Review and Variance Application by Mitch Bronaugh of Energy Cost Order 2004-04

November 16, 2004

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Decision 2004-101: Review and Variance Application by Mitch Bronaugh of Energy Cost Order 2004-04

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Published by

Alberta Energy and Utilities Board
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Calgary Alberta

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DECISION

The Alberta Energy and Utilities Board has considered the findings and recommendations set out in the following Board Member report and adopts the recommendations contained therein.

DATED in Calgary, Alberta, on November 16, 2004**.**

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

Neil McCrank, Q.C.
Chairman

ALBERTA ENERGY AND UTILITIES BOARD
Calgary Alberta

BOARD MEMBER REPORT RESPECTING
REVIEW AND VARIANCE APPLICATION BY MITCH BRONAUGH OF ENERGY COST ORDER 2004-04

Decision 2004-101
Application No. 1339860

1 RECOMMENDATION

Having fully and carefully considered all of the submissions, the Board Member recommends that Energy Cost Order (ECO) 2004-04 be varied to allow in full the travel costs claimed by Mr. Mitch Bronaugh.

2 INTRODUCTION

By way of letter dated March 22, 2004, Mr. Mitch Bronaugh applied to the Alberta Energy and Utilities Board (Board/EUB) for a review and variance (R&V) of ECO 2004-04 as it related to his cost claim filed for representation of Sid and Myrna Marty. Mr. Bronaugh claimed $20 925.00 in fees, disbursements, and GST for his participation at a public hearing to consider various applications by Polaris Resources Ltd. (Polaris), and in ECO 2004-04 the Board awarded him $6704.00. It was Mr. Bronaugh's position that the Board panel that presided over the initial hearing and rendered the cost decision made the following errors when it reduced his cost claim:

- Mr. Bronaugh contended that he was qualified to act as an advocate for parties and attached a copy of his curriculum vitae in that regard. He noted that he had represented interveners at a number of proceedings before the Board and that his qualifications had not been called into question in those instances.

- Mr. Bronaugh argued that it was inappropriate to reduce his hourly rate from $90.00 to $50.00. He pointed out that he had been representing interveners for 11 years and that he could have asked for $210.00/hr under the Board's *Scale of Costs*. He noted that articling students are entitled to recover $90.00/hr and stated that given his experience, knowledge, and track record, $90.00 was not unreasonable. He also pointed out that he had claimed the same hourly rate for earlier proceedings without comment from the Board.

- Mr. Bronaugh stated that he coordinated the Martys' intervention and that he was responsible for hiring their expert, Lawrence Nkemdirim. He noted that Mr. Nkemdirim's costs were approved and that the Board commented on his usefulness. He suggested that it was inconsistent for the Board to criticize the intervention while applauding the evidence.

- Mr. Bronaugh stated that the Board's determination that the issues he raised at the proceeding were largely moot was vague and general. He stated that this criticism is unsubstantiated, unfair, and invalid.

- Mr. Bronaugh stated that there was nothing in EUB *Guide 31A: Guidelines for Energy Cost Claims* that said that he could not recover travel costs from British Columbia. He noted that he had recovered such costs in the past in EUB proceedings.

By way of letter dated March 23, 2004, the EUB invited the office of McLennan Ross LLP, counsel for Polaris, to file comments with respect to the R&V application. On April 6, 2004, the EUB received comments from Mr. Daron Naffin of McLennan Ross and, by way of letter dated April 19, 2004, Mr. Bronaugh filed a response to Mr. Naffin's comments.

On July 28, 2004, the Board advised interested parties that it had considered the submissions filed and granted Mr. Bronaugh's request for a review proceeding. The Board advised that it was granting a review to consider the following issues:

- Did the Board panel commit an error of law or jurisdiction when it determined that the hourly rate of $90.00 claimed by Mr. Bronaugh was excessive, and
- did the Board panel commit an error of law or jurisdiction when it reduced Mr. Bronaugh's travel disbursements on the grounds that he should be entitled to recover travel disbursements commensurate with travel from Calgary, and not from his home in British Columbia?

The following additional issue was raised in correspondence from Polaris dated August 24, 2004:

- Is it appropriate for non-lawyers to represent interveners at EUB hearings?

3 BACKGROUND

Polaris applied to the EUB for the following:

- Pursuant to Section 2.020 of the *Oil and Gas Conservation Regulations* (OGCR), Polaris applied for a licence to drill a vertical level-3 critical gas well from a surface location in Legal Subdivision (LSD) 11 of Section 32, Township 10, Range 2, West of the 5th Meridian (11-32 well).
- Pursuant to Section 4.040 of the OGCR, Polaris applied for an order to establish a special drilling spacing unit (DSU) comprising Sections 32 and 33 of Township 10, Range 2, West of the 5th Meridian, with the target area being within the DSU and having sides 300 metres (m) from and parallel to the sides of the DSU, for the production of gas from all zones below the top of the Mississippian System.
- Pursuant to Section 80 of the *Oil and Gas Conservation Act* (OGCA), Polaris applied for an order prescribing that all tracts within the special DSU comprising Sections 32 and 33 be operated as a unit for the production of gas from all zones below the top of the Mississippian System through the 11-32 well.

The Board held a hearing in Maycroft, Alberta, commencing on September 9, 2003, before Presiding Board Member T. M. McGee and Acting Board Members M. J. Bruni, Q.C., and D. D. Waisman, C.E.T. On December 16, 2003, the Board panel issued *Decision 2003-101*. On February 26, 2004, the Board issued ECO 2004-04 with respect to the proceeding.

4 VIEWS OF MR. BRONAUGH

In addition to the alleged errors listed above, Mr. Bronaugh also filed an additional submission by way of e-mail on August 11, 2004. Mr. Bronaugh referenced Section 1 of the Board's *Rules of Practice*, which states the following:

> These Rules must be liberally construed in the public interest to ensure the most fair, expeditious and efficient determination on its merits of every proceeding before the Board.

Mr. Bronaugh discussed the implementation of *Guide 31A* that took place in 2001. He noted that the implementation involved a stakeholders' consultation process to which Mr. Bronaugh was invited, including discussions and proposed suggestions with respect to the *Scale of Costs*. Mr. Bronaugh further noted that the hourly rate he charges is less than that allowed under the *Scale of Costs*.

Mr. Bronaugh expressed concern about the Board panel's determination that his hourly rate should be reduced due to a lack of qualifications and the fact that he was a "lay person." Mr. Bronaugh argued that the Board has always known that he is not a lawyer and pointed out that his hourly rate had not been challenged by the Board on these grounds before. Further, Mr. Bronaugh stated that the Board panel did not contact him to request what his "qualification" might be. Mr. Bronaugh took the position that the Board improperly assumed that because he is not a lawyer he did not have qualifications. Mr. Bronaugh alleged that this suggested that the Board was prejudiced in making its decision.

With respect to travel costs, Mr. Bronaugh submitted that *Guide 31A* did not indicate that costs resulting from travel outside of Alberta would be disallowed. He argued that if such policy changes were being contemplated by the Board, they should have been announced during the consultation process leading up to the issuance of *Guide 31A*.

Mr. Bronaugh submitted that the determinations made in ECO 2004-04 were "an ambush without warning, were prejudicial, unfair, and detrimental." He stated that the abrupt and irregular departure from the Board's normal practice was not compatible with Section 1 of the Board's *Rules of Practice* and as such resulted in an error in law.

With regard to allegations by Polaris that he was improperly acting as a lawyer, contrary to the *Legal Professions Act*, Mr. Bronaugh asserted that he was not representing people in a court of law and that the act did not apply to this situation. He pointed out that the Board is a quasi-judicial body with a history of awarding costs to intervener representatives who were not lawyers.

5 VIEWS OF POLARIS

By way of letter dated August 24, 2004, the Board received comments from Daron Naffin, of McLennan Ross, on behalf of Polaris.

Polaris submitted that the issues involved in this review went beyond what costs Mr. Bronaugh might recover for representing his clients. It argued that the Board must consider who might

appear before it in a representative capacity, what role such parties should play, and what safeguards were in place to ensure that parties being represented by individuals who were not trained legal professionals had their interests effectively served.

Polaris took the position that Mr. Bronaugh's services were not the services of an expert or a consultant; rather they were put forward as the services of an advocate or lawyer. Mr. Naffin noted that under Section 106 of the *Legal Profession Act*, Mr. Bronaugh was prohibited from charging such services.

Polaris argued that Mr. Bronaugh's role had taken the form of practising as a barrister or solicitor when representing his clients, which was in contravention of Section 106(1)(a) of the act. Section 106 reads as follows:

> 106 No person shall, unless the person is an active member of the Society,
>
> (a) practice as a barrister or as a solicitor
>
> (b) act as a barrister or solicitor in any court of civil or criminal jurisdiction,
>
> (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
>
> (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.

Polaris submitted that the Martys' cost claim in connection with Mr. Bronaugh's hourly rate should be dismissed or, in any event, should be no more than what was initially awarded in ECO 2004-04.

With respect to whether or not the Board panel committed an error of law or jurisdiction when it reduced Mr. Bronaugh's travel disbursements on the basis that he should be entitled to recover travel disbursements commensurate with travel from Calgary, Polaris submitted that no error was committed.

Polaris took the position that legal authority supported the Board panel's decision to only pay Mr. Bronaugh's travel costs commensurate with travel from Calgary to Maycroft. Specifically, Polaris referenced Justice Slatter, of the Alberta Court of Queen's Bench, in the decision of *Hansraj v. Ao* [2002] A.J. No. 1038 (Alta. Q.B.) wherein he stated:

> It is undoubtedly true that parties have the right to select counsel of their choice. However, that is not the issue; the issue is who is to pay for that choice. Where counsel are retained outside the judicial district where the action is commenced, the travel expenses of that counsel are not taxable unless the party who is retained out-of-town counsel can demonstrate that there were no competent counsel within the judicial district who could handle the matter, or other special reasons.

Based on the above, Polaris submitted that it should not be required to pay Mr. Bronaugh's travel costs from Nelson, British Columbia. Further, Polaris stated that a great quantity of competent legal representation does exist in Calgary and that a member of that community could easily have been retained by the Martys.

6 VIEWS OF THE BOARD

6.1 Introduction

As noted above, the Board granted this review on two specific grounds. In its response to the Board's Notice of Review, and in relation to the first ground, Polaris raised the question of whether awarding Mr. Bronaugh any hourly rate at all was an error of jurisdiction. Polaris contended that as Mr. Bronaugh was not a lawyer he was statutorily barred from charging fees for representing the Martys pursuant to the *Legal Professions Act*. The Board Member will address this issue prior to addressing the two primary grounds for review.

6.2 Representation of Interveners by Non-Lawyers

The Board Member has carefully reviewed the cases cited by Polaris in support of its contention that Mr. Bronaugh was essentially practising law when he represented the Martys at the proceeding. The Board Member notes that the cases relied upon concerned non-lawyers appearing in court and not before administrative tribunals. In the Board Member's view, this is an important distinction that cannot be ignored. While not provided by Polaris, the Board Member finds that the New Brunswick Court of Appeal's decision in *Thomas* v. *Assn. of New Brunswick Nursing Assistants* [2003] N.B.J. No. 327 (*Thomas*) is instructive with respect to this issue.

In *Thomas*, the Court of Appeal considered whether the Discipline Committee of the Association of New Brunswick Registered Nursing Assistants erred when it determined that a union representative could not represent a nursing assistant in a disciplinary hearing on the grounds that his involvement was tantamount to practising law. The Court found that the participation of lay representatives in administrative proceedings is consistent with the functioning of such tribunals and is generally not an impediment to achieving legislative objectives underlying the establishment of the tribunal.

The Court found that there are generally two categories of non-lawyers that are entitled to appear before administrative tribunals: those who simply act as friend or agent, with no particular expertise, and those who possess expertise relevant to the tribunal's particular deliberations. The Court stated that tribunals must assess the appropriateness of allowing lay representation based upon the specific circumstances of the proceeding. It emphasized that the tribunal, as master of its own procedure, may determine that there are circumstances where such representation is inappropriate or of little assistance and may thus consequently decide to exclude the agent's participation.

The Court granted the appeal and summarized its decision as follows:

> In summary, at common law, persons appearing before adjudicative tribunals possess the right to be represented by an agent of their choosing. But that right is not absolute. Tribunals retain a residual discretion to limit participation to those persons that the tribunal believes will facilitate, rather than hinder, the adjudicative process.

It has long been the Board's practice to allow non-lawyers to appear before it as representatives or agents of interveners. The Board Member also understands that other tribunals in Alberta, including the Environmental Appeal Board, the Surface Rights Board, and the Natural Resource

Conservation Board, have adopted a similar approach. The Board Member finds that this custom is consistent with the principles of openness and flexibility that characterize administrative tribunals. The Board Member recognizes that the issues raised in proceedings before it may be complex and technical in nature and that the Board's application and hearing process may present challenges to those who have had little previous experience appearing before an administrative tribunal.

The Board Member acknowledges that Mr. Bronaugh has, for more than ten years, provided assistance to numerous interveners when appearing before the EUB. The Board has previously recognized that Mr. Bronaugh possesses some specialized knowledge with respect to the Board's processes, practices, and procedures.[1] The Board Member is of the view that, for the most part, Mr. Bronaugh's participation has assisted both those that he represents and the Board itself in understanding the issues raised in the various applications he has been involved in.

It is not the Board Member's impression that Mr. Bronaugh provides legal advice to his clients or that he is practising as a barrister or solicitor. Rather, it has been the Board's experience that he assists interveners in understanding the technical issues raised by application and works with other consultants to present the intervener's positions in an able and effective manner. While Mr. Bronaugh does sometimes engage in cross-examination of applicant witnesses, it is the Board Member's view that this is not an exercise that falls within the exclusive domain of lawyers. The Board itself seeks assistance from its technical staff who occasionally examine witnesses at its proceedings.

With respect to the proceeding in question, the Board Member has carefully reviewed the record and is of the view that Mr. Bronaugh's participation was consistent with his previous appearances before the Board. The Board Member notes that Mr. Bronaugh generally addressed issues of a technical nature. In that regard, the Board Member believes that it was appropriate to award costs to Mr. Bronaugh in recognition of and commensurate with the degree of his assistance to the Martys as a general consultant.

In summary, it is the Board Member's view that interveners are entitled to be represented by an agent of their choosing, be it a lawyer, a consultant with expertise in a particular subject matter, or a family friend. The Board Member finds that such participation will be appropriate as long as an intervener's chosen representative assists the intervener and contributes to a better understanding of the issues before the Board. Such participation will enable cost recovery, but only according to the requirements of the *Board's Rules of Practice* and *Guide 31A*.

6.3 Assessing Cost Claims

Regarding the question of whether the Board committed an error of law or jurisdiction when it determined that the hourly rate of $90.00 claimed by Mr. Bronaugh was excessive, when assessing claims for costs, the Board is guided by the factors outlined in Section 55 of the *Rules of Practice* and by *Guide 31A*. However, the Board Member appreciates that there is no specific formula for deriving the appropriate award. The determination of a cost award requires, to some degree, a subjective assessment of the participant's contribution to the process. The

[1] For example, Cost Orders 99-23 and 2000-50 and the associated letters.

determination involves the consideration of the effectiveness of the participation of the parties and, in turn, the reasonableness of the costs claimed given that assessment.

In the Board Member's view, assessment of costs is most appropriately conducted pursuant to the direction of the hearing panel, as it will have observed firsthand the effectiveness of the participant's involvement in the proceeding. Given the nature of such an assessment, it is the Board Member's opinion that a cost award should be varied only when the initial award represents a clear error of law or jurisdiction. For the reasons that follow, the Board Member is of the view that Mr. Bronaugh has failed to demonstrate that such an error was committed by the Board when it determined that Mr. Bronaugh's hourly rate was excessive in the circumstances.

The Board derives its authority to award costs from Section 28 of the *Energy Resources Conservation Act*. Subsection 28(3) states:

> Where the Board makes an award of costs under subsection (2), it may determine
>
> (a) the amount of costs that shall be paid to a local intervener, and
>
> (b) the persons liable to pay the award of costs.

The Board Member finds that Subsection (3) provides the Board with significant discretion to determine the amount of costs that are ultimately awarded to a local intervener. While the Board will generally not question the hourly rate of an individual appearing before it if it is in accordance with the *Scale of Costs*, the Board Member considers that the Board has the residual authority to make a reduction to the claimant's hourly rate to reflect the value of his or her contribution.

Generally, when the Board determines that a participant's claim is not commensurate with the value provided to the Board, it will reduce the amount requested without specific reference to the hourly rate claimed. In ECO 2004-04, the Board Panel reduced Mr. Bronaugh's claim on the ground that his hourly rate was excessive given the expertise demonstrated at the Polaris proceeding and on the ground that his participation did not "overly assist the Board in obtaining a clearer understanding of the issues before it." It is the Board Member's opinion that the reduction to his claim, based on the dual grounds, was not unreasonable given the broad discretion granted in Subsection 28(3).

The Board Member considers, however, that the Board panel's determination as to Mr. Bronaugh's hourly rate was specific to the circumstances of the Polaris proceeding and that Mr. Bronaugh should in no way be precluded from asserting claims based upon his $90.00 hourly rate at future proceedings. Expertise demonstrated and assistance to the Board, assessed on a case-by-case basis, will continue to be the primary considerations when determining the reasonableness of the costs claimed.

6.4 Assessing Travel Cost Claims

Regarding the question of whether the Board committed an error of law or jurisdiction when it reduced Mr. Bronaugh's travel disbursements on the grounds that he should be entitled to recover only those travel disbursements commensurate with travel from Calgary, the Board Member notes that neither *Guide 31A* nor the *Rules of Practice* provides direction with respect to

this issue. The Board Member notes, however, that it has long been the Board's practice to allow interveners to engage counsel and consultants of their choosing and to require the applicant to pay the associated travel as long as they are reasonable.

The Board Member notes that other interveners at the proceeding hired counsel and consultants from outside of Calgary and that similar adjustments were not made to those claims. Further, the Board Member observes that many of the Board's hearings are held in rural Alberta and that the introduction of unreasonable limitations with respect to where counsel and experts can be hired from would inject significant complexity into the EUB's cost process.

The Board Member notes that a similar restriction has not previously been employed by the Board and that Mr. Bronaugh has been able to recover his travel expenses in the past. In the Board Member's view, the reduction of Mr. Bronaugh's travel disbursements would establish a new policy direction from the Board that was not conveyed to the parties prior to the proceeding. It is the Board Member's view that the Board made an error of law when it purported to change Board policy with respect to travel disbursements without providing notice to potentially affected parties.

Dated in Calgary, Alberta, on November 15, 2004.

ALBERTA ENERGY AND UTILITIES BOARD

(Original signed by)

B. T. McManus, Q.C.
Board Member