



Canadian Natural Resources Ltd.

Application for a Well Licence, a Facility Licence, and
Two Pipeline Licences
Bentley Field

Cost Awards

January 15, 2009

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2009-001: Canadian Natural Resources Ltd., Application for a Well Licence,
a Facility Licence, and Two Pipeline Licences
Bentley Field

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CONTENTS

Decision	1
Examiner Report	3
1 Recommendation	3
2 Introduction.....	3
2.1 Background.....	3
2.2 Cost Claim.....	4
3 Views of the Board —Authority to Award Costs.....	4
4 Views of the Parties	5
4.1 Views of CNRL.....	5
4.2 Views of David Zarowny	6
5 Views of the Board	7
6 Order	9

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**CANADIAN NATURAL RESOURCES LTD.
APPLICATION FOR A WELL LICENCES, A
FACILITY LICENCE, AND TWO PIPELINE
LICENCES
BENTLEY FIELD**

**Energy Cost Order 2009-001
Applications No. 1518483, 1525506,
1525527, and 1525629
Cost Application No. 1583954**

DECISION

The Energy Resources Conservation Board has considered the findings and recommendation set out in the following examiner report, adopts the recommendation, and directs that Cost Application No. 1583954 be approved.

Dated in Calgary, Alberta, on January 15, 2009.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by M. J. Bruni, Q.C.”

M. J. Bruni, Q.C.
Board Member

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**EXAMINER REPORT RESPECTING
CANADIAN NATURAL RESOURCES LTD.
APPLICATION FOR A WELL LICENCES, A
FACILITY LICENCE, AND TWO PIPELINE
LICENCES
BENTLEY FIELD**

**Energy Cost Order 2009-001
Applications No. 1518483, 1525506,
1525527, and 1525629
Cost Application No. 1583954**

1 RECOMMENDATION

Having carefully considered all of the submissions, the examiners recommend that the Energy Resources Conservation Board (ERCB/Board) approve Cost Application No. 1583954 as set out below.

2 INTRODUCTION

2.1 Background

Application No. 1518483

Canadian Natural Resources Ltd. (CNRL) submitted an application to the Energy Resources Conservation Board (ERCB/Board), in accordance with Part 4 of the *Pipeline Act*, for approval to construct and operate a pipeline for the purpose of transporting natural gas containing no hydrogen sulphide (H₂S) from an existing well at Legal Subdivision (LSD) 10, Section 33, Township 58, Range 7, West of the 4th Meridian, to an existing tie-in point at LSD 7-33-58-7W4M. The proposed pipeline would be about 0.53 kilometres (km) in length, with a maximum outside diameter of 114.3 millimetres (mm).

Application No. 1525506

CNRL submitted an application, in accordance with Section 2.020 of the *Oil and Gas Conservation Regulations (OGCR)*, for a licence to drill a well from a surface location at LSD 4-34-58-7W4M. The purpose of the well would be to obtain crude oil containing no H₂S from the Upper Mannville Formation.

Application No. 1525629

CNRL submitted an application, in accordance with Section 7.001 of the *OGCR*, requesting approval to construct and operate a multiwell oil battery at LSD 4-34-58-7W4M for the purpose of storing produced crude bitumen.

Application No. 1525527

CNRL submitted an application, in accordance with Part 4 of the *Pipeline Act*, for approval to construct and operate three pipelines for the purpose of transporting fuel gas containing no H₂S from an existing tie-in point at LSD 13-27-58-7W4M to an existing well at LSD 4-34-58-7W4M, from an existing tie-in point at LSD 14-27-58-7W4M to an existing well at LSD 11-27-58-7W4M, and from an existing tie-in point at LSD 11-27-58-7W4M to an existing well at LSD 6-27-58-7W4M.

The proposed well, multiwell oil battery, and pipelines form a project that would be located about 16 km northwest of the Town of Elk Point.

David Zarowny filed an objection with the ERCB to the applications on behalf of himself and Daniel Zarowny (the Zarownys). Their concerns included cumulative impacts, future land development, initial consultation, and noise in the area. Barbara Smereka also filed an objection to the applications with the ERCB. Ms. Smereka's concerns included noise, traffic, and oil and gas development in the area. The respective concerns of the Zarownys and Ms. Smereka were expressed during CNRL's public consultation and notification process and during the ERCB process leading up to the hearing.

The Board held a public hearing in St. Paul, Alberta, which commenced and concluded on July 31, 2008, before Board-appointed examiners D. K. Boyler, P.Eng. (Presiding Member), T. J. Pesta, P.Eng., and R. W. Kennedy. A site visit was conducted by the examiners and ERCB staff on the morning of July 31, 2008.

2.2 Cost Claim

On August 21, 2008, counsel for Mr. Zarowny filed a cost claim totalling \$14 210.20. On September 3, 2008, counsel for CNRL submitted comments regarding the cost claim. On September 8, 2008, Mr. Zarowny submitted a response.

The Board considers the cost process to have closed on September 8, 2008.

3 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*, 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 application in question.

When assessing costs, the Board refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix D: *Scale of Costs* in *ERCB Directive 031A: Guidelines for Energy Costs Claims*.

Subsection 57(1) of the *Rules of Practice* states:

57(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 and contributed to a better understanding of the issues before the Board.

4 VIEWS OF THE PARTIES

4.1 Views of CNRL

On September 3, 2008, counsel for CNRL submitted comments regarding the cost claim filed by Mr. Zarowny. CNRL contended that the cost claim was not reasonable given the nature, scope, and impact of the application heard by the Board.

CNRL submitted that it was unnecessary for Mr. Zarowny to be represented by two counsels at the hearing that was fairly straightforward. CNRL questioned cost line items set out in the statement of account of Ackroyd LLP, such as Eva Chipiuk's assistance with removing the file from the hearing room, Richard Secord's organization of the file after the hearing, and the time for both counsels to confer with each other. CNRL did not see how these items were directly and necessarily related to Mr. Zarowny's intervention.

CNRL further submitted that any costs claimed in association with fees incurred preparing for appropriate dispute resolution (ADR) should be disallowed given the fact that Mr. Zarowny refused to meet with CNRL or even schedule an ADR. Due to Mr. Zarowny's unwillingness to meet with CNRL, any and all costs associated with scheduling or preparing for an ADR should be disallowed.

CNRL also took issue with the fees incurred for meetings, communications, and conferences with Nicole Mah. CNRL did not know what role Ms. Mah held in this matter but was under the assumption that Ms. Mah was Mr. Secord's assistant. CNRL submitted that any costs incurred in relation to Ms. Mah should be disallowed.

In relation to costs incurred in Mr. Secord and Ms. Chipiuk's meetings with Ray Strom, CNRL questioned Mr. Strom's involvement in the matter and pointed out that he played no role in the hearing. Furthermore, it submitted that given that costs had already been claimed by two counsel, one of whom was a senior and experienced counsel, it was unnecessary and duplicative to incur costs for yet another advisor, especially given the nature, scope, and impact of the application.

Noting specifically the interoffice communications and Mr. Strom's involvement in the matter and given that Mr. Zarowny was the only witness called, CNRL was of the opinion that the intervention was not conducted efficiently.

CNRL did acknowledge that Mr. Zarowny should be entitled to reasonable costs for his intervention. However, in this instance, costs should be only for one counsel, they should not include time pertaining to ADR matters, and they should not include the inefficient and duplicative interoffice conferencing or any conferencing with Mr. Strom, who played no visible role in the hearing.

4.2 Views of David Zarowny

On September 8, 2008, counsel for Mr. Zarowny submitted a response to CNRL's comments. Counsel for Mr. Zarowny contended that the applications in this matter turned out not to be that straightforward.

Counsel for Mr. Zarowny pointed out that it was Mr. Zarowny's testimony that the well site was never to be a pad site and that it was to be a vertical well. Mr. Zarowny later discovered that CNRL had already drilled a directional well. Mr. Zarowny's counsel also pointed out that these applications involved an analysis of the historical relationship and dealings between CNRL and Mr. Zarowny and that Mr. Zarowny had also expressed concern regarding the impacts of the proposed development on his neighbours, the Smerekas, and his brother Daniel Zarowny, who is an adjacent land owner.

In response to CNRL's comment that the use of two counsel in this matter was unnecessary and duplicative, counsel for Mr. Zarowny submitted that

Ms. Chapiuk devoted 19.9 hours of "preparation" time to the file directly and necessarily related to Mr. Zarowny's intervention, thus reducing the costs that would have been incurred had more senior counsel performed this work. Ms. Chapiuk's hourly rate is \$125/hr which is half the amount of Mr. Secord's hourly rate.

Counsel for Mr. Zarowny further submitted that in relation to the costs incurred for removing the file materials from the hearing room and for the file organization after the hearing, which combined totalled 1.0 hour, these tasks were directly and necessarily related to Mr. Zarowny's intervention.

With regard to CNRL's comment on costs incurred in relation to the ADR, counsel for Mr. Zarowny submitted that the Board issued a Notice of Hearing on April 9, 2008, for a hearing scheduled for July 8, 2008. Mr. Secord's account had an initial time entry of May 20, 2008, which was well after the Notice of Hearing had been issued. The Board then issued a Notice of Rescheduling of Hearing dated May 26, 2008, changing the hearing to July 15, 2008. Counsel for Mr. Zarowny was of the view that if CNRL's position on costs associated with organizing an ADR were successful it would discourage legal advisors from incurring these types of costs in case an ADR did not take place. Further, the statement by CNRL that Mr. Zarowny refused to participate in ADR was incorrect in that Mr. Zarowny was out of the province and unable to be contacted from June 14 to July 5, which made scheduling an ADR difficult.

Counsel for Mr. Zarowny pointed out that the time incurred by Mr. Secord related to ADR scheduling and preparation was merely 1.3 hours and was directly and necessarily related to Mr. Zarowny's intervention.

In relation to the fees incurred for meetings, communication, and conferences with Ms. Mah, counsel for Mr. Zarowny confirmed that Ms. Mah was Mr. Secord's assistant and the time entries were all directly and necessarily related to Mr. Zarowny's intervention and in particular to the preparation of Mr. Zarowny's submission and appendices, which were filed on June 30, 2008.

In response to the comments made by CNRL in relation to the involvement of Mr. Strom, counsel for Mr. Zarowny was of the view that Mr. Strom's involvement was very necessary given that he represented Mr. Zarowny prior to Mr. Secord being retained on May 20, 2008.

When Mr. Zarowny was unavailable from June 13 to July 5, Mr. Strom was able to provide information necessary for Mr. Zarowny's submission. Mr. Secord only incurred 0.6 hour with telephone calls to Mr. Strom and Ms. Chipiuk only incurred 0.3 hour with telephone calls to Mr. Strom.

Mr. Secord, Ms. Chipiuk, and Mr. Zarowny also had two meetings with Mr. Strom in relation to Mr. Zarowny's submission. Mr. Secord noted that no costs have been claimed for Mr. Strom's attendance at the hearing.

Counsel for Mr. Zarowny were of the view that the hearing was run very efficiently, that a lot of ground was covered in the one day of the hearing, and that it was very useful for their final argument for Ms. Chipiuk to be in attendance and take detailed notes.

Counsel for Mr. Zarowny made reference to *Energy Cost Order 2004-04: Polaris Resources Ltd.*, wherein the Board stated the following:

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

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 and contributed to a better understanding of the issues before the Board.

In assessing each individual cost claim, the Board considers the participant's contribution to the hearing process. Specifically, in cases where the Board is of the view that the participation of individuals did little to enhance the hearing process or indeed where a hindrance to the effective and efficient operation of the hearing, the Board will exercise its discretion by allowing costs either in whole or in part of the amount claimed.

Based on the foregoing, counsel for Mr. Zarowny submitted that the costs claimed were reasonable and should be awarded in full.

5 VIEWS OF THE BOARD

The cost claim submitted by Mr. Zarowny included legal fees of \$12 450.00, expenses of \$969.24, an attendance honorarium of \$100.00, and GST of \$690.96, for an overall claim of \$14 210.20.

The Board has considered the comments and responses submitted in relation to the costs incurred for scheduling an ADR. 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 costs incurred for negotiations and facilitations. That being said, the Board recognizes that when the attempts to

schedule the ADR took place, Mr. Zarowny was also preparing for the scheduled hearing. Therefore, it is reasonable to expect that, to some extent, preparing for the ADR also resulted in preparing for the hearing. The Board has taken this into account when reviewing the statement of account. The Board finds that the entry on May 21, 2008, regarding a telephone conference about ADR dates is not eligible for cost recovery. Therefore, a reduction of 0.2 hour to Mr. Secord's account will be made, reducing his fees by \$78.75 including GST.

The Board does not generally award costs for the attendance of two counsel at a hearing. It is only in exceptional circumstances, such as where issues and the intervention are complex, that the Board finds it necessary for two counsel to be in attendance at a hearing. The Board finds that the intervention of Mr. Zarowny was not complex enough to require the use of two counsel at the hearing. Therefore, the Board will not allow the time incurred by Ms. Chipiuk of 13.4 hours incurred on the day of the hearing, reducing her claim by \$1 785.75 inclusive of GST. In addition to disallowing the hours incurred by Ms. Chipiuk for her attendance at the hearing, the Board is also denying Ms. Chipiuk the 3.8 hours of time incurred for travel to and from the hearing for a further reduction of fees of \$249.38 inclusive of GST. Regarding Ms. Chipiuk's assistance with the preparation of the file for a total of 13.9 hours, the Board recognizes that some of the preparation for the hearing done by Ms. Chipiuk, including the drafting and reviewing, reduced the time and costs associated with senior counsel conducting those activities. However, the Board will not allow Ms. Chipiuk's time to meet with Mr. Secord, even though Mr. Secord had already billed time to meet with Ms. Chipiuk. Similarly, Ms. Chipiuk's time for attendance at client meetings with Mr. Secord will also not be allowed. The Board therefore will allow 7.8 of the 13.9 hours total preparation time that Ms. Chipiuk has claimed, for a reduction of 6.1 hours totalling \$800.63 inclusive of GST.

In relation to the submission made by CNRL regarding the time incurred by Ms. Chipiuk for the removal of the file from the hearing room totalling 0.5 hour and the organization of the file after the hearing by Mr. Secord totalling 0.5 hour, the Board refers to Section 6.3.1 of *Directive 031A*, wherein it states:

The Board will consider only those fees and disbursements claimed by the lawyer that are determined to be reasonable and **directly and necessarily related to the presentation and preparation of the intervention.** [Emphasis added.]

In this instance, the Board is of the view that the removal of a file from a hearing room and the organization of a file after a hearing does not assist the Board in making its decision. Therefore, having reduced Ms. Chipiuk's time for attendance at the hearing, the Board also will not allow the 0.5 hour claimed by Mr. Secord, reducing his fees by \$131.25 inclusive of GST.

In relation to the issue of Mr. Secord's use of Ms. Mah, the Board once again refers to Section 6.3.2 of *Directive 031A*, which states: "A lawyer's hourly rate will include all overhead expenses such as secretarial work." However, the Board is of the view that since Mr. Secord did not charge an additional hourly rate for a paralegal and was merely using his assistant, his time incurred in relation to meetings, communication, and conferences with Ms. Mah will be allowed.

In relation to costs incurred by Mr. Secord for meetings with Mr. Strom, the Board recognizes that Mr. Zarowny retained experienced counsel and that Mr. Strom did not play a role at the hearing. The Board notes that no independent costs have been claimed in relation to Mr. Strom,

including attendance at meetings with Mr. Secord, and therefore feels that no reductions to Mr. Secord's time on this matter are necessary.

6 ORDER

It is hereby ordered that

- 1) The Board approves intervener costs in the amount of \$11 164.44.
- 2) Payment shall be made to Ackroyd LLP, Barristers & Solicitors, 1500, 10665 Jasper Avenue, Edmonton, Alberta T5J 3S9.

Dated in Calgary, Alberta, on January 15, 2009.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by D. K. Boyler”

D. K. Boyler, P.Eng.
Presiding Member

“Original Signed by T. J. Pesta”

T. J. Pesta, P.Eng.
Examiner

“Original Signed by R. W. Kennedy”

R. W. Kennedy
Examiner