Bearspaw Petroleum Ltd.

Application for Two Wells and Two Pipeline Licences Crossfield Field

Cost Awards

June 5, 2009

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2009-005: Bearspaw Petroleum Ltd., Application for Two Wells and Two Pipeline Licences, Crossfield Field

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

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TWO PIPELINE LICENCES	**1462817, 1462821, and 1509981**
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1 INTRODUCTION

1.1 Background

Bearspaw Petroleum Ltd. (Bearspaw) submitted Applications No. 1462817 and 1462821, in accordance with Section 2.020 of the *Oil and Gas Conservation Regulations* (*OGCR*), to drill two gas wells in the Crossfield area. Application No. 1462817 was for a licence to drill a directional well from a surface location of Legal Subdivision (LSD) 16, Section 35, Township 23, Range 28, West of the 4th Meridian (16-35 well) to a bottomhole location of LSD 13-36-23-28W4M. Application No. 1462821 was for a licence to drill a vertical well from a surface location of LSD 9-2-24-28W4M (9-2 well). The purpose of both wells would be to produce natural gas from the Belly River Group with a maximum hydrogen sulphide (H_2S) concentration of 0.0 moles per kilomole (mol/kmol), or 0.0 per cent. The proposed wells would be located respectively about 0.8 kilometres (km) southeast and 0.5 km east of the Town of Chestermere.

Bearspaw also submitted three alternative pipeline applications, Applications No. 1451117, 1457452, and 1509981, in accordance with Part 4 of the *Pipeline Act*, for approval to construct and operate two pipelines to be constructed within the same right-of-way. It requested that one be approved. One pipeline would transport natural gas containing no H_2S from the proposed wells at the 16-35 and the 9-2 surface locations to an existing battery located at LSD 7-33-23-28W4M (7-33 battery). The second pipeline would transport oil effluent with an expected H_2S content of 20.0 mol/kmol (2 per cent) from an existing oil well located at LSD 9-2-24-28W4M to the 7-33 battery. The existing 9-2 oil well is referred to in this document as the 9-2 oil well (bottomhole 10-2). Application No. 1451117 is referred to as the proposed "Original Route," Application No. 1457452 as the proposed "Alternate Route 1," and Application No. 1509981 as the proposed "Alternate Route 2."

During the proceeding, Bearspaw submitted two amended applications that modified the pipeline routing in Application No. 1451117 (Original Route) and Application No. 1509981 (Alternate Route 2). The amendments were for a routing change to the proposed two parallel pipeline routes on the north side of the access road to the 7-33 battery. The amendments proposed a new routing of the pipelines to the north of the southeast quarter of Section 33-23-28W4M. These amendments were confirmed by ERCB staff to be technically complete and are referred to as the proposed "Original Route amended" and the proposed "Alternate Route 2 amended." Bearspaw obtained confirmation of nonobjection from all landowners, occupants, and residents for the route-change portion of the amended pipeline applications, as required by ERCB *Directive 056: Energy Development Applications and Schedules*.

Several area landowners filed objections regarding one or more of the applications. Submissions were received prior to the hearing from

- Stanley H. Forster, Arline C. Forster, Vicki L. Worthen, and Monte S. Forster (the Forsters);
- Dan Meier, Mike Meier, and Deborah Meier (the Meiers);
- Young and Kalef Landowners (the YKL):
  - Maurice Paperny, Dr. Mark Zivot, Deborah Zivot, Michael Shafron, Melissa Shafron, Tracey Sheftel, Danielle Sheftel, Rose Zivot, Annette Shafron, R. SIDJ Holdings Ltd., Harphil Investments Ltd., Ralph Gurevitch and Sheila Gurevitch, and Philip Libin and Hariet Libin, and
  - EIN-GEDI Investments Ltd., Lissette Holdings Ltd., Aviva Holdings Ltd., Libtel Investments Ltd., Leotel Holdings Ltd., Natanya Investments Ltd., Haifa Investments Ltd., Cartradan Holdings Ltd., Miktel Holdings Ltd., and Madacalo Investments Ltd.;
- Ray Blanchard;
- Glen Clarke, Katherine Clarke, and Gail Clarke (the Clarkes);
- L. Jane Hawkins, Maureen S. Hawkins, Kelly L. Warrack, and Carolyn Hurst (the Hawkins, Warrack, and Hurst Group);
- Margaret B. Scott and Earl H. Scott (the Scotts);
- Bill Deniger and Carolyn Deniger (the Denigers); and
- Wayne Mikkelsen.

All of the parties own land or reside on a portion of land along one of the proposed pipeline routes. The Forsters also own the land on which the proposed 16-35 well would be located.

The Board held a public hearing in Calgary, Alberta, starting on September 15, 2008, before Presiding Board Member M. J. Bruni, Q.C., and Acting Board Members C. A. Langlo, P.Geol., and F. Rahnama, Ph.D. All of the intervening parties listed above were represented at the hearing except for the Scotts. The mayor of the Town of Chestermere, Mayor P. Matthews, presented a submission at the hearing on behalf of the Town of Chestermere.

The hearing continued over nine days, concluding on October 22, 2008.

On October 3, 2008, an “in camera” session was held within the hearing to deal with confidential information relating to the proposed 16-35 well.

At the conclusion of the oral portion of the hearing, Bearspaw and the Forsters were required to complete undertakings to provide additional information. Submission of this information was completed on November 19, 2008, and the hearing was closed November 20, 2008.

The Board issued *Decision 2009-023* on February 17, 2009.

1.2 Cost Claim

On November 21, 2008, the Forsters filed a cost claim totalling $82 963.57. On December 5, 2008, Bearspaw submitted comments regarding the cost claim. On December 12, 2008, the Forsters submitted a response.

On November 21, 2008, the YKL filed a cost claim totalling $100 641.04. On December 5, 2008, Bearspaw submitted comments regarding the cost claim. On December 12, 2008, the YKL submitted a response.

On December 16, 2008, the Hawkins, Warrack, and Hurst Group filed a cost claim totalling $31 126.50. On December 30, 2008, Bearspaw submitted comments regarding the cost claim. On January 13, 2009, the Hawkins, Warrack, and Hurst Group submitted a response.

The Board considers the cost process to have closed on January 13, 2009.

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*, 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.

3 FORSTER FAMILY

The Forsters submitted a cost claim that included legal fees in the amount of $36 825.00, expert fees (Bissett Resources Consultants Ltd.) in the amount of $26 462.50, honoraria in the amount of $3150.00, expenses of $12 725.42, and GST of $3800.65, for a total claim of $82 963.57. Part of the legal costs claimed were on behalf of Mr. Manning (counsel for the Forsters), and the balance was claimed on behalf of Mr. Forster, who submitted that he acted as a representative to

the Forster family during the time that Mr. Manning was not available. Mr. Forster also submitted a claim for honoraria should the Board decide that he is not entitled to legal fees.

3.1 Views of Bearspaw

Legal Fees

Bearspaw took no issue with the fact that Mr. Forster should be compensated with an honorarium or as a lawyer, but submitted that the manner of the intervention by the Forster family would require a reduction in the legal fees that were claimed. Bearspaw submitted that the total claim for legal fees, disbursements, and GST claimed by Lawson Lundell, LLP, and Mr. Forster should be reduced to $19 867.90. Bearspaw made reference to Section 5.1 of *Directive 031A*, where it is stated that

> The Board may deny a claim for costs, in whole or in part, if: the Board did not hold a hearing on the matter, or **the Board is not satisfied that the intervention was conducted economically** [emphasis added].

Bearspaw noted that the hearing had been scheduled to commence on September 15, 2008, and run continuously to September 26, 2008. However, due to delays at the outset as a result of the Forsters not having an expert report prepared, the hearing became a staggered process, which started on September 15, 2008, but did not conclude until October 22, 2008. The basis for the adjournment was to obtain information that Mr. Forster could have obtained by using the Board's Information Request (IR) process before the hearing. Ultimately, the Board determined that the information was not relevant in the proceedings. Bearspaw submitted that this caused serious scheduling difficulties for the Board, Bearspaw, and the other interveners, and in Bearspaw's opinion this significantly increased the costs and inconvenience to all parties involved.

Reference was made by Bearspaw to *Utility Cost Order 2002-070* at page 2 (although it is based on *Directive 031B: Guidelines for Utility Cost Claims*, Bearspaw felt it was relevant):

> Based on the foregoing, the Board considers that Calgary engaged in conduct that unnecessarily lengthened the duration of the proceeding and resulted in unnecessary costs by seeking to admit the Union UFG Report during the cross examination of the APS panel.

Based on the above submissions, Bearspaw was of the view that the legal costs claimed by the Forsters should be reduced by 50 per cent.

Bissett Resources Consultants Ltd. (Bissett)

Bearspaw submitted that the Bissett cost claim should be reduced by 50 per cent, for a total award of $39 906.79.

Bearspaw maintained that a reduction in Bissett's cost claim was appropriate because Bissett amended its initial report due to an error made in ground-truthing. Bearspaw was of the view that this error was a direct result of the deficiencies of the Bissett field staff and that Bearspaw should not have to incur the additional costs of this error.

Bearspaw also noted that the Bissett report did not include information suggesting that the proposed surface location was not technically feasible and did not deal with the surface impacts

of the alternative surface locations. Bearspaw noted that during the hearing, Mr. Bissett confirmed that his report did not deal with the advantages and disadvantages of those alternative sites.

Based on the above, Bearspaw submitted that the report and testimony provided by Bissett did not assist the Board in determining the issues at hand and therefore was of the view that a 50 per cent reduction was warranted.

3.2 Views of the Forster Family

Legal Fees

In response to the comments submitted by Bearspaw, the Forsters admitted that they did indeed request an adjournment to respond to evidence and that this in turn resulted in an inconvenience to the other parties involved. However, in the view of the Forsters, the adjournment was due to Bearspaw's refusal, until the oral portion of the hearing had commenced, to provide information to the Forsters that they had previously requested. The Forsters submitted that in their opinion, Bearspaw was well aware in advance of the hearing of the evidence sought by the Forsters but ignored the request.

With regard to the geological information ultimately obtained, the Forsters submitted that the bottomhole locations were relevant to every well licence application and the Board had the power to direct that the location be moved or denied for lack of adequate information on the appropriateness of the location.

The Forsters further submitted that Bearspaw's suggestion that their cost claim be reduced by 50 per cent was unjustified and it would be improper and arbitrary to reduce the claim. The Forsters noted that Bearspaw did not allege that the cost claim put forward for legal fees was high. The Forsters submitted that the five applications from Bearspaw that were before the Board each had an effect on the Forsters in some way. The Forsters carried the sole burden with respect to the well application on their land.

Based on the above, the Forsters submitted that the Board should award the costs claimed for legal fees in full or, alternatively, that if the Board found that Mr. Forster was only entitled to an honorarium, the Board still award 100 per cent of the legal fees claimed on behalf of Mr. Manning plus the honorarium and disbursements claimed by Mr. Forster. In addition, the Forsters submitted that should the Board decide that Mr. Forster only be entitled to an honorarium, it should be only if the Board concluded that it did not have the authority to award costs as requested by the Forsters for Mr. Forster acting as counsel in Mr. Manning's absence.

Bissett

The Forsters were of the view that the report and testimony provided by Bissett were helpful to the Board in assessing the issues before it and that the Bissett report provided alternative surface locations that had not been considered by Bearspaw.

Regarding Bearspaw's argument that Bissett had made an error in its report, the Forsters were of the opinion that this error was due to the Bearspaw well site survey plan being inaccurate. In addition, the Forsters pointed out that during the hearing Bissett explained the inaccuracy to the

hearing participants prior to presenting its evidence. The Forsters submitted that Bissett prepared its second report to correct the initial report, which had used the inaccurate survey plan, not to correct a ground-truthing error. According to the Forsters, the ground-truthing initially provided by Bissett was not incorrect.

The Forsters did not accept Bearspaw's suggestion that the cost claim, including the disbursements of Bissett, be reduced by 50 per cent. The Forsters were of the view that even if there had been an error in the ground-truthing, that would not justify a 50 per cent reduction in recoverable expert costs and the disbursements should not be reduced in any circumstances.

The Forsters noted that Bissett also incurred additional costs in order to attend an entire day of the hearing in anticipation of providing additional oral evidence. The Forsters submitted that this delay was a result of the examination of the Bearspaw panel going on longer than anticipated. They argued that this was due in part to the decision by Bearspaw to have its expert provide rebuttal evidence to avoid additional expense of having that expert return later. As a result, Bissett did not testify as originally anticipated on that day.

The Forsters submitted that Bissett provided evidence that Bearspaw itself failed to provide and used lower hourly rates than could have been warranted under the *Scale of Costs*. Therefore, the Forsters were of the view that the cost claim submitted on behalf of Bissett should be awarded in full.

3.3 Views of the Board

Legal Fees

The Board notes that Mr. Forster is a member of the Forster family and an intervener in these proceedings. Mr. Forster has characterized his participation in the hearing as acting as legal counsel for himself and his family. The Board also notes that Bearspaw does not object to Mr. Forster's claim for legal costs on the basis that he is a party to these proceedings.

The Board does not doubt that Mr. Forster's legal training assisted in the preparation of the Forster family submission. However, the Board is not prepared to award legal costs to an intervener on the basis of professional status. The Board considers that Mr. Forster participated in the hearing as a representative of the Forster family and not as an independent legal counsel. Accordingly, the Board denies Mr. Forster's claim for his legal fees.

In considering claims for preparation honoraria, the Board is mindful of Part 6.1.1 of *Directive 31A*, which states in part:

> …an intervener who personally prepares a substantial submission without expert help may, depending upon the complexity of the submission, receive an honorarium in the range of $300 to $500. In very exceptional cases, and when the necessary preparation time is substantial, honoraria in excess of $500 to a maximum of $2500 may be considered. There must, of course, clearly be a need for any such substantial intervention.
>
> 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.

The Board recognizes that the Forsters were represented by senior legal counsel and that Mr. Manning has claimed his fees at the Board's maximum prescribed hourly rate. The Board also notes that Mr. Forster conducted the Forster family intervention for the most part and often without the benefit of Mr. Manning in attendance. Taking the above into account, as well as the number of hours Mr. Forster incurred in his preparation for the hearing, the Board finds that Mr. Forster made a very significant contribution to the coordination and presentation of the Forster intervention. As such, Mr. Forster's claim for a preparation honorarium must reflect his contribution. The Board recognizes that Mr. Forster, by taking on such a significant role, substantially reduced costs that would otherwise be claimed by senior counsel. For these reasons, the Board is prepared to grant Mr. Forster the honorarium of $2500 that has been claimed. As honorarium awards are not subject to GST, no GST is approved in relation to this award.

In addition, the Board grants Mr. Forster his request for attendance honoraria at $50.00 for each one-half day in attendance at the hearing, for a total $650.

The Board refers to Section 57(2)(h) of the *Rules of Practice*, wherein it states:

> In determining the amount of costs to be awarded to a participant, the Board may consider whether the participant did one or more of the following: …**(h) engaged in conduct that unnecessarily lengthened the duration of the proceeding or resulted in unnecessary costs** [emphasis added].

The Board notes that the adjournment request to allow participation by the Forsters did inconvenience the parties and required adjustments to the Board's schedule. As well, the events leading up to the adjournment suggest that the request for additional information could have been better handled by both the Forsters and Bearspaw. The Forsters had requested certain information and it was not until just before the hearing that they were advised that the information would not be provided. That being said, Mr. Forster could have requested the information prior to the hearing by making a request during the Board's IR process. Therefore, because the Board is of the view that both parties were equally responsible for the unnecessary delay in the hearing, the Board makes no deduction to the Forsters' claim.

Bissett

The Board notes that the amended Bissett report was prepared in response to reliance on Bearspaw survey information. Subsequently, Bissett determined that the information was not correct, thereby requiring the subsequent ground-truthing. The Board appreciates that accuracy was an important consideration in the preparation of the Bissett report and is not prepared to reduce the expert cost claim for this reason.

Bearspaw submits that Bissett's costs should be reduced because its report addressed the technical feasibility of alternative sites but did not address the appropriateness of those sites.

The Board notes that Bearspaw maintained in the proceeding that alternative sites were not technically feasible, given Bearspaw's choice of a bottomhole location. Clearly, technical feasibility was an important factor in Bearspaw's location decision. As well, the Bissett report and testimony facilitated the Board's understanding of the appropriateness of potential surface locations. It also prompted the presentation of more fulsome evidence by Bearspaw to support its original location decision and allowed for a full consideration of this issue in the proceeding.

The Board is of the view that Bearspaw had the obligation to present evidence in support of its original siting decision, including alternative well sites. The lack of transparent documented well site alternatives and the rationale in support of their exclusion contributed in large part to the protracted nature of the Board's consideration of this issue. In response to a question by the Board panel chair, Mr. Osterman acknowledged that having gone through the hearing, in the future he would document the process that he went through in evaluating the most appropriate well site and other potential well sites.

Given the above, the Board is not prepared to reduce the Forsters' expert cost award as requested by Bearspaw.

Finally, with respect to the claim for disbursements in the amount of $12 725.42, the Board is of the view that the expenses incurred were directly and necessarily related to the hearing in this matter and should be awarded in full.

4 YOUNG AND KALEF LANDOWNERS

The YKL submitted a cost claim that included legal fees in the amount of $66 826.00, expert fees in the amount of $24 338.00, honoraria in the amount of $650.00, expenses of $4061.62, and GST of $4765.42, for a total claim of $100 641.04.

4.1 Views of Bearspaw

Honoraria

Bearspaw did not take issue with the costs claimed by Mr. Libin and Mr. Porozoni for their attendance honoraria.

Legal Fees

Bearspaw submitted that the legal fees being claimed on behalf of Bennett Jones should be reduced to $20 617.24.

Bearspaw noted that the ERCB issued the notice of hearing in relation to this matter on March 28, 2008, and that prior to the notice of hearing being issued, the YKL made a claim for services provided by Bennett Jones in the amount of $15 019.43, including fees and disbursements. Bearspaw was of the view that the cost claim should be reduced by that amount, given that the services were provided before the notice of hearing had been issued.

In support of its position, it referred to *Petrofund Corp. Energy Cost Order 2006-001*, wherein the Board stated:

> …it is the view of the Board 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. It is the Board's practice, subject to exceptional circumstances, to acknowledge only those costs incurred after the ERCB has issued a notice of hearing.

In addition, Bearspaw noted that four lawyers from Bennett Jones billed for their fees for the YKL's intervention. Bearspaw submitted that the use of four counsel was not reasonable or

necessary, considering that the YKL participated in less than one day of the hearing and had included only one third-party expert witness. Bearspaw was of the view that the evidence and submissions presented by the YKL were very limited in nature, although the witnesses were experienced and sophisticated. Based on the foregoing, Bearspaw submitted that the YKL's preparation and attendance could have been more efficient and therefore that the YKL's claim should be reduced by an additional 60 per cent. To support this reduction, Bearspaw also noted that there was evidence of extensive internal conferencing and a great deal of duplication for time spent reviewing materials.

With respect to the professional fees for travel time being claimed by the four lawyers, Bearspaw noted that it appeared that the claim was for the maximum rate chargeable for legal services, not half of their hourly rate, as permitted by the *Scale of Costs*. Bearspaw therefore submitted that the cost claim for Bennett Jones should be further reduced by 2 per cent to account for the hourly rate charged for travel time to and from the hearing.

Stantec Consulting

Stantec Consulting (Stantec) claimed a total of $27 668.13 for services provided to the YKL. Bearspaw submitted that Stantec should only be awarded a total of $5135.19.

Bearspaw submitted that Stantec did not provide sufficient detail in its invoice to allow Bearspaw to determine whether or not the hours claimed were reasonable and directly and necessarily related to the matters at hand.

Bearspaw objected to the costs, stating that as they were not reasonable given the nature of the YKL intervention. Bearspaw also noted that Stantec did not provide a written report and participated for less than one day of the hearing. The only evidence submitted by Stantec, according to Bearspaw, was the Ronmor Conceptual Plan, which Bearspaw believed would have been created in any event.

In addition, Bearspaw noted that Stantec's invoices accounted for time billed for the services of at least five employees, one of which was not even named and was referred to only as a "Level 6" employee. In Bearspaw's view, the use of Stantec employees in addition to Mr. Scott was not necessary, and Mr. Scott's time was not reasonable given the nature of the intervention.

Based on the above, Bearspaw submitted that the cost claim for Stantec should be reduced by 80 per cent.

Finally, Bearspaw submitted that according to the *Scale of Costs*, the Board does not recognize claims for overhead based upon percentages of the fees or disbursements claimed. Therefore, as stated in Bennett Jones's covering letter, the flat rate of 8 per cent charged by Stantec for disbursements for a total of $1992.18 should not be allowed. Bearspaw also noted that insufficient detail was provided in order to substantiate the disbursements being claimed.

4.2 Views of the YKL

Legal Fees

The YKL submitted that Bearspaw's assertion that its role was limited to land value and planning issues was incorrect. The YKL argued that they were more concerned with the choice of appropriate routing with regard to future land use and planning and that land value and planning were part of the larger issue. The YKL noted that due to the more involved nature of their claim, the potential to be impacted by each of the three pipeline routes, it was necessary for the YKL to use the services of Bennett Jones prior to the notice of hearing being issued.

The YKL claimed that the application process leading up to the hearing was not routine and therefore there were exceptional circumstances in their case that justified the awarding of additional costs, specifically, the filing of a well and pipeline application and its withdrawal in 2006 due to inadequate consultation with landowners.

In relation to the costs being incurred prior to the notice of hearing being issued, the YKL referred to *Energy Cost Order 2006-001* wherein the Board referred to the statement in *Directive 031A*:

> 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** [emphasis added].

The YKL submitted that from March 8, 2006, when Bearspaw had submitted a well and pipeline application, up to the date of the notice of hearing being issued, discussions between the YKL and Bearspaw related mainly to pipeline routing concerns, which in the view of the YKL was a matter of public interest. The YKL was of the view that the costs incurred prior to the notice of hearing being issued were reasonable and directly and necessarily related to their intervention in this matter. The YKL reiterated that the process leading up to the hearing was time consuming, primarily resulting from the applicant's decision to file three pipeline applications.

The YKL were also of the view that they should not be penalized for the length of the proceedings prior to and during the hearing. The YKL made a considerable effort to provide an efficient and succinct presentation in relation to their issues in this matter. The YKL were of the view that the proceedings required more time than initially anticipated because of some unforeseen circumstances, none of which was the fault of the YKL.

With respect to the involvement of four counsel from Bennett Jones, YKL advised that initially Ms. Sheehan was their primary counsel in this matter, but shortly before the hearing Ms. Sheehan left on maternity leave and Mr. Shawn Munro took over. Mr. Chell was a student-at-law when he first assisted on the matter and performed various tasks on behalf of Mr. Munro in order to keep costs down. In fact, according to the YKL, the majority of the costs incurred by Bennett Jones were for work prepared by Mr. Chell. The fourth lawyer involved, Mr. Daron Naffin, was only involved to provide advice on a certain area of law. The YKL also submitted that with the exception of Mr. Chell, for the majority of the hearing only one lawyer was in attendance other

than when absolutely necessary. The YKL were also of the view that there was minimal duplication and felt that their case was managed efficiently, given the complexity and length of the hearing.

The YKL did not provide any comments on the hourly rate claimed for travel time by Bennett Jones.

Stantec

The YKL were of the opinion that the cost claim submitted by Stantec was reasonable and necessary and that Mr. Scott played a significant role in the hearing, as well as leading up to the hearing. The YKL noted that Mr. Scott conducted research essential to the submissions of the YKL and provided key evidence to the Board relating to land use.

With respect to the use of additional Stantec employees in order to assist in Mr. Scott's consultation, the YKL submitted that that this was not at all unreasonable, considering that the additional Stantec employees all had their own individual expertise, which was essential for Mr. Scott to conduct his research in a timely manner, thereby reducing the overall costs of the Stantec claim.

The YKL submitted that the position taken by Bearspaw with respect to the Stantec claim was unjustified and therefore the claim should be awarded in full.

4.3 Views of the Board

Honoraria

The Board notes that Bearspaw did not take any issue with the honoraria claims of the YKL and finds that the attendance honoraria claimed were reasonable. Therefore, the Board approves the honoraria in full.

Regarding the disbursements claimed by the YKL in the amount of $227.12, the Board is of the view that such claims are reasonable and necessarily related to the hearing and approves them in full.

Legal Fees

Part 7 of *Directive 031A* states the following with regard to the point in time from which costs may be claimed:

> 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 notes that many of the charges incurred by Bennett Jones prior to the notice of hearing being issued on March 28, 2008, appear to be related to consultation and negotiation

with Bearspaw undertaken by Bennett Jones on behalf of the YKL. While the Board appreciates and encourages parties to attempt to resolve concerns among themselves whenever possible, the Board is of the view that cost recovery for negotiations between the parties is to be dealt with in the context of the negotiations themselves and not through the Board's cost recovery process. Although the YKL argue that exceptional circumstances existed with respect to Bearpaw's applications that warrant the awarding of costs prior to the notice of hearing, the Board does not agree. The Board finds that the YKL have not provided any compelling reasons to demonstrate that the costs incurred were specific to their intervention in the hearing, as opposed to consultation and negotiation with Bearspaw over the routing of the proposed pipeline. The Board finds that YKL has not substantiated that the legal costs incurred by Bennett Jones prior to the issuance of the notice of hearing are reasonable and directly and necessarily related to the YKL's intervention in the hearing.

Taking the foregoing into account, for this particular matter the Board considers the legal costs incurred prior to March 28, 2008, to be directly associated with the consultation and negotiation process and does not consider any of the fees incurred during that time as having been incurred in preparation for the hearing before the Board. As such, the Board considers that any fees and expenses incurred prior to March 28, 2008, are not eligible for recovery. Therefore, Ms. Sheehan's fees are reduced by a total of $8865.00 plus GST, Mr. Munro's fees are reduced by $5425.00 plus GST, and Mr. Naffin's fees are reduced by $594.00 plus GST.

With respect to travel time, the Board notes that Mr. Munro and Mr. Chell claimed their full hourly rates. The Board is consistent in applying the ERCB's *Scale of Costs* by allowing professionals to charge half of their hourly rate for travel time. The statement of account does provide for line-by-line activities and associated time, including travel time to and from the hearing. However, the Board notes that Mr. Munro's and Mr. Chell's travel times are not recorded separate and apart from other activities. Therefore, the Board has estimated 0.5 hours for return travel between the offices of Bennett Jones in downtown Calgary and the hearing venues. Furthermore, the Board has estimated 1.0 hours for return travel between the Calgary offices of Bennett Jones to the location of the proposed project in the Chestermere area. Upon review of the account, the Board has determined that it is reasonable to estimate that Mr. Munro's time includes 3.5 hours of travel, while Mr. Chell's time as an articling student includes 3.5 hours of travel and his time as an associate includes 1 hour of travel time. Based on this estimate, the Board reduces Mr. Munro's and Mr. Chell's hourly rates for their travel time by 50 per cent.

Regarding the use of four lawyers in relation to the YKL intervention, the Board finds it reasonable that once Ms. Sheehan went on leave, another lawyer, in this case Mr. Munro, would assume the file, and as such there would be some discussion between Ms. Sheehan and Mr. Munro. Although it is apparent to the Board that a certain level of overlap did occur, the Board does not find, given the amount of hours incurred, that all of the preparation time by the two was duplicated.

With respect to Mr. Naffin's involvement, the Board notes that he was brought on the file to provide assistance on a specific matter only and his involvement was for a total of 3.5 hours. The Board finds that this was a reasonable use of additional counsel.

The Board does note that Mr. Chell and Mr. Munro were both in attendance at the hearing on certain days. The Board does not generally award costs for the attendance of two counsel at a hearing. Only in exceptional circumstances, such as if issues and the intervention are complex, will the Board find it necessary for two counsel to be in attendance at a hearing. The Board realizes that Mr. Chell was typically alone at the hearing unless Mr. Munro was required to present direct evidence, cross-examine witnesses, or provide final arguments. However, the Board does not find that there were exceptional circumstances in the hearing that would necessitate both Mr. Munro and Mr. Chell to be in attendance at the same time. It is not clear from Mr. Munro's and Mr. Chell's accounts as to the exact hours that the two were attending the hearing together. However, the Board finds it reasonable to make a reduction to Mr. Chell's attendance hours for the days that Mr. Munro was also in attendance at the hearing, for a total reduction of $3710.00 plus GST.

With respect to the expense claim submitted by Bennett Jones totalling $1842.32, the Board finds that the majority of these expenses are reasonable. However, the Board is of the view that the expenses incurred prior to March 28, 2008, the date the notice of hearing was issued, should be disallowed. Therefore, the Board reduces the expenses claimed by $392.03 plus GST.

Stantec

As discussed above, the Board's usual practice is to acknowledge only those costs incurred after the ERCB has issued a notice of hearing. It is generally the ERCB's position that until a notice of hearing has been issued, there is no certainty that a hearing will be held. The ERCB finds that in many cases the prenotice interactions between interveners and applicants relate to compensation matters and not public interest issues.

In this instance, the Board does not find that the YKL has provided sufficient detail to explain that the costs incurred by Stantec prior to the notice of hearing are reasonable and directly and necessarily related to the YKL intervention in the hearing; therefore, the Board has decided that the YKL is not eligible for any costs incurred by Stantec prior to March 28, 2008. Based on the foregoing, the Board reduces Stantec's fees by $5546.00 plus GST.

Regarding the use of five additional employees in order to complete the evidence being submitted by Mr. Scott, the Board is of the view that the fees incurred by the "Level 6" employee are disallowed, because no specifics were given as to who the Level 6 employee was, how many years of experience he/she had, what tasks he/she completed, and what his/her actual job description or title was. Therefore, the costs submitted by Stantec are reduced by a further $2182.50 plus GST. The Board, however, allows the costs for the other employees' fees, as the Board understands that this was a collaborative project between Stantec's employees, even though only Mr. Scott appeared at the hearing. However, the Board does take issue with the fact that 164.75 hours were claimed and no expert report was presented by Mr. Scott at the hearing. The Board finds that the amount claimed by Stantec is excessive and therefore reduces Stantec's fees by an additional 25 per cent.

Directive 031A states that the Board will not recognize claims based upon percentages of fees or disbursements claimed. The YKL has not presented any rationale why the Board should depart from the directive. Accordingly the Board denies Stantec's disbursement claim in the amount of $1992.18, which was calculated as a flat rate of 8 per cent for disbursements.

5 HAWKINS, WARRACK, AND HURST GROUP (HWH)

HWH submitted a cost claim that included legal fees of $28 350.00, honoraria of $1200.00, expenses of $159.00, and GST of $1417.50, for a total claim of $31 125.50.

5.1 Views of Bearspaw

Legal Fees

Bearspaw submitted that the claim provided by HWH lacked detail as to time spent as required by *Directive 031A*. Bearspaw referred to Section 8 of *Directive 031A*, which states:

> It is the obligation of the person claiming costs to support his or her claim and to establish that the costs claimed are reasonable and directly and necessarily related to the matters in conflict at the proceeding. The EUB requires that all those claiming local intervener's costs submit enough information to allow it to consider the claim in a fair and efficient manner.

Bearspaw submitted that, therefore, the cost claim provided by HWH should be rejected in its entirety, since it did not meet the criteria set out in *Directive 031A*.

Bearspaw also submitted that, alternatively, should the Board feel it necessary to award some costs to HWH, the hourly rate claimed by Mr. Thomas Taylor, of Taylor Conway, should be reduced, as it exceeded the rate allowed in the *Scale of Costs*. Accordingly, the rate should be reduced from $350 per hour to $250 per hour.

In addition, Bearspaw noted that on Mr. Taylor's account for services rendered, 22.5 hours were claimed for preparation of the intervention. Bearspaw was of the view that this was excessive, in light of the HWH's written submission. Bearspaw submitted that the hours claimed for preparation should be reduced by 70 per cent.

Bearspaw maintained that the majority of the intervention of HWH related to amending Bearspaw's applications at the outset of the hearing, which Bearspaw accommodated. It further noted that a large portion of the hours claimed once the hearing commenced related to obtaining the confirmations of nonobjections rather than to assisting the Board in understanding the issues before it. Therefore, Bearspaw submitted that the hours claimed in respect of the hearing itself should be reduced by 70 per cent.

Honoraria

Regarding the honoraria claim of $1200.00 for HWH, Bearspaw referred to Section 6.1.1 of *Directive 031A*, which states:

> 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.

Bearspaw noted that only one of the interveners, Kelly Warrick, actually participated in the hearing.

Based on the above, Bearspaw submitted that HWH's honoraria claim should be denied entirely or, if the Board decided otherwise, that the amount allowed for honoraria should not exceed $300.00.

5.2 Views of HWH

HWH submitted that the hourly rate claimed by Mr. Taylor of $350.00 was reasonable even though it exceeded the amount allowed in the *Scale of Costs*. HWH submitted that Mr. Taylor's involvement in the proceedings greatly reduced hearing time and assisted HWH's intervention. HWH noted that the Board encourages the use of legal counsel and was of the view that it should not be penalized for engaging counsel.

With respect to the 22.5 hours incurred for preparation of the intervention, HWH submitted that the actual time spent by the interveners and Mr. Taylor was well in excess of those 22.5 hours. It maintained that the time claimed was reasonable, considering the amount of time and effort that was put in so that it could ensure that its submissions were limited to pipeline line routing and that the hearing was not complicated.

HWH advised that Mr. Taylor spent a considerable amount of time, at Bearspaw's request, ensuring that the amended applications would be completed by the close of the hearing. HWH noted that Mr. Taylor only charged for 8 hours of his time for completing this task, when he actually spent a far greater amount of time on it.

Regarding the issue of honoraria, HWH submitted that the honoraria claimed did not overlap with the legal expense claim, as HWH spent a considerable amount of time itself preparing for the hearing and submitting numerous complaints to the Board regarding other applications brought forward by Bearspaw. HWH advised that it also spoke daily with Mr. Taylor in order to be updated on the progress of its submissions and noted that Mr. Taylor did not charge for any of the time he incurred during these discussions. In addition, HWH submitted that the amount claimed for honoraria was reasonable as its members had each put in substantial time in preparation for the hearing. If they would have based their claim on an hourly rate of $25.00 it would have been well in excess of the amount actually claimed.

5.3 Views of the Board

Legal Fees

The legal fees submitted by Mr. Taylor are clearly related to the Bearspaw applications. In the Board's view, it is incumbent upon counsel representing interveners to file cost claims that comply with the *Rules of Practice* and *Directive 031A*. Section 55 of the *Rules of Practice* makes it clear that the Board may only award costs that are in the Board's opinion directly and necessarily related to the proceeding. The Board finds that Mr. Taylor's account for legal fees was properly substantiated in the HWH's response submissions dated January 13, 2009.

With respect to the legal costs incurred, the Board finds it reasonable for HWH to have retained counsel in preparation for the hearing. However, the Board recognizes that the hourly rate of $350.00 claimed by Mr. Taylor exceeds the *Scale of Costs* in *Directive 031A*. The Board has reviewed the statement of account and does not consider that the scope or complexity of the issues in this

proceeding merit an hourly rate above the *Scale of Costs*. Therefore, given Mr. Taylor's years of experience, the Board approves an hourly rate of $250, which is the maximum allowable rate.

The Board notes that Mr. Taylor claimed 22.5 hours for preparation time in this proceeding. In the Board's view, this is not excessive, in light of the submission presented by HWH at the hearing. The Board therefore approves the 22.5 hours claimed.

With respect to the 8 hours claimed for Mr. Taylor's efforts to obtain confirmation of nonobjection for amendment pipeline routes on the HWH land, the Board is of the view that 8 hours is excessive for such a task. The Board understands that Mr. Taylor had some difficulty obtaining the confirmations, specifically in one instance not being able to get in touch with the occupants of a portion of the group's lands in a timely manner. As a result, the Board finds that 4 hours would be an appropriate claim in the circumstances and therefore reduces this portion of Mr. Taylor's claim by 50 per cent.

Honoraria

Each member of the HWH claimed a preparation honorarium of $300.00. It is the Board's practice that where an individual intervener retains counsel to assist with the intervention and counsel is primarily responsible for the intervention, a preparation honorarium will not be provided to the interveners themselves. If both the lawyer and the local intervener prepare an intervention, the Board may consider an honorarium in recognition of the local intervener's efforts.

The Board notes that counsel submitted a substantial account in relation to the preparation in this proceeding. The Board also recognizes from the statement of account provided by Mr. Taylor and HWH's response submissions that HWH was substantially involved with the preparation of its submission. The Board also notes that Mr. Warrack, who gave evidence at the hearing, did not claim an attendance honorarium. The Board finds it appropriate to recognize the time incurred for these activities by the members of the group and finds the amount claimed to be justified for each member.

For the foregoing reasons, the Board approves a preparation honorarium of $300.00 for each member of HWH.

Finally, with respect to the claim for disbursements in the amount of $159.00, the Board is of the view that the expenses incurred were directly and necessarily related to the hearing in this matter and should be awarded in full.

6 ORDER

It is hereby ordered that

1) The Board approves total intervener costs in the amount of $152 479.75.

2) Payment in the amount of $65 507.32 shall be made to Monte S. Forster at Suite 2, 880 – 16 Avenue SW, Calgary AB T2R 1J9.

3) Payment in the amount of $65 400.93 shall be made to Bennett Jones LLP at 4500, 855 – 2 Street SW, Calgary AB T2P 4K7.

4) Payment in the amount of $21 571.50 shall be made to Taylor Conway, Barristers & Solicitors at 440, 7220 Fisher Street SE, Calgary AB T2H 2H8.

Dated in Calgary, Alberta, on June 5, 2009.

ENERGY RESOURCES CONSERVATION BOARD

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

C. A. Langlo, P.Geol.
Acting Board Member

F. Rahnama, Ph.D.
Acting Board Member

APPENDIX SUMMARY OF COSTS CLAIMED AND AWARDED

Appendix A

Appendix is available through ERCB Information Services. Contact infoservices@ercb.ca