation awarded to a person by an Arbitration Committee does not exceed eighty-five per cent of the amount of compensation offered by the company, the legal, appraisal and other costs incurred by that person in asserting his claim for compensation are in the discretion of the Committee, and the Committee may direct that the whole or any part of those costs be paid by the company or by any other party to the proceedings.	(2) Si, par contre, l'indemnité accordée est égale ou inférieure à quatre-vingt-cinq pour cent de celle offerte par la compagnie, l'octroi des frais visés au paragraphe (1) est laissé à l'appréciation du comité; celui-ci peut ordonner que les frais soient payés en tout ou en partie par la compagnie ou toute autre partie.

[67] The applicant submitted that section 99 of NEBA did not apply to the costs of the action, since the respondent was not asserting any claim to compensation in the action. The respondent submitted that had the Alberta Court of Queen's Bench found that the claims argued before the previous PAC had been released; the arbitration process and first hearing would have been moot. As a result, it was submitted that in order to successfully assert his claim for compensation in the context of the arbitration proceeding, the respondent had no choice but to defend the action.

[68] As noted by the appellant, the respondent was not asserting a claim to compensation in the context of the action, given that he was the defendant and did not counterclaim. However, the respondent was placed in a position where he had to defend the action, or else risk a finding by the

Court that he had released the claims argued before the previous PAC. As a result, his participation in the litigation could be characterized as being reasonably incurred in asserting his claim for compensation.

[69] I am of the opinion that the PAC did not err in allowing the respondent the balance of his expenses in defending the action as I believe subsection 99(1) of the Act applies on the facts of this case. The respondent "reasonably incurred" this expense to make sure that he could continue with his claim for compensation. If he did not defend the action, the Court could have declared that he had released his claims for compensation. As such, I find nothing unreasonable with the PAC's award of costs.

[70] Because of my finding, I need not determine whether the costs of the action were payable pursuant to section 84 of the Act.

Issue 3

If the PAC had jurisdiction, did it err in law in its determination regarding the costs associated with the first hearing?

[71] The PAC determined that the parties had to absorb the costs of actual appearances before the previous PAC and correspondence with the previous PAC. The PAC awarded the respondent "legal fees and disbursements of the arbitration proceedings, except for those directly related to attendance

at the first hearing and subsequent correspondence regarding the status and effect of the first hearing after its loss of quorum."

[72] As noted by the applicant, the power of the PAC to award costs under section 99 is premised upon the issuance of an award. The previous PAC lost quorum and did not render an award with respect to the first hearing. As a result, the arbitration process was a nullity. In my view, the award of the PAC reflects the fact that the first proceeding resulted in a nullity, in that costs directly related to attendance at the first hearing and subsequent correspondence with respect to the first hearing after its loss of forum were explicitly excluded from the award. I do not agree with the appellant's argument on this issue.

[73] The appeal is therefore dismissed, with costs to the respondent.

JUDGMENT

[74] **IT IS ORDERED that** the appeal is dismissed, with costs to the respondent.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Alberta Rules of Court*, Reg. 390/1968:

> 601(1) Notwithstanding anything in Rules 602 to 612, but subject to any Rule expressly requiring costs to be ordered, the costs of all parties to any proceedings (including third parties), the amount of costs and the party by whom or the fund or estate or portion of an estate (if any) out of which they are to be paid are in the discretion of the Court, and when deciding on costs the Court may consider the result in the proceeding and
>
> (a) the amounts claimed and the amounts recovered,
>
> (b) the importance of the issues,
>
> (c) the complexity of the proceedings,
>
> (d) the apportionment of liability,
>
> (e) the conduct of any party that tended to shorten or to unnecessarily lengthen the proceeding,
>
> (f) a party's denial of or refusal to admit anything that should have been admitted,
>
> (g) whether any step or stage in the proceedings was
>
> (i) improper, vexatious or unnecessary, or
>
> (ii) taken through negligence, mistake or excessive caution,
>
> (h) whether a party commenced separate proceedings for claims that should have been made in one proceeding or whether a party unnecessarily separated their defence from another party, and
>
> (i) any other matter relevant to the question of costs.
>
> …

The *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31.:

> 21 Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances.

The *National Energy Board Act*, R.S.C. 1985, c. N-7:

84. The provisions of this Part that provide negotiation and arbitration procedures to determine compensation matters apply in respect of all damage caused by the pipeline of a company or anything carried by the pipeline but do not apply to	84. Les procédures de négociation et d'arbitrage prévues par la présente partie pour le règlement des questions d'indemnité s'appliquent en matière de dommages causés par un pipeline ou ce qu'il transporte, mais ne s'appliquent pas:
(a) claims against a company arising out of activities of the company unless those activities are directly related to	a) aux demandes relatives aux activités de la compagnie qui ne sont pas directement rattachées à l'une ou l'autre des opérations suivantes:
(i) the acquisition of lands for a pipeline,	(i) acquisition de terrains pour la construction d'un pipeline,
(ii) the construction of the pipeline, or	(ii) construction de celui-ci,
(iii) the inspection, maintenance or repair of the pipeline;	(iii) inspection, entretien ou réparation de celui-ci;
(b) claims against a company for loss of life or injury to the person; or	b) aux demandes dirigées contre la compagnie pour dommages à la personne ou décès;
(c) awards of compensation or agreements respecting compensation made or entered into prior to March 1, 1983.	c) aux décisions et aux accords d'indemnisation intervenus avant le 1er mars 1983.

86.(1) Subject to subsection (2), a company may acquire lands for a pipeline under a land acquisition agreement entered into between the company and the owner of the lands or, in the absence of such an agreement, in accordance with this Part.

86.(1) Sous réserve du paragraphe (2), la compagnie peut acquérir des terrains par un accord d'acquisition conclu avec leur propriétaire ou, à défaut d'un tel accord, conformément à la présente partie.

(2) A company may not acquire lands for a pipeline under a land acquisition agreement unless the agreement includes provision for

(2) L'accord d'acquisition doit prévoir:

(a) compensation for the acquisition of lands to be made, at the option of the owner of the lands, by one lump sum payment or by annual or periodic payments of equal or different amounts over a period of time;

a) le paiement d'une indemnité pour les terrains à effectuer, au choix du propriétaire, sous forme de paiement forfaitaire ou de versements périodiques de montants égaux ou différents échelonnés sur une période donnée;

(b) review every five years of the amount of any compensation payable in respect of which annual or other periodic payments have been selected;

b) l'examen quinquennal du montant de toute indemnité à payer sous forme de versements périodiques;

(c) compensation for all damages suffered as a result of the operations of the company;

c) le paiement d'une indemnité pour tous les dommages causés par les activités de la compagnie;

(d) indemnification from all liabilities, damages, claims, suits and actions arising out of the operations of the company other than liabilities, damages, claims, suits and actions resulting from

d) la garantie du propriétaire contre les poursuites auxquelles pourraient donner lieu les activités de la compagnie, sauf, dans la province de Québec, cas de faute lourde ou intentionnelle de celui-ci et, dans les autres provinces, cas de

négligence grossière ou d'inconduite délibérée de celui-ci;

(i) in the Province of Quebec, the gross or intentional fault of the owner of the lands, and

(ii) in any other province, the gross negligence or wilful misconduct of the owner of the lands;

(e) restricting the use of the lands to the line of pipe or other facility for which the lands are, by the agreement, specified to be required unless the owner of the lands consents to any proposed additional use at the time of the proposed additional use; and

e) l'utilisation des terrains aux seules fins de canalisation ou d'autres installations nécessaires qui y sont expressément mentionnées, sauf consentement ultérieur du propriétaire pour d'autres usages;

(f) such additional matters as are, at the time the agreement is entered into, required to be included in a land acquisition agreement by any regulations made under paragraph 107(a).

f) toutes autres questions mentionnées dans le règlement d'application de l'alinéa 107a) en vigueur au moment de sa conclusion.

91.(1) Where the Minister is served with a notice of arbitration under this Part, the Minister shall,

91.(1) Dès qu'un avis d'arbitrage lui est signifié, le ministre:

(a) if an Arbitration Committee exists to deal with the matter referred to in the notice, forthwith serve the notice on that Committee; or

a) si un comité d'arbitrage a déjà été constitué pour régler la question mentionnée dans l'avis, signifie à celui-ci l'avis d'arbitrage;

(b) if no Arbitration Committee exists to deal with the matter, forthwith appoint an Arbitration

b) dans le cas contraire, nomme un comité d'arbitrage et signifie l'avis à celui-ci.

Committee and serve the notice on that Committee.

(2) The Minister shall not take any action under subsection (1) where the Minister is satisfied that the matter referred to in a notice of arbitration served on the Minister is a matter

(2) Le paragraphe (1) ne s'applique pas dans les cas où le ministre est convaincu que la question mentionnée dans l'avis d'arbitrage qui lui a été signifié:

(a) solely related to the amount of compensation that has been previously awarded by an Arbitration Committee and that, under the award, the amount is not subject to a review at the time the notice is served; or

a) soit ne porte que sur le montant de l'indemnité accordé antérieurement par un comité d'arbitrage, lequel montant n'était pas, aux termes de la décision, susceptible de révision à la date de signification de l'avis;

(b) to which the arbitration procedures set out in this Part do not apply.

b) soit est exclue de la procédure d'arbitrage.

(3) The Minister may, of his own motion and without having been served with a notice of arbitration referred to in subsection (1), appoint an Arbitration Committee.

(3) Le ministre peut constituer un comité d'arbitrage de sa propre initiative, sans qu'aucun avis d'arbitrage ne lui ait été signifié.

97.(1) An Arbitration Committee shall determine all compensation matters referred to in a notice of arbitration served on it and in doing so shall consider the following factors where applicable:

97.(1) Le comité d'arbitrage doit régler les questions d'indemnité mentionnées dans l'avis qui lui a été signifié, et tenir compte, le cas échéant, des éléments suivants:

(a) the market value of the lands taken by the company;

a) la valeur marchande des terrains pris par la compagnie;

(b) where annual or periodic payments are being made pursuant to an agreement or an

b) dans le cas de versements périodiques prévus par contrat ou décision arbitrale, les

arbitration decision, changes in the market value referred to in paragraph (a) since the agreement or decision or since the last review and adjustment of those payments, as the case may be;

(c) the loss of use to the owner of the lands taken by the company;

(d) the adverse effect of the taking of the lands by the company on the remaining lands of an owner;

(e) the nuisance, inconvenience and noise that may reasonably be expected to be caused by or arise from or in connection with the operations of the company;

(f) the damage to lands in the area of the lands taken by the company that might reasonably be expected to be caused by the operations of the company;

(g) loss of or damage to livestock or other personal property or movable affected by the operations of the company;

(h) any special difficulties in relocation of an owner or his property; and

(i) such other factors as the Committee considers proper in the circumstances.

changements survenus dans la valeur marchande mentionnée à l'alinéa a) depuis la date de ceux-ci ou depuis leurs derniers révision et rajustement, selon le cas;

c) la perte, pour leur propriétaire, de la jouissance des terrains pris par la compagnie;

d) l'incidence nuisible que la prise des terrains peut avoir sur le reste des terrains du propriétaire;

e) les désagréments, la gêne et le bruit qui risquent de résulter directement ou indirectement des activités de la compagnie;

f) les dommages que les activités de la compagnie risquent de causer aux terrains de la région;

g) les dommages aux biens meubles ou personnels, notamment au bétail, résultant des activités de la compagnie;

h) les difficultés particulières que le déménagement du propriétaire ou de ses biens pourrait entraîner;

i) les autres éléments dont il estime devoir tenir compte en l'espèce.

(2) For the purpose of paragraph (1)(a), "market value" is the amount that would have been paid for the lands if, at the time of their taking, they had been sold in the open market by a willing seller to a willing buyer.

(2) Pour l'application de l'alinéa (1) a), la valeur marchande des terrains correspond à la somme qui en aurait été obtenue si, au moment où ils ont été pris, ils avaient été vendus sur le marché libre.

98 . . .

98 . . .

(3) Every award of compensation made by an Arbitration Committee in respect of lands acquired by a company shall include provision for those matters referred to in paragraphs 86(2)(b) to (f) that would be required to be included in a land acquisition agreement referred to in section 86.

(3) La décision du comité d'arbitrage accordant une indemnité pour des terrains acquis par une compagnie doit renfermer des dispositions correspondant à celles qui, aux termes des alinéas 86(2)b) à f), doivent être incorporées dans un accord d'acquisition de terrains.

99.(1) Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation.

99.(1) Si l'indemnité accordée par le comité d'arbitrage est supérieure à quatre-vingt-cinq pour cent de celle qu'elle offre, la compagnie paie tous les frais, notamment de procédure et d'évaluation, que le comité estime avoir été entraînés par l'exercice du recours.

(2) Where the amount of compensation awarded to a person by an Arbitration Committee does not exceed eighty-five per cent of the amount of compensation offered by the company, the

(2) Si, par contre, l'indemnité accordée est égale ou inférieure à quatre-vingt-cinq pour cent de celle offerte par la compagnie, l'octroi des frais visés au paragraphe (1) est laissé à l'appréciation du comité; celui-

legal, appraisal and other costs incurred by that person in asserting his claim for compensation are in the discretion of the Committee, and the Committee may direct that the whole or any part of those costs be paid by the company or by any other party to the proceedings.

ci peut ordonner que les frais soient payés en tout ou en partie par la compagnie ou toute autre partie.

101. A decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court within thirty days after the day on which the decision, order or direction is made, given or issued or within such further time as that Court or a judge thereof under special circumstances may allow.

101. Appel d'une décision ou d'une ordonnance du comité d'arbitrage peut être interjeté, sur une question de droit ou de compétence, devant la Cour fédérale dans les trente jours du prononcé ou dans le délai ultérieur que le tribunal ou un de ses juges peut accorder dans des circonstances spéciales.

The *Pipeline Arbitration Committee Procedure Rules*, S.O.R./86-787:

22. A Committee may direct the parties to a hearing or their counsel to appear before three members of the Committee at a specified time and place for a conference before or during the hearing or to make submissions in writing, for the purpose of formulating issues and considering . . .

Le comité peut ordonner aux parties ou à leur avocat de se présenter devant trois membres du comité, au lieu, à la date et à l'heure précisés, pour s'entretenir avec eux avant ou pendant l'audience ou faire des déclarations écrites, dans le but de formuler les questions en litige et d'étudier . . .:

(b) the necessity or desirability of amending the notice of arbitration or the reply to clarify, amplify or limit the issues;

b) la nécessité ou l'opportunité de modifier l'avis d'arbitrage ou la réponse, de manière à les rendre plus clairs, plus complets ou plus concis;

41. A Committee may, on such terms as it considers advisable, order an amendment to any pleading that, in the opinion of the Committee, may tend to prejudice or delay a fair hearing of the case if, in the opinion of the Committee, the amendment is necessary for the purposes of the hearing and for determining the real question in issue between the parties to the hearing.

41. Le comité peut, selon les modalités qu'il juge à propos, ordonner la modification de toute plaidoirie qui, à son avis, pourrait entraver ou retarder l'audience s'il le juge nécessaire pour la conduite de l'audience ou pour la détermination des véritables points en litige entre les parties.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1826-06
STYLE OF CAUSE:	ALLIANCE PIPELINE LTD. v. VERNON JOSEPH SMITH
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	July 4, 2007
REASONS FOR JUDGMENT:	O'KEEFE J.
DATED:	January 4, 2008

APPEARANCES:

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Richard C. Secord	FOR THE RESPONDENT

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