Burlington Resources Canada Ltd.

Application for Single Well at 11-29-39-11 W4M

Cost Awards

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Energy Cost Order 2005-001: Burlington Resources Canada Ltd.
Application for Single Well Licence at 11-29-39-11 W4M
Application No. 1342210

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Contents

ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

Burlington Resources Canada Ltd.	**Energy Cost Order 2005-001**
Single Well Application	**Application No. 1342210**
LSD 11-29-39-11 W4M	**File No. 8000-1342210-01**

1 INTRODUCTION

On April 14, 2004 the Alberta Energy and Utilities Board (EUB/Board) received an application from Burlington Resources Canada Ltd. (Burlington) for a single well at 11-29-39-11 W4M to produce sweet gas from coal bed seams in the Upper Mannville formation.

The Board received an objection from Julian Bodnar on behalf of his clients H. Thomas and M. Thomas. Given Mr. and Mrs. Thomas' proximity to the area affected by the application the Board granted standing and noted that there was potential for direct and adverse impact based on the proposed routing of the access road. In May 2004 the subject application was set down to be considered at a public hearing. Further, in June of 2004 the Board scheduled a pre-hearing meeting to commence on July 30, 2004.

On July 2, 2004 Burlington filed an amended route to access the proposed well surface location. The Board determined that the amended route was not located immediately adjacent to or on any lands owned by Mr. and Mrs. Thomas. By way of letter dated July 19, 2004 the Board advised Mr. Bodnar that given Burlington's proposed amended access route, the potential for direct and adverse impact with respect to Mr. and Mrs. Thomas had not been established and accordingly the objection was dismissed.

On July 27, 2004 the Board issued the well licence, being Licence No. 0312531.

On August 26, 2004 the Board received a cost claim from Mr. Bodner, counsel for Mr. and Mrs. Thomas, totaling $23,794.21. On September 16, 2004 Burlington was invited to provide a response to the cost claim by September 24, 2004. Counsel for Burlington, Mr. Luft, advised that their offices were not in receipt of the cost claim and as such requested an extension to file comments by October 15, 2004. The Board accepted the request for an extension. Burlington's comments were received by the Board on September 29, 2004 and Mr. Bodnar filed a response to the comments on October 15, 2004.

Taking the foregoing into account the Board considers that the cost process for this particular matter closed on October 15, 2004.

2 VIEWS OF THE BOARD – Authority to Award Costs

In determining local intervener costs, the Board is guided by its enabling legislation. In particular, by section 28 of the *Energy Resources Conservation Act* (ERCA) which reads as follows:

> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,
>
> (a) has an interest in, or
> (b) is in actual occupation of or is entitled to occupy
>
> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

It is the Board's position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the project in question.

When assessing costs, the Board will have reference to Part 5 of the *Rules of Practice* and to its *Scale of Costs*.

Section 55(1) of the *Rules of Practice* reads as follows:

> Section 55(1) The Board may award costs in accordance with the Scale of Costs, to a participant if the Board is of the opinion that:
>
> (a) the costs are reasonable and directly and necessarily related to the proceeding and;
> (b) the participant acted responsibly in the proceeding an contributed to a better understanding of the issues before the Board.

3 VIEWS OF THE PARTIES

3.1 Burlington

By way of letter dated September 29, 2004 Burlington submitted that Mr. Bodnar's cost claim should be rejected in its entirety. Burlington submitted 5 areas of concern including the timing of the claim, intervener standing pursuant to section 28(1) of the ERCA, the nature and extent of the costs claimed, and the reasonableness and responsibility of the claim.

Burlington submits that the claim is statute barred by virtue of section 53(1), Part 5 of the Board's Rules of Practice which requires that a cost claim be submitted within 30 days after the proceeding has closed and that the participant shall serve a copy of the claim on the other participants. Further, that Guide 31A states that "*The EUB will not consider claims received after the 30-day period unless extraordinary circumstances prevented timely filing.*"

Burlington takes the position that the Thomas family does not meet the requirements set out in section 28(1) of the ERCA. Specifically, Burlington submits that the Thomas family does not hold any legal ownership or legal rights to land on which the subject well would be located or accessed and that the land is wholly owned by the Hutterian Brethren of South Bend. Burlington notes that both Flagstaff County and the Hutterian Brethern of South Bend did not object to the location of the well or the access road. As such, Burlington argues that the Thomas family does not hold the necessary interest in land. Burlington also takes the position that the Thomas family does not meet the second test of section 28(1) of the ERCA, such that there is the potential for direct and adverse effect.

Burlington notes that the Board did attempt to schedule a prehearing meeting but did not issue a Notice of Hearing. Burlington found Mr. Bodnar to be avoiding a commitment towards the process and noted that Mr. Bodnar's correspondence of June 21, 2004 put forward the position that it was premature to be setting a hearing date. Further, Burlington found that there was a lack of effort on Mr. Bodnar's part to commit to any reasonable time frame to advance the process.

Burlington recalls that after receiving a list of questions from the Thomas family it provided a complete response and offered to meet with the family. Rather than receiving a reply, Mr. Bodnar filed an objection with the Board. Burlington submits that from that point forward it was unsuccessful in eliciting any clear and coherent issues from Mr. Bodnar to which it could address for the Thomas family. It is Burlington's position that Mr. Bodnar's efforts have not been geared towards resolving the matter by clear communication and discussion but rather chose to delay and confuse the matter and refused to clearly document his clients' issues resulting in significantly reducing any meaningful discussion or timely resolution.

Burlington also recalls that after considerable efforts to engage in the Appropriate Dispute Resolution (ADR) process, Mr. Bodnar rejected the offer. Further, with respect to the testing of the domestic water well, Burlington continues to experience the same level of frustration in attempting to provide proper testing. Specifically, Mr. Bodnar rejected the engagement of Hydrogeological Consultants Ltd. to conduct the standard tests. Rather, Burlington has utilized a third party consultant retained by and with clear connections to Mr. Bondar; extended the suite of tests beyond the commitment; have samples tested at a laboratory of Mr. Bodnar's choosing; and paying for the cost of the expanded testing.

In closing, Burlington submits that the intention has not been to achieve a clear and measurable result, but rather delay, increase costs and misuse both the process and the good intentions of industry.

3.2 Thomas Family

On October 15, 2004 the Board received a response from Mr. Bodnar regarding Burlington's comments. Mr. Bodnar submits that the comments filed by Burlington did not correctly identify the position of the Thomas family in this matter and that they appeared to be a tactical attempt at discouraging landowners from retaining professional assistance when addressing the implications of oil and gas operations. Further, Mr. Bodnar found that the comments admonished the Thomas' for taking a stand in protecting their interests.

With respect to the legal costs contained in the claim, Mr. Bodnar submits that they were properly incurred in accordance with the Board's rules, and fairly depict the involvement of counsel.

With respect to the comments filed regarding the ADR process, Mr. Bodnar submits that the comments serve to enhance the public image of Burlington and in this particular case Burlington had decided within its own quarters what it believed to be "right" for the Thomas family, announced its decision, and then defended that decision. It is Mr. Bodnar's position that this approach is not reflective of the true intentions and spirit of the ADR process.

4 VIEWS OF THE BOARD

The Board has considered the cost claim filed on behalf of the Thomas family which consists of legal fees in the amount of $18,350.00, disbursements of $1,025.00, and applicable GST of $1,356.25. Professional fees incurred by Landcore International Corp. in the amount of $1,063.50, disbursements of $114.50, and applicable GST of $82.46, and an honorarium for Mr. Thomas in the amount of $1,802.50. The cost claim totals $23,794.21.

In considering the costs being claimed the Board has reviewed and considered the comments filed by Burlington and the response filed by Mr. Bodnar.

Local Intervener Status

During the course of the Application the Board determined that the development of the access road, at the original suggested location, could cause Mr. and Mrs. Thomas to be directly and adversely affected by associated impacts including noise, dust, safety, and disruption to their farming activities. In that regard the Board notes that the original location was amended by Burlington and by way of letter dated July 19, 2004 the Board issued a letter to Mr. Bodnar dismissing his clients' objection. Accordingly, the Board finds that Mr. and Mrs. Harvey do qualify as local interveners pursuant to section 28(1) of the ERCA up to July 19, 2004 and are therefore eligible to apply for cost recovery to this point.

Notice of Hearing

By way of letter dated May 27, 2004 the Board advised Mr. Bodnar that it had granted a hearing for this matter to consider the objections filed by his clients. Although the Board's correspondence did not provide dates for the hearing it did advise that it intended to set the matter down for a hearing in the next 8 to 12 weeks. Part 7 of Guide 31A, Guidelines for Energy Cost Claims, states the following with regard to the point in time in which costs may be claimed from.

> The EUB's usual practice (there are exceptions) is to acknowledge only those costs incurred after the EUB has issued a notice of hearing. It is generally the EUB's position that until a notice of hearing has been issued, there is no certainty that a hearing will be held. The EUB finds that in many cases the prenotice interactions between interveners and applicants relate to compensation matters and not public interest issues. The EUB recognizes, however, that it is sometimes necessary for local interveners to incur costs prior to the notice and that such costs may be reasonable and directly and necessarily related to the intervention in question.

The Board recognizes that a Notice of Hearing was not issued, however, given the nature of its correspondence of May 27, 2004 the Board finds that it would have been reasonable for Mr. Bodnar to anticipate a Board hearing. Accordingly, the Board finds that it is appropriate to consider costs incurred from May 27, 2004 to July 19, 2004.

Julian Bodnar, Barrister and Solicitor

The Board has reviewed Mr. Bodnar's portion of the claim and notes that 26.5 hours have been claimed between the time-period acceptable to the Board for cost recovery. In considering these hours the Board has reviewed the statement of account submitted as well as the correspondence submitted to the Board by Mr. Bodnar during the course of the Application. It has been made clear to the Board that it was not Mr. Bodnar's intent to have these matters proceed to a hearing

as noted in his various letters to the Board[1]. The Board has determined that Mr. Bodnar was not preparing for a hearing but rather attempting to negotiate the issues with Burlington directly. While the Board appreciates and encourages parties to attempt to resolve concerns as much as possible themselves, it is the Board's view that compensation for such negotiations is to be dealt with in the context of the negotiations themselves and not through the Board's cost recovery process. The Board notes that a cost regime exists for those costs incurred for negotiations and facilitations. In that regard the Board notes the following statement from Informational Letter 2001-1.

> For the Preliminary ADR Meeting, industry participants should be responsible for the costs, including the direct third-party costs of landowners and the public. Costs and payment for future ADR options should be discussed and agreed to at the Preliminary ADR Meeting.

The Board has also determined, in light of the attempted negotiations, that the costs have not been incurred in accordance with section 55(1) of the Board's Rules of Practice which allows for an award of costs which are reasonable and directly and necessarily related to the proceeding and contribute to a better understanding of the issues before the Board.

The Board does find however, that Mr. Bodnar did have to deal with the issue of the Application going to hearing and a pre-hearing by reviewing and drafting correspondence on the matter, as well as having discussions with his clients. In that regard the Board finds that 8 hours of attending to this particular concern in the Application is appropriate. It is the Board's opinion that the remaining hours relate to attempted negotiations. The Board finds that Mr. Bodnar's hourly rate of $250.00 is in accordance with Guide 31A and therefore legal fees are approved in the amount of $2,000.00.

With respect to the disbursements being claimed the Board finds the amount of $1,025.00 to be excessive for the period of time the Board has allocated towards consideration of cost recovery. From a review of Mr. Bodnar's account for the allocated time period, the Board has determined that no client meetings took place and that the majority of expenses relate to long distance telephone calls to Mr. Bodnar's clients, Burlington, and Landcore International Corp., and minor photocopying costs. Again the Board recognizes that although theses expenses are incurred during the acceptable time period a majority of the costs have been incurred as a result of negotiations.

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[1] Letter to EUB dated May 18, 2004. "In speaking with Diana Pane of Burlington today, it is our hope to discuss this matter further tomorrow with a view to resolution without formal Hearing before the Board."

Letter to EUB dated May 24, 2004. "We would still hope to resolve the matter without Hearing. Therefore, until we are able to meet with Burlington and fully assess the implications of its intentions, my clients will not be in a position to respond to this case. It is by no means possible for my clients to prepare for a Hearing in these circumstances."

Letter to EUB dated June 2, 2004. "In short, my clients and others interested in this topic will not concede to a Hearing on short notice. We would entertain a Pre-Hearing Conference instead, so that the concerns and interested parties could be identified."

Letter to EUB dated June 21, 2004. "…we would suggest that given the complexity of the issues here, it would be premature to be setting a Hearing date. Just as the issues can be better defined through the Pre-Hearing Meeting, so can the timing of the Hearing in order that there is sufficient preparation time for proper addressing of those issues, and with respect to other commitment of affected parties."

Taking all of the foregoing into account the Board disallows the mileage claim of $360.00; approves one third of the long distance telephone claim ($261.00 / 3 = $87.00); approves fax charges in the amount of $50.00; and approves photocopying costs as claimed in the amount of $10.00. The total amount of disbursements approved is $147.00.

The total amount approved for Mr. Bodnar is $2,297.29 which is inclusive of applicable GST in the amount of $150.29.

Landcore International Corp. (Landcore)

With respect to Landcore's portion of the claim, the Board applies the same determination regarding the acceptable time-period in which costs may be considered, May 27, 2004 to July 19, 2004. Although Landcore did incur 2.9 hours during this time, the Board is of the view that Landcore's involvement during this time was dedicated to negotiations on behalf of Mr. and Mrs. Harvey. As determined above with respect to Mr. Bodnar, costs incurred as a result of negotiations are not eligible for cost recovery. There has been no indication by way of the cost claim or the correspondence with respect to the Application file that Landcore was involved with any aspect of the Board's decision to set this matter down for hearing. It appears to the Board that this matter was dealt with by Mr. Bodnar.

Taking all of the foregoing into account the Board denies Landcore's cost claim in full.

Harvey Thomas

Mr. Thomas' portion of the claim, an honorarium in the amount of $1,802.50, was concluded based on the hourly rates of $75.00 and $100.00. It is not the Board's practice to award fees to individual interveners based on hourly rates, rather, Part 6 of Guide 31A provides for various ranges of honorariums based on certain circumstances. Part 6.1.1 provides the following.

> If an individual intervener hires a lawyer to assist with the intervention and the lawyer is primarily responsible for the preparation of the intervention, the Board generally will not provide an honorarium to the individual for his or her preparation efforts. In situations where both the lawyer and the individual contribute substantially to the preparation of the intervention, the Board may consider an honorarium in recognition of the individual's efforts.

In this particular instance, the Board recognizes that Mr. and Mrs. Thomas were represented by counsel as well as Landcore. In addition and as already determined, the majority of this intervention did relate to negotiating the matters at hand with intent to avoid the Board's process. The Board has reviewed the timekeeping records of Mr. and Mrs. Thomas and finds that the hours incurred during the period of May 27, 2004 to July 19, 2004 were related to reviewing documentation and discussions with counsel. The Board does not find that these activities, totaling 7 hours, warrant an honorarium. It is the Board's view that the role of Mr. and Mrs. Harvey during this period was not related to assisting counsel with preparation for attending a hearing before the Board.

Taking all of the foregoing into account the Board denies Mr. Thomas' claim for an honorarium.

5 ORDER

IT IS HEREBY ORDERED THAT:

(1) Burlington Resources Canada Ltd. shall pay intervener costs in the amount of $2,297.29.

(2) Payment under this order shall be made to Julian Bodnar, 607 Lenore Drive, Saskatoon, Saskatchewan, S7K 5G7.

Dated in Calgary, Alberta on this 13th day of January, 2005.

ALBERTA ENERGY AND UTILITIES BOARD

Original Signed by Thomas McGee

Thomas McGee
Board Member