Date: 20090408

Docket: A-56-08

Citation: 2009 FCA 110

CORAM: **NOËL J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

ALLIANCE PIPELINE LTD.

Appellant

and

VERNON JOSEPH SMITH

Respondent

Heard at Edmonton, Alberta, on February 11, 2009.

Judgment delivered at Ottawa, Ontario, on April 8, 2009.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: NOËL J.A.

CONCURRING REASONS BY: PELLETIER J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] This is an appeal from a decision of O'Keefe J. of the Federal Court, 2008 FC 12, dated January 4, 2008, dismissing the appeal brought by Alliance Pipeline Ltd., pursuant to section 101 of the *National Energy Board Act*, R.C.S. 1985, c. N-7 (the "Act"), from the decision and award of the Pipeline Arbitration Committee (the "PAC") dated September 2, 2006, as corrected on November 6, 2006.

[2] The issue raised by the appeal pertains to the PAC's determination of the respondent's entitlement to recover from the appellant the legal costs which he incurred in proceedings

commenced and disposed of in the Alberta Court of Queen's Bench and in arbitration proceedings commenced before a previous panel of the PAC.

THE FACTS

[3] In 1999, Alliance Pipeline Ltd. (the "appellant") constructed a pipeline across a portion of the respondent's farmland, located in the Mayerthorpe area of central Alberta. This came as a result of the approval that the appellant had received from the National Energy Board, in November of 1998, for construction of a pipeline extending from the northeast region of British Columbia to a point near Chicago, Illinois, and crossing the Canada-United States border near Elmore, Saskatchewan.

[4] Despite a series of agreements between the parties with respect to the construction of the pipeline, a dispute arose regarding the reclamation of a portion of the land used for the pipeline. The respondent claimed that it was necessary to apply manure to the entire right-of-way in order to return the land to its pre-construction growing ability. The appellant disagreed.

[5] Notwithstanding 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 for $9,829.00 to the appellant, which rejected the invoice and made a counter-offer of $2,500.00. The respondent rejected the counter-offer and sent the appellant a second invoice for $16,819.00.

[6] On August 8, 2001, the respondent issued a Notice of Arbitration pursuant to subsection 90(2) of the Act, which was served on the appellant and on the Minister of Natural Resources (the "Minister"), requesting compensation for the reclamation work performed. On September 24, 2001, the respondent served its Reply to the Notice of Arbitration, and argued, *inter alia*, that the damages claimed by the respondent were covered by the release agreements entered into by the parties.

[7] As a result of the foregoing, by letter dated February 21, 2002, the Minister advised both the appellant and the respondent that he had appointed three persons to form an Arbitration Committee (the "first panel"), namely Mr. Raymond McKall, Mr. John Gill and Mr. Robert P. James. The hearing before the first panel was held on May 6, 2003 and its decision was reserved.

[8] 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 first panel not to render a decision until such time as the issue pertaining to the releases could be determined.

[9] The application for an injunction was dismissed by order of Madam Justice Nation on October 2, 2003, and party and party costs of the injunction application were ordered to be 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 in the action. However, the respondent's solicitor-client costs for the proceedings in the Alberta Court of Queen's Bench totalled $20,788.54. The party and party costs paid by the appellant totalled $4,565.97, leaving $16,222.57 as unrecovered legal fees.

[10] In February 2005, the first panel advised the parties that one of its members, Mr. Justice John Gill, had been appointed to the Alberta Court of Queen's Bench and that the other two members of the panel remained prepared to continue their respective participation in the arbitration process. It appears that counsel for the respondent was prepared to allow the first panel to complete the process, but counsel for the appellant objected. Consequently, no decision was rendered by the first panel.

[11] By letter dated August 11, 2005, the Minister informed the parties that he had appointed a new Arbitration Committee (the "second panel") to deal with the issues raised in the arbitration proceedings, namely Mr. Jim McCartney, Mr. Doug Perras and Mr. Ian C. Schofield. The Minister's letter reads, in part, as follows:

> …
>
> I appreciate that Mr. Smith, Alliance and yourself have already invested a significant amount of time, energy and money in dealing with this case to date. After careful consideration, the Government of Canada has determined that the most appropriate manner to proceed is to appoint a new committee, consisting of three new members, to review all outstanding issues.

[12] Following the appointment of the second panel, the respondent filed an Amended Notice of Arbitration on November 14, 2005, and again on January 20, 2006. The Amended Notice of

Arbitration asserted the same core claims that had been before the first panel, together with claims for additional relief, which included the costs of the arbitration proceedings commenced before the first panel and the unrecovered portion of his legal costs in the action commenced by the appellant in July 2003 in the Alberta Court of Queen's Bench.

[13] At the end of December 2005, the appellant filed its Reply to the Amended Notice of Arbitration.

[14] The hearing before the second panel was held on March 22 to 24 and April 3 to 4, 2006 and it rendered its decision on September 18, 2006, as corrected on November 6, 2006.

DECISION OF THE SECOND PANEL

[15] The second panel concluded that the respondent was entitled to an award in the amount of $9,829 (as corrected) for his reclamation work in the spring of 2000 and to an award of $1,200 (as corrected) for the September 2000 trespass. These rulings, as well as certain others, are not at issue in this appeal. The disputed matters before the Federal Court and before this Court pertain to the second panel's determination that the respondent was entitled to compensation for the unrecovered portion of his legal costs incurred in defending the injunctive action and to the costs of the arbitration proceedings commenced before the first panel.

[16] The second panel found that it had jurisdiction, under the Act, to determine all compensation matters. It held that if a party was of the view that the Minister had referred a Notice of Arbitration

which included matters outside of its jurisdiction, the objecting party was bound to seek judicial review of the Minister's decision.

[17] With respect to the costs of the action commenced in the Alberta Court of Queen's Bench, the second panel awarded the respondent $16,222.57 for his net legal fees, disbursements and GST, stating that the respondent was entitled to his solicitor-client costs as compensation for damages suffered as a result the operations of the appellant. The second panel concluded that the appellant's legal action was directly related to the respondent's attempt to obtain compensation in respect of the appellant's proposed activities and that it was thus proper and reasonable for it to consider the expenses he had incurred and the inconvenience which he had been put through in the circumstances. The second panel also noted that the respondent's out-of-pocket expenses for legal fees had been claimed in his Amended Notice of Arbitration and that a PAC was required to determine matters referred to in a Notice of Arbitration. The second panel thus found that it was required to make provision for compensation of all damages suffered by the respondent as a result of the operations of the appellant.

[18] With respect to the costs relating to the first arbitration proceedings, the second panel awarded the respondent his legal fees and disbursements incurred in those 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 the loss of quorum. In support of this view, the second panel found that notwithstanding the fact that the arbitration proceedings had to recommence, the parties' agreement to arbitrate survived.

[19] The appellant brought its appeal to the Federal Court under section 101 of the Act, claiming that the second panel had exceeded its jurisdiction and that it had erred in law by awarding the respondent his costs incurred in the Alberta litigation and those in the proceedings commenced before the first panel.

DECISION OF THE FEDERAL COURT

[20] O'Keefe J. dismissed the appeal on January 4, 2008, holding that the second panel had not exceeded its jurisdiction and that it had not erred in awarding the respondent the unrecovered part of his costs in the Alberta Court of Queen's Bench action, nor in awarding him the costs incurred in connection with the arbitration proceedings commenced before the first panel.

[21] The learned Judge held that the second panel was correct in concluding that it had jurisdiction to consider the cost claims, as it was bound to consider all compensation matters set out in the Notice of Arbitration.

[22] O'Keefe J. was not persuaded by the appellant's submission that the issue of costs relating to the action was *res judicata*, because the respondent "reasonable incurred" these costs to ensure that he could continue with his claim for compensation before the PAC.

[23] Finally, the Judge upheld the second panel's cost award pertaining to the costs of the first arbitration proceedings, after noting that the second panel had excluded the costs directly related to

attendance at the previous arbitration hearing and subsequent correspondence in connection with the loss of quorum.

APPELLANT'S SUBMISSIONS

[24] The appellant submits that O'Keefe J. erred in finding that the second panel had jurisdiction and in confirming its determinations with respect to the costs of the action and the cost of the first arbitration proceedings (together, the "cost claims").

[25] First, the appellant submits that the Judge erred in law when he found that the second panel had jurisdiction over the cost claims because these were not "compensation matters" under the Act. The appellant also argues that it was not obliged to apply for judicial review of the Minister's decision to refer the matter to a PAC in order to challenge the second panel's jurisdiction with respect to the cost claims. The appellant alleges that a PAC's power to decide submissions on its own jurisdiction, subject to a right of appeal to the Federal Court, was an adequate alternative legal remedy.

[26] Second, the appellant submits that the Judge erred in law and made a palpable and overriding error of fact when he found that the second panel's award of costs in the action was reasonable. The appellant argues that the costs incurred in the action were the sole jurisdiction of the Court of Queen's Bench of Alberta, and that the Alberta Court's decision made the costs issue *res judicata* before the Judge. The appellant also argues that the second panel did not have jurisdiction with respect to the costs of the action and that the award of such costs cannot be reasonable,

considering that the second panel did not hear nor decide the action commenced before the Alberta Court.

[27] Finally, the appellant contends that the Judge erred in law and made a palpable and overriding error of fact when he found that the second panel's award of the costs incurred in the first arbitration proceedings was reasonable. According to the appellant, the second panel did not have jurisdiction to award any costs incurred in the first arbitration proceedings because these proceedings were a nullity and, more particularly, because it did not hear nor decide the first arbitration proceedings.

RESPONDENT'S SUBMISSIONS

[28] The respondent submits that the second panel had jurisdiction to consider the cost claims because it was necessary for him to incur these costs in order to assert his claim for compensation. He contends that the second panel had to determine the cost issues because the panel, according to the Act, had to "determine all compensation matters referred to in a Notice of Arbitration".

[29] With respect to the costs incurred in the first arbitration proceedings, the respondent submits that he was entitled to these costs because the issues before the first panel were essentially the same as those before the second panel and because the second panel carefully parsed out and did not award him those costs that related exclusively to the first arbitration proceedings. The respondent also contends that O'Keefe J.'s decision and that of the second panel are consistent with the objectives of the Act, which have been identified as ensuring that landowners are not prejudiced in

their ability to seek legal and other advice, by virtue solely of their relatively weaker financial position.

[30] Finally, the respondent submits that the Judge was correct in finding that the second panel had jurisdiction to award the costs of the action to him because these costs were "reasonably incurred" by him in asserting his claim for compensation. The respondent further argues that his solicitor-client costs were payable as compensation for damages suffered as a result of the appellant's operations and that the second panel was required to consider, when determining a compensation matter, the factors listed in subsection 97(1) of the Act, including "such other factors" as the second panel "considers proper in the circumstances" (para. 97(1)(i) of the Act). The respondent further submits that the costs issue was not *res judicata* because although the order of the Alberta Court was final and the parties were the same, the question decided in the action was not the same as the one before the second panel, i.e. whether the respondent was entitled to costs under the Act.

THE ISSUES

[31] The issues in this appeal, as formulated by the parties, are the following:

1. Did the Judge err in concluding that the second panel had jurisdiction to consider the cost claims?
2. Did the Judge err in determining that the second panel's determination of the cost claims was reasonable?

LEGISLATION

[32] The relevant provisions of the Act read as follows:

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
(a) claims against a company arising out of activities of the company unless those activities are directly related to
(i) the acquisition of lands for a pipeline,
(ii) the construction of the pipeline, or
(iii) the inspection, maintenance or repair of the pipeline;
(b) claims against a company for loss of life or injury to the person; or
(c) awards of compensation or agreements respecting compensation made or entered into prior to March 1, 1983.

[…]

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) aux demandes relatives aux activités de la compagnie qui ne sont pas directement rattachées à l'une ou l'autre des opérations suivantes :
i) acquisition de terrains pour la construction d'un pipeline,
ii) construction de celui-ci,
iii) inspection, entretien ou réparation de celui-ci;
b) aux demandes dirigées contre la compagnie pour dommages à la personne ou décès;
c) aux décisions et aux accords d'indemnisation intervenus avant le 1er mars 1983.

…

91. (1) Where the Minister is served with a notice of arbitration under this Part, the Minister shall,
(a) if an Arbitration Committee exists to deal with the matter referred to in the notice, forthwith serve the notice on that Committee; or
(b) if no Arbitration Committee exists to deal with the matter, forthwith appoint an Arbitration Committee and serve the notice on that Committee.

(2) The Minister shall not take any action under subsection (1) where the Minister is

91. (1) Dès qu'un avis d'arbitrage lui est signifié, le ministre :
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) dans le cas contraire, nomme un comité d'arbitrage et signifie l'avis à celui-ci.

(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) soit ne porte que sur le montant de

satisfied that the matter referred to in a notice of arbitration served on the Minister is a matter
(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
(b) to which the arbitration procedures set out in this Part do not apply.

(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.

[…]

93. (1) Three members of an Arbitration Committee constitute a quorum and may perform any function of the Committee and, when performing such a function, have all the powers and jurisdiction of the Committee.

[...]

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:
(a) the market value of the lands taken by the company;
(b) where annual or periodic payments are being made pursuant to an agreement or an 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,

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) soit est exclue de la procédure d'arbitrage.

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

…

93. (1) Le quorum du comité d'arbitrage est constitué de trois membres; ceux-ci peuvent exercer des fonctions du comité et, à cette fin, ils sont investis de la compétence et des pouvoirs du comité.

[...]

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) la valeur marchande des terrains pris par la compagnie;
b) dans le cas de versements périodiques prévus par contrat ou décision arbitrale, les 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

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.

(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.

[…]

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.

(2) Where the amount of compensation

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) 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.

…

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) Si, par contre, l'indemnité accordée est égale ou inférieure à quatre-vingt-cinq pour cent de celle offerte par la compagnie,

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.	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.
[…]	…
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.

ANALYSIS

[33] Before addressing the questions raised by the appeal, a few words regarding the standard of review are in order. Because of the conclusions which I have reached with respect to the second panel's determination of the cost claims, i.e. that the second panel made errors of law which justify our intervention, the result of this appeal is not affected by the choice of standard of review, be it that of correctness or of reasonableness. On either standard, the second panel's decision cannot stand and, as a result, the Judge ought to have intervened.

1. Did the Judge err in concluding that the second panel had jurisdiction to consider the cost claims?

[34] The appellant submits that the second panel had no jurisdiction to deal with the cost claims and, hence, that it erred in law in so doing. In my view, the errors made by the second panel are errors of law and not errors of jurisdiction.

[35] It is not disputed that the PAC has jurisdiction to award costs pursuant to section 99 of the Act. It is also not disputed that the PAC has jurisdiction to determine, under the Act, all compensation matters. More particularly, the PAC finds its jurisdiction in regard thereto under sections 84, 97 and 98 of the Act.

[36] The question which arises in this appeal is, in my view, simply whether the cost claims made by the respondent fall within the ambit of the above provisions. If so, then the second panel was clearly entitled to make the award it made and, if not, the second panel fell into error.

[37] At paragraph 61 of his Reasons, the Judge concluded that the second panel had made no error in finding that it had jurisdiction to determine whether the respondent was entitled to the costs claimed. In my view, the Judge made no error in so deciding because, as I have just indicated, there clearly is jurisdiction under the Act for the PAC to determine cost issues and compensation matters. The fact that the PAC must consider those matters of compensation which are sought by a claimant in his or her Notice of Arbitration does not obviously predetermine the issues before it.

[38] I will therefore not deal any further with the issue of jurisdiction, but will move on to the question of whether or not the second panel erred in making the costs award.

2. <u>Did the Judge err in determining that the second panel's determination of the cost claims was reasonable?</u>

(a) Did the second panel err in awarding the costs of the action in the Court of Queen's Bench of Alberta?

[39] The second panel concluded that the respondent was entitled to $16,222.57 for his net legal fees, disbursements and GST. In its view, these costs were payable to the respondent as compensation for damages suffered by reason of the appellant's operations and thus, it was "proper and reasonable" for it to consider them. The second panel reached this conclusion for the following reasons.

[40] First, by reference to section 84 of the Act, the second panel stated that the arbitration procedures to determine compensation applied with respect to "all damage caused by the pipeline".

[41] Second, it pointed out that the respondent's legal fees had been claimed in his Notice of Arbitration and that, as a result, it was obliged to determine all compensation matters referred to therein.

[42] Third, the second panel expressed the view that these costs were expenses which had been made necessary by the operations of the appellant and, thus, that they constituted "damages". It

concluded its reasoning on this point by stating, at page 25 of its Reasons (Appeal Book, Vol. I, p. 156):

> […] Clearly, the Alliance attempt to accept the ROW [right of way] 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.

[43] The second panel then held, in the alternative, that the respondent's solicitor-client costs for the litigation in the Alberta Court of Queen's Bench were costs which had been reasonably incurred by the respondent in asserting his claim for compensation. As a result, these expenses were recoverable as costs pursuant to section 99 of the Act.

[44] The Judge dealt with this issue at paragraphs 62 to 70 of his Reasons. In particular, he stated at paragraph 69:

> [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.

[45] Thus, the Judge confirmed the second panel's alternative conclusion that the respondent's litigation costs were recoverable as costs under section 99 of the Act. With respect to whether these costs could be recovered by the respondent as compensation for damages, the Judge made no determination.

[46] In my view, both the Judge and the second panel were wrong in concluding as they did that the respondent's litigation costs were recoverable.

[47] I begin with section 99 of the Act, which provides at subsection (1) that where a PAC awards compensation to a person which exceeds eighty-five percent of the amount of compensation offered by a company, the company shall, as a result, pay all costs which the PAC finds "to have been reasonably incurred by that person in asserting that person's claim for compensation".

[48] As to subsection 99(2), it provides that, where the amount of compensation awarded to a person by the PAC does not exceed eighty-five percent of the amount of compensation offered by the company, the PAC may, in its discretion, order the company to pay the whole or part of the costs incurred by that person.

[49] In my view, the simple answer is that the costs incurred by the respondent in the Alberta litigation are not costs incurred by him "in asserting his claim for compensation". Those words, found at subsection 99(1) of the Act, can only mean the person's claim for compensation made in the arbitration proceedings before, in this case, the second panel. Thus, the legal costs incurred in the Alberta proceedings do not fall within the ambit of the subsection and, as a result, the second panel erred in law in determining that the respondent's litigation costs were allowable under subsection 99(1).

[50] In their *Law of Bilingual Interpretation*, 1st ed. (Toronto: LexisNexis, 2008), Michel Bastarache et al express the view that: "When two versions of a provision are not in conflict, courts are consistently prepared to refer to one version in order to confirm an interpretation reached on the basis of the other." To the same effect is the view of Pierre-André Côté found in *The Interpretation of Legislation in Canada*, 3d ed., (Toronto: Carswell, 2000), where he says at page 324: "Often the meaning in one language is confirmed by the other."

[51] I therefore turn to the French wording of subsection 99(1), which reads as follows:

> **99.** (1) Si l'indemnité accordé 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.
>
> [Emphasis added]

[52] The words "par l'exercice du recours", which literally translated mean "by the exercise of the recourse", can only be a reference to the recourse brought before the second panel by way of the respondent's Amended Notice of Arbitration. Thus, the French wording of the subsection supports entirely my view of the meaning of subsection 99(1).

[53] I am therefore of the opinion that both the English and French wording of subsection 99(1) are to the same effect. As Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 5th ed., (Toronto: LexisNexis, 2008), says at page 102:

> … Although the two versions of bilingual legislation may not be identical in every respect, for practical purposes they usually say much the same thing. In these circumstances, the shared meaning is usually the ordinary meaning of the words as established in both

> languages. Thus, the effect of relying on both versions is to lend further weight to the presumption in favour of ordinary meaning.

[54] I now turn to the second panel's main finding that the respondent's litigation costs were damages. In my view, the panel also erred in law in making this finding.

[55] Section 84 of the Act sets out the framework applicable to the determination of compensation matters by the PAC. It provides that compensation may be awarded in respect of damages caused by a pipeline, but excludes claims against a pipeline company "arising out of the activities of the company unless those activities are directly related to: (i) the acquisition of lands for a pipeline, (ii) the construction of the pipeline, or (iii) the inspection, maintenance or repair of the pipeline". Thus, damages that are caused by the activities of the company are only compensable if they are directly related to those matters enumerated at subparagraphs 84(1)*(a)*(i), (ii) and (iii).

[56] In addition, subsection 97(1) of the Act provides that the PAC must determine "all compensation matters" which are referred to in a Notice of Arbitration and, in so doing, the PAC must consider the factors set out at paragraphs 97(1)*(a)* to *(i)*. These factors include, for example, damage to lands and damage to livestock or other personal property affected by the operations of the company. However, the factors which are set out at subsection 97(1) clearly have no relevance to the costs which the respondent incurred in the Alberta legal proceedings.

[57] Therefore, it is to section 84 that one must turn to in order to determine the boundaries of the matters which are compensable, and in my respectful view, the costs incurred by the respondent

defending the appellant's action in the Alberta Court cannot possibly be characterized as a claim against the appellant arising out of its activities directly related to either the acquisition of lands for the pipeline, the construction of the pipeline, or the inspection, maintenance or repair thereof.

(b) Did the second panel err in its determination regarding the costs of the first arbitration proceedings?

[58] As I indicated earlier, the second panel allowed the respondent's costs of the first hearing, except for the costs "of actual appearances before the Previous PAC and correspondence with the Previous PAC" (Appeal Book, Vol. I, p. 159). The second panel came to its conclusion on the basis of its finding that the only portion of the arbitration proceedings which had been nullified was "the involvement of the Previous PAC" (Appeal Book, Vol. I, p. 159).

[59] The Judge dealt briefly with this finding at paragraphs 71 and 72 of his Reasons. After stating that the first panel had lost quorum, he indicated that "the arbitration process was a nullity". He then stated that, in his view, the award made by the second panel reflected "the fact that the first proceedings resulted in a nullity". He thus confirmed the second panel's finding. At paragraph 72 of his Reasons, he sets out his reasoning:

> [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 [*sic*] were explicitly excluded from the award. I do not agree with the appellant's argument on this issue.

In my view, the Judge erred in law in so concluding.

[60] In “The Law and Practice of Commercial Arbitration”, R.H. McLaren and E.E. Palmer (Toronto; 1982), the learned authors state on page 12 that “statutory arbitration” is a type of arbitration established by legislation to deal with certain types of disputes: for example, a conflict between the state and individuals where property is expropriated for government purposes. As opposed to other types of arbitration, such as consensual arbitration, the authors explain on pages 14-15 that “...statutory arbitrations may only deal with the matters within the scope and limitations of the enabling statute.” The authors further state on page 92 that, “[o]bviously, when the arbitration is pursuant to a specific statute, costs will be awarded according to the directions set out in the governing statute.”

[61] Since arbitration under the Act is clearly statutory arbitration, it is therefore necessary to refer to the Act in order to determine whether the second panel could award the costs of the first arbitration proceedings. Although the Act does not deal expressly with the consequence of a truncated PAC, an interpretation which I believe is consistent with the language of the Act is that the power of a PAC to award costs is premised on the issuance of an award, and that these costs may only relate to the proceedings which were before the same members who made the award.

[62] I come to this conclusion, in part, by reference to section 93 of the Act, which provides that three members of an arbitration committee constitute a quorum. In addition, I rely on section 91 of the Act, which stipulates that when the Minister is served with a Notice of Arbitration, the Minister shall appoint an arbitration committee and serve the notice on that committee.

[63] In this case, when the first panel lost its quorum and did not render a decision, the Minister had no choice but to appoint a second panel, and the arbitration process, in effect, had to recommence with the filing of an Amended Notice of Arbitration. It is clear from the Minister's letter dated August 11, 2005 (see para. 11 of these Reasons) that in appointing a second panel, the Minister was conscious of the hardship which might result to the parties. This notwithstanding, the Minister indicated that "after careful consideration", it had been determined that the proper course of action in the circumstances was to appoint a second panel.

[64] I should point out as well that the first arbitration proceedings ended through no fault of either party, and that they did not benefit either party in that the evidence adduced before the first panel was not placed before the second panel and the evidence adduced before the second panel was "called afresh" at the hearing.

[65] Finally, I refer to subsection 99(1) of the Act, and to the interpretation of this subsection which I have given earlier (see paras 47 to 51 of these Reasons). As I stated above, the costs that may be awarded by the PAC under this subsection are the costs incurred by the respondent in asserting his claim for compensation made in the arbitration proceedings before, in this case, the second panel. It follows that the costs incurred in the first arbitration proceedings, like the costs incurred in the Alberta proceedings, do not fall within the ambit of the subsection.

[66] The reasons for which the power of a panel to order costs does not extend to those proceedings over which it did not preside are not insignificant. Indeed, since the second panel did not hear or decide the first arbitration proceedings, it is not in a position to determine what award would have been made by the first panel. For instance, one cannot speculate as to whether the first panel would have awarded compensation to the respondent, and if the amount of compensation, if any, would have exceeded eighty-five percent of the amount of compensation offered by the appellant. Equally, since the second panel did not preside over the first arbitration, it cannot assess the reasonableness of the costs claimed in light of all the circumstances of the first arbitration proceedings, nor can it determine what, if any, exercise of discretion the first panel would have implemented in considering the costs of the first hearing.

[67] Thus, based on an interpretation of the relevant provisions of the Act, I come to the conclusion that the second panel was in error in excluding only those costs pertaining to the hearing and the correspondence which followed it. The arbitration proceedings recommenced upon the serving of the Amended Notice of Arbitration in November 2005 and, as a consequence, all costs incurred prior thereto cannot be recovered.

DISPOSITION

[68] I would therefore allow the appeal with costs, set aside the judgment of the Federal Court and, rendering the judgment which ought to have been rendered, I would allow the appellant's

appeal from the PAC's decision of September 18, 2006, and I would quash the awards of the second panel in regard to the cost claims.

"M. Nadon"

J.A.

"I agree.
Marc Noël J.A."

PELLETIER J.A. (CONCURRING)

[69] I come to the same conclusion as my colleague as to the proper disposition of this appeal. That said, I am of the view that Alliance's conduct in this matter has not been honourable and that it has caused Mr. Smith to incur unnecessary expenses. The fact that those expenses are not recoverable under the statutory scheme in issue in the appeal ought not to be taken as a vindication of Alliance's course of conduct.

[70] The expenses that are the subject of this appeal are the direct result of Alliance's disavowal of the position it took before the first Arbitration Committee. In its response to the first Notice of Arbitration, Alliance raised the issue of the effect of the releases that it had in hand (A.B., p. 175). At the hearing itself, Alliance abandoned that position and the hearing proceeded on the merits of the claim (A.B., p. 207-208). In spite of the fact that it had abandoned its reliance on the releases before the Arbitration Committee, Alliance then brought an application before the Court of Queen's Bench seeking, inter alia, a declaration that the releases in question were a complete answer to Mr. Smith's claim for compensation (A.B., p. 201-202) and an order directing the Arbitration Committee not to rule on Mr. Smith's claim until the issue of the releases was determined (A.B., p. 202). At the same time, Alliance wrote to the Arbitration Committee, asking it to refrain from deciding Mr. Smith's claim until the Court proceedings were completed (A.B., p. 205).

[71] Notwithstanding the fact that the injunction application was dismissed in October 2003 (A.B., p. 748), the Arbitration Committee did not render an award with respect to Mr. Smith's claim and eventually, in January 2005, one of its members was appointed to the Court of Queen's Bench

for Alberta (A.B., p. 879). The two remaining members of the Arbitration Committee were prepared to proceed to dispose of the case, but Alliance insisted that a new Arbitration Committee be appointed (A.B., p. 881-891).

[72] Alliance was perfectly entitled to plead the effect of the releases at the hearings before the first Arbitration Committee. It was under no obligation to abandon that position. However, having abandoned that argument before the first Arbitration Committee, it was unbecoming of Alliance to effectively stonewall Mr. Smith by reneging on its earlier position and commencing the proceedings which it did in the Court of Queen's Bench. In my view, Mr. Smith and the public are entitled to expect a higher standard of conduct from those who purport to act for the convenience of the public.

"J.D. Denis Pelletier"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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