



Bernum Petroleum Ltd.

Applications for One Facility Licence and
Two Well Licences
Lochend Area

Cost Awards

May 7, 2013

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2013-002: Bernum Petroleum Ltd., Applications for one facility licence and two well licences, Lochend Area

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ENERGY RESOURCES CONSERVATION BOARD

Calgary, Alberta

**BERNUM PETROLEUM LTD.
APPLICATIONS FOR ONE FACILITY
LICENCE AND TWO WELL LICENCES
LOCHEND AREA**

**Energy Cost Order 2013-002
Application Nos. 1725984, 1726232, 1729096,
1726089, 1726104, and 1729100
Cost Application No. 1750249**

INTRODUCTION

Background

- [1] Bernum Petroleum Ltd. (Bernum) applied in accordance with Section 2.020 of the *Oil and Gas Conservation Regulations* for licences to drill two wells and construct and operate a multiwell battery at either a surface location in Legal Subdivision (LSD) 1 of Section 4, Township 26, Range 3, West of the 5th Meridian (LSD 01-04-26-3W5M; 1-4 location), or an alternative surface location at LSD 16-33-25-3W4M (16-33 location). The purpose of the wells would be to obtain crude oil production with no hydrogen sulphide content from the Cardium Formation. The wellsite facility equipment would consist of two separators, four liquid storage tanks, a flare knockout tank, and a flare stack.
- [2] The proposed wells and related multi-well battery would be located about 4.7 kilometres east of the Town of Cochrane.
- [3] Timothy Bancroft and Frances Bancroft, owners of the southeast quarter of Section 4-26-3W5M, the northeast quarter of Section 33-25-3W5M, and the west half of Section 34-25-3W5M, objected to the applications.
- [4] The Energy Resources Conservation Board (ERCB/Board) held a hearing in Calgary on November 27 through 30 and December 5, 2012.
- [5] The Board issued its decision on April 4, 2013 in *Decision 2013 ABERCB 004*.

Cost Claim

- [6] On January 4, 2013, Timothy Bancroft, Carol Bancroft, and Frances Bancroft (the Bancrofts) filed a cost claim in the amount of \$140 799.93. On January 21, 2013, Bernum submitted comments to the Bancrofts' cost claim. On February 4, 2013, the Bancrofts submitted a response to the comments of Bernum.
- [7] The Board considers the cost process to have closed on February 4, 2013.

VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

- [8] 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.

[9] 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.

[10] When assessing costs, the Board refers to part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*.

[11] 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.

COST CLAIM OF THE BANCROFTS

[12] Mr. Gavin Fitch, of McLennan Ross LLP, represented the Bancrofts. On January 4, 2013, the Bancrofts filed a cost claim for legal fees in the amount of \$54 613.00, expert fees in the amount of \$61 682.00, attendance honoraria in the amount of \$2400.00, expenses in the amount of \$15 564.79, and GST in the amount of \$6540.14, for a total claim of \$140 799.93.

Views of Bernum

[13] On January 21, 2013, Bernum provided its comments on the Bancrofts’ cost claim. It did not take issue with the Bancrofts’ status as local interveners as defined under section 28 of the *Energy Resources Conservation Act*.

[14] Bernum stated that in several instances the interveners’ costs were unjustified or unreasonable. It stated that several of the costs claimed by the interveners were either inflated relative to the work produced or were not in accordance with the scale of costs set out in *Directive 031*.

- [15] *Directive 031* more fully sets out the Board's rules and guidelines with respect to the Board's discretion to award intervener costs. Bernum particularly referred to section 4.1, which gives the Board the ability to deny a claim for costs, in whole or in part, where "the Board is *not satisfied that the intervention was conducted economically*" (emphasis added).
- [16] Further to these guiding statutory provisions, an award of costs to an intervener, and the specific amount of those costs, is a discretionary matter subject to a determination of reasonableness and economy.

Legal Fees – McLennan Ross

- [17] Section 6.3 of *Directive 031* stipulates that costs claimed before the Notice of Hearing is issued are not normally awarded, as there is no certainty that a hearing will be held until a Notice of Hearing is issued. Bernum states that McLennan Ross should have its legal fees reduced by \$4166 on this basis as it claimed time beginning from its retainer in July of 2012, despite the Notice of Hearing not being issued until September 21, 2012.
- [18] Bernum and the Bancrofts participated in a previous hearing before the Board relating to Bernum's Application No. 1674911 for a sweet horizontal Cardium oil well to be located at the 1-4 surface location. Subsequent to the two-day hearing, the Bancrofts filed a costs claim, and the Board awarded \$18 725.00 in legal fees to the Bancrofts' then counsel for representation at the hearing.
- [19] Since the previous hearing, the Bancrofts retained new counsel, being Mr. Gavin Fitch of McLennan Ross.
- [20] Bernum stated that throughout the course of the hearing, Mr. Fitch tried to portray Bernum's applications and the hearing as a second try at the previously heard application. Bernum suggested that much of the work regarding the interveners' objection to the applications had been done by the previous counsel and Mr. Bissett. Bernum expected that the legal fees claimed by Mr. Fitch would be similar to those claimed in the past, though perhaps somewhat discounted given the amount of work previously done in assessing these lands and the issues surrounding them.
- [21] Bernum noted that Mr. Fitch's claimed fees—at \$54 613.00—are almost three times the fees that were previously determined appropriate and reasonable by the Board. Mr. Fitch's bill includes work performed by four articling students or junior counsel and two paralegals. Bernum submitted that this is not reasonable in light of the facts at issue, the facts and evidence previously at issue, and the nature of the evidence presented at the hearing.
- [22] Bernum suggested that the change in counsel led to duplication of work previously done; Bernum further suggested that, with the transfer of a file where there has been a good deal of history between the parties, this necessarily requires the duplication of work previously done in order to apprise the new counsel of the relevant facts, issues, and evidence. This is particularly true because the previous proceeding dealt with similar issues and essentially the same proposed surface location. Bernum stated that it should not bear the burden of the Bancroft's choice to retain new counsel, and thus the costs claim should be further reduced

by \$20 000.00. A reduced claim of \$34 613.00 would still result in fees approximately double those previously awarded by the Board for hearing attendance and preparation.

- [23] Bernum pointed out that a good portion of the time spent by one of the four junior counsel involved on the matter was spent researching case law relating to contracts against public policy. Bernum noted that no case law was referred to by Mr. Fitch on this issue, either in submissions or final argument. Bernum submitted that this is work that did not advance the proceeding and was not relevant to the evidence submitted. The fees claimed by McLennan Ross should therefore be reduced even further by \$1848.00 (8.8 hours× \$210/hr) to reflect this.
- [24] Bernum suggested that legal fees in the amount of \$28 599.00 would be reasonable and economic.

Expert Fees – Bissett Resource Consultants

- [25] Bernum took the position that fees of \$56 397.66 for the services provided by Mr. Dick Bissett (of Bissett Resource Consultants) are uneconomical and unjustified given the level of analysis demonstrated by the produced report.
- [26] Although Mr. Bissett is well known in the field of oil and gas exploration in Alberta, he gave testimony during the hearing that he personally had never programmed a horizontal Cardium well in Alberta. Bernum observed that his expertise does not lie in this particular field.
- [27] Bernum presented two scenarios for cost reduction: first, they stated that the report Mr. Bissett produced for the purpose of the hearing was not an expert report, but rather an advocate's report. Mr. Bissett clearly stated that his purpose in writing the report was to identify potential locations for the wells that were not on the Bancroft lands. On cross-examination, Mr. Bissett admitted that none of his suggested alternate sites are better than either Bernum's 1-4 or 16-33 locations, and that both sites are better in his opinion than any contained in his report. Bernum therefore suggested that reducing Mr. Bissett's costs claim to the amount of \$18 159.55 is appropriate (covering the \$8159.55 claimed in disbursements, with \$10 000.00 compensation for hearing appearance and time spent in drafting) to reflect the nature of the evidence led.
- [28] Second, Bernum took the position that the 163.50 stated hours of preparation, at the hourly rate of \$210.00, is unreasonable given the issues raised at the hearing. Mr. Bissett's report is seven pages long, with two pages taken up with discussions of the equity and fairness of Bernum's proposed project, which is not within Mr. Bissett's established realm of expertise.
- [29] The remainder of the report set out a total of three alternate locations from which Bernum could drill its wells and locate its facility; each is discussed generally in terms of the potential benefits and disadvantages as compared to Bernum's proposed locations. The report refers generally to an increase in drilling costs where the alternate locations require additional builds and turns but does not calculate or state these costs. The report does calculate and anticipate the additional cost for access to the proposed 16-28 Bissett alternate location; however, much of the work and analysis for the 16-28 alternate location

is taken from the report Mr. Bissett produced for the previous hearing between the Bancrofts and Bernum.

- [30] The disproportionate nature of the time claimed versus work produced is especially uneconomic in light of the fact that Mr. Bissett did not attend to the sites discussed before preparing his report. In fact, Mr. Bissett states on page 3 of his report that he had not attended to the sites since preparing the report filed in the previous proceeding in 2011.
- [31] Mr. Bissett's time entries include several hours spent reviewing the relevant ERCB directives, in particular *Directive 060*, which formed an integral part of Mr. Bissett's report. Despite this review, Mr. Bissett's report nonetheless gets it wrong in terms of the application. Bernum submitted that the hours spent were therefore not productive and that his claim should be reduced by a minimum of 18.75 hours (\$3937.50).
- [32] There are 12 hours of secretarial time included at a rate of \$110 per hour, which is again unreasonable in light of the time claimed by Mr. Bissett and the length of the resulting report. Bernum observed that in the past the Board has considered secretarial time as being part of the overall internal expense of an expert. Bernum submitted that the claim should therefore be further reduced by \$1386.00.
- [33] Mr. Bissett claimed costs for 30.25 hours of hearing appearance at the rate of \$310.00 per hour. This rate exceeds the maximum rate allowed by the Board under the scale of costs. Bernum submitted that Mr. Bissett's claim should be reduced by an additional \$1210.00 accordingly.
- [34] In summary, Bernum submitted that either fees in the amount of \$18 159.55 would be reasonable and economic in light of all circumstances or that Mr. Bissett's fees should be reduced as set out above to \$34 864.16 (i.e., discounted by \$6533.50 as specifically set out above, plus an additional \$15 000.00 for duplication of work).

Expert Fees – Brown and Associates

- [35] Brown and Associates (Brown) claimed fees, expenses, and GST in the amount of \$18 920.11 for the preparation of a five-page report (the Brown report) and appearance at the hearing. This claim includes 43.5 hours of time spent by Mr. Ken Venner, who did appear at the hearing and who was apparently responsible for preparation of the report; 34 hours by Liisa Tipman, a community planner; 16.5 hours by Justin Wick, planning technician; and 5.5 hours by Rob Wrigley, Brown principal.
- [36] Bernum observed that the Brown report attaches schematics constituting a general outline of a "plan area" (which is essentially a square area overlying the relevant lands). The report does not discuss the relevant planning framework in the county, the planning approval process, or any background information regarding the timeline for development of the subject lands.
- [37] Bernum submitted that a review of the report, along with cross-examination of Mr. Venner, established that the report contained several errors and contradictions and was not useful in assessing the applications or the intervention brought by Mr. and Mrs. Bancroft.

- [38] On cross-examination, it became clear Mr. Venner had not read and understood Mr. Bissett's report on which his conclusions were based, did not understand or appreciate that Mr. Bissett's alternate sites could result in four well sites and associated pipelining, and had not appreciated that Mr. Bissett's report proposed to locate the wells either in the centre of Mr. Venner's concept plan for development or in areas designated as country residential (Section 9-36-3W5). Mr. Venner admitted that the conclusion of the Brown report is inconsistent with its stated purposes.
- [39] Mr. Venner also stated under cross-examination that he had spent time reviewing ERCB *Directive 060* and its application. Bernum submitted that the Brown report incorrectly applies the directive and that it should not be responsible for this time.
- [40] Mr. Timothy Bancroft clearly stated in his evidence that he had no plans to develop the lands that were the subject of the hearing. Bernum submitted that, as owners of the two sections that were the subject of the hearing, Mr. Bancroft's plans are relevant to his intervention. As a result, the work done by Brown in assessing the impact of the applications on residential development of the lands is not reasonable or necessary for Mr. and Mrs. Bancrofts' intervention. Bernum therefore submitted that the costs claimed by Brown should be dismissed by the Board in its entirety.

The Bancrofts

- [41] Timothy Bancroft participated in the hearing, and despite Carol and Francis Bancroft not participating but only being in attendance, Bernum did not dispute their claims for attendance honoraria.
- [42] Bernum objected to disbursement claims made by Carol Bancroft for cartridges for her printer and fax machine, being \$85.41 and \$55.00, respectively, given that Ms. Bancroft's legal counsel incurred and claimed disbursements for copying and external printing in the amount of \$1466.03.
- [43] Bernum requested documentation in support of the mileage claim by Carol Bancroft for 360 kilometres and noted that mileage claims are limited to the hearing phase of the proceeding.
- [44] Bernum acknowledged that it agreed to pay for Mr. Orvel Miskiw's parking for his hearing attendance.
- [45] Bernum requested that the Board use its discretion afforded under section 57 of the ERCB *Rules of Practice* and section 4.1 of *Directive 031* to reduce the costs claimed by the interveners by \$85 522.14. Bernum summarized its submission as follows:

Bancroft's Claim	\$134,259.79*
Duplication and Unnecessary Legal Fees	-\$31,810.08
Bissett Resource Consultants	-\$35,552.50
Brown and Associates	-\$18,019.15
Miscellaneous Disbursements	-\$140.41
Revised Costs Claim	\$48,737.65*

*Note costs not inclusive of GST

Views of the Bancrofts

- [46] The Bancrofts provided their response to Bernum's comments on February 4, 2013.
- [47] The Bancrofts noted that Bernum had requested that the Board reduce the Bancrofts' costs from \$134 259.79 to \$48 737.65; a reduction of approximately 64%.
- [48] The Bancrofts submitted that the costs they claimed in this proceeding are reasonable and were directly and necessarily related to this proceeding. The Bancrofts stated that they acted responsibly in the proceeding and submitted that their participation contributed to a better understanding of the issues before the Board, issues which Bernum failed to meaningfully address until raised by the Bancrofts and the Board.

Legal Costs

- [49] The Bancrofts submitted that Bernum's position that there should be a reduction for legal costs prior to the issuance of the Notice of Hearing is not a tenable point.
- [50] Mr. Fitch stated that Bernum did not raise a concern about the Bancrofts retaining counsel prior to the issuance by the Board of a Notice of Hearing but apparently welcomed it. Given the history between Bernum and the Bancrofts, everybody was well aware that when Bernum filed new applications for oil and gas facilities on the Bancrofts' land, a second hearing was inevitable. This is presumably why Mr. Niven did not object in July 2012 to the Bancrofts' retaining legal counsel prior to a Notice of Hearing being issued. The Bancrofts submitted that this ground for reducing legal costs is entirely without merit.
- [51] The Bancrofts stated that Bernum's argument was essentially that the Bancrofts ought not to have hired a different lawyer for the second hearing so as to reduce Bernum's cost exposure and submitted that Bernum cannot dictate whom the Bancrofts should retain as their legal counsel.
- [52] The Bancrofts submitted that the entire duplication argument is misguided and mischaracterizes the nature of the Bancrofts' intervention in this proceeding.
- [53] Bernum filed six different applications as compared to one in the prior proceeding. The hearing in this proceeding was twice as long as the first proceeding. The Bancrofts submitted that to suggest that the Bancrofts' legal costs in this proceeding should be the same as or similar to their costs in the prior proceeding is disingenuous.
- [54] The inclusion of an application to construct and operate a flaring battery on the Bancrofts' property in addition to two wells introduced difficult issues that never arose in the first proceeding, including gas conservation economics, the impact of a flaring battery on country residential development, etc.
- [55] If a party changes counsel in the midst of a proceeding, a reduction of costs for duplication may be appropriate. However, the Bancrofts submitted that these are two separate proceedings, the second of which was more complicated and contained many more issues than the first. The Bancrofts were under no obligation to use the same counsel in the second proceeding.

- [56] The Bancrofts submitted that if citing case law was a criterion, legal costs would rarely if ever be awarded in ERCB proceedings. The issue of Bernum's application being contrary to public policy was directly raised in the Bancrofts' written submissions, as well as in cross-examination and closing argument.
- [57] The amount of time spent researching the issue (8.8 hours) was modest, and junior counsel was utilized to undertake this legal research. To nevertheless suggest that this time should be disallowed because no case law was cited in the Bancrofts' submissions or argument is absurd.
- [58] The Bancrofts submitted that there is no valid basis to support any reduction of the claimed legal costs.

Expert Costs

- [59] Bernum requests a reduction in the costs claimed by Bissett Resource Consultants from \$56 397.66 to \$18 159.55. The Bancrofts stated that this reduction of almost 70% is completely unwarranted.
- [60] The fact that Mr. Bissett had never personally programmed a Cardium horizontal well is irrelevant. The Bancrofts submitted that Mr. Bissett was clearly more qualified to speak to drilling than any other witness at the hearing.
- [61] Bernum then makes the argument, which it had previewed in its cross-examination, to the effect that Mr. Bissett did not render an expert report but rather an "advocate's report." The Bancrofts submitted that this is the pot calling the kettle black. If Mr. Bissett was an advocate, then Bernum's independent expert witnesses—the environmental witness (Mr. Johnson) and the planning witnesses (Mr. Melenka and Mr. Romanesky)—were cheerleaders. Mr. Bissett was far more even-handed and fair in his evidence than any of Bernum's experts.
- [62] The Bancrofts submitted that as the applicant, Bernum bears the onus of demonstrating that it appropriately canvassed alternative surface locations and that the locations it chose were the best available. In his evidence, Mr. Bissett pointed out that there are equally good surface locations not on the Bancrofts' lands. There is absolutely nothing improper about this evidence.
- [63] The Bancrofts stated that it is not the length of the report but the expertise, experience, and judgement contained in the report that matters. The Board has on many occasions in the past recognized Mr. Bissett for his expertise, experience, and judgement, and there is no reason it should not do so this time.
- [64] The Bancrofts observed that notwithstanding that Bernum considered that Mr. Bissett spent too much time preparing, it also believed he should have visited the sites a third time. The Bancrofts fail to see what good that would have done.
- [65] With respect to Mr. Bissett's time spent reviewing *Directive 060*, it should be noted that it only came into effect in November 2011, and no matter how experienced a person is, when new rules are developed they must be reviewed.

- [66] On the matter of Bissett Resource Consultants including secretarial time, and Mr. Bissett charging his hearing appearance time at \$310.00 per hour, the Bancrofts submitted that the Board has discretion to award these costs. With respect to Mr. Bissett's hearing appearance hourly rate, the Bancrofts submitted that if ever a witness has the expertise and experience which justifies an award of costs above the maximum hourly rate, Mr. Bissett is that witness.
- [67] The Bancrofts submitted that the amount of the Brown costs, \$18 920.11, is very reasonable. Given the level of Mr. Venner's experience and expertise, one might say it is a bargain.
- [68] Brown was retained to give expert evidence on land use planning. This issue was specifically identified by the Board in the previous hearing. The Board noted that it "was not presented with any evidence indicating that drilling would prevent future development of lands for commercial or residential purposes." The Brown report in this proceeding constituted evidence on that very point.
- [69] Mr. Ken Venner has particular expertise with the application and implementation of land development policies in Rocky View County, having worked in the municipality for over 13 years as both a municipal planner and a private planning consultant. It was obvious at the hearing that Mr. Venner had far greater experience and expertise than either of the planning experts retained by Bernum.
- [70] Brown was retained to review Bernum's proposed battery and well site locations on the Bancrofts' lands from a land use planning perspective and not retained to critically evaluate the relative merit of alternative sites or of using only one site versus four sites. The purpose of the Brown report was to provide an opinion, based on its knowledge of Rocky View County's adopted statutory planning framework, on whether Bernum's proposed battery and well sites would negatively impact future country residential development potential on the Bancrofts' lands.
- [71] One of the key issues in the hearing was whether it would be more appropriate to locate these oil and gas sites south of Highway 1A instead of north of Highway 1A. The Brown report provided expert opinion evidence that the sites could and should be more appropriately located south of Highway 1A, having regard to the Bearspaw Area Structure Plan and other county planning documents. This evidence clearly was relevant.
- [72] With respect to Bernum's criticism that Mr. Venner allegedly misinterpreted *Directive 060*, Mr. Venner was clear that he agreed with Mr. Bissett that the application of *Directive 060* appears more suited to rural and sparsely populated agricultural areas than to areas that are designated for future country residential development.
- [73] The fact that Mr. Tim Bancroft stated that he has no current plans to develop the lands had no bearing on Mr. Venner's analysis, assessment, and interpretation of the county's statutory planning framework. The Bancroft's lands are designated for future country residential development and will continue to be so designated for as long as the Bearspaw Area Structure Plan remains in force. The lands south of Highway 1A are designated for continued agricultural use. The issue is, having regard to the potential for future development, whether the area north or south of the highway is more appropriate for oil

and gas development. The conclusion of the Brown report is clear that such development should occur south of the highway in order to minimize conflict with future country residential development.

[74] In short, contrary to what Bernum argues, the Brown report and Mr. Venner's evidence was highly relevant. Moreover, the amount of Brown's costs is entirely reasonable. Further, Mr. Venner was highly qualified to give the evidence he did. Accordingly, the Bancrofts submit that Brown's costs should be awarded in full.

[75] The Bancrofts note Bernum's complaint that only Timothy Bancroft should be awarded attendance honoraria, followed by Bernum's indication that it does not intend to dispute the attendance honoraria claims made by Francis and Carol Bancroft. Bernum did, however, object to the Bancrofts' daughter claiming expenses related to printing and faxing, in the amounts of \$85.41 and \$55.00, respectively. The Bancrofts expressed their disappointment that Bernum would quibble over such minor amounts. Carol Bancroft lives outside of the City of Calgary and was forced to fax and print many documents on behalf of her elderly parents.

[76] The Bancrofts advised that Carol Bancroft's mileage represents travel from her home in De Winton to Govier Hall for five days, representing 36 kilometres one way for a total of 360 kilometres; they suggest that this is entirely reasonable.

[77] The Bancrofts reiterated that they had absolutely no desire to participate in a second hearing with Bernum in just over a year. Having been forced into it, the Bancrofts were entitled to put forward all reasonable arguments against approval of the applications. In *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, the Court of Appeal stated that in today's Alberta, "it is accepted that citizens have a right to provide input on public decisions that will affect their rights" and that "an award of costs may well be a practical necessity if the Board is to discharge its mandate on providing a forum in which people can be heard." The Court closes by warning the Board against applying its costs discretion "too restrictively."

[78] The Bancrofts submitted that their participation in the hearing was entirely reasonable and directly and necessarily related to the proceeding and that their participation contributed to a better understanding of the issues before the Board. Before the hearing, Bernum purportedly had no plans other than to drill the two wells applied for. By the end of the hearing, it was clear that Bernum could drill up to eight wells, all on the Bancrofts' land.

Views of the Board

[79] In order to be eligible for costs, as stated above, the Bancrofts must be local interveners as defined under section 28 of the *ERCA*. The Board confirms that Bernum did not raise the Bancrofts' status as local interveners as an issue given that the Bancrofts own the land on which the proposed well sites and facilities would have been located. The Board finds that the Bancrofts are local interveners for the purposes of section 28, and therefore the cost claim is eligible for consideration by the Board.

McLennan Ross – Legal Fees

- [80] The Board has considered the claim made by the Bancrofts for costs and has also considered the submissions of the parties. The Board notes that Bernum has raised concerns with costs that were incurred prior to the Notice of Hearing being issued. The Board further notes that *Directive 031* states that the Board generally will not award costs which precede the Notice of Hearing as there is no certainty that the matter will proceed to a hearing until the Notice is issued. The applications, however, were on the Bancrofts' land, and correspondence confirming standing was forwarded to Mr. Fitch on September 17, 2012. It was reasonable and necessary for counsel to begin preparing for the hearing from the date of the standing letter; therefore, fees commencing on this date and after are allowed. With respect to fees prior to the date of the standing letter, these are disallowed and result in a reduction of \$1261.00 plus GST.
- [81] With respect to the assertion by Bernum that the Bancrofts have unreasonable legal costs and duplication of work, the Board confirms that there was no obligation on the Bancrofts part to remain with their former counsel for this hearing. The Board accepts that this hearing was a separate proceeding which was more complicated, longer, and contained more issues than the first proceeding. The Board finds no issues with the hours claimed by Mr. Fitch, as lead counsel, after the Bancrofts were granted standing.
- [82] However, with respect to some of the time regarding Mr. Fitch's support, the Board does agree that a reduction is warranted. For instance, although the amounts are small, the Board does not find justification for the separate additional amounts included for the paralegal work added to the professional fees when there does not appear to be any reason why these costs are not already included in the lawyer's hourly rate. This results in a reduction of \$45.00 plus GST.
- [83] Regarding Bernum's assertion that Mr. Fitch did not specifically cite public policy case law in his submissions, the Board recognizes that counsel is entitled to review law and for many reasons may or may not mention specific decisions. Counsel is entitled to conduct research that assists in presenting his or her case even though specific decisions are not referenced.
- [84] With respect to the use of articling students, the Board notes that some of the tasks, such as copying discs and delivering materials, would not require any legal ability and these could have been performed by non-legal staff. As such, those costs should already be factored into the lawyer's hourly rate and not added on as a specific item. This results in a reduction of \$490.00 plus GST.

Expert Fees – Bissett Resource Consultants

- [85] Bernum acknowledged that Mr. Bissett is well known in the field of oil and gas exploration in Alberta and despite Mr. Bissett not programming a horizontal Cardium well, the Board confirms that it finds no issues with Mr. Bissett's credentials.
- [86] Regarding the *Directive 060* review, the Board finds that the hours claimed by Mr. Bissett in reviewing this directive in order to opine on it are reasonable. Concerning site visitation, the Board notes that Mr. Bissett had visited the area relatively recently, and the Board does

not find the work produced for his hearing report uneconomic in this respect. There are therefore no deductions in reference to these concerns.

- [87] However, Bernum's position is that Mr. Bissett's report is an advocate's report instead of an expert's report and that Mr. Bissett stated during the hearing that his purpose in writing the report was to identify locations that were not on the Bancrofts' lands. The Board was troubled that Mr. Bissett failed to disclose in his written report an analysis of any alternative sites on the Bancrofts' land when a review of those sites was an important issue in the proceeding.
- [88] Although expert witnesses are free to give their opinions as they see fit, the Board notes that it is important the expert opine on the main issues with respect to his or her area of expertise. In this regard, Mr. Bissett's report was greatly lacking; it did not identify that a major criterion for his site selections was that they should not be located on the Bancrofts' land nor did it express a professional opinion as to the best location(s) for development of the resources. Mr. Bissett only disclosed these opinions under cross-examination.
- [89] The Board finds that had Mr. Bissett presented these opinions in his written report there could have been significant time efficiencies gained at the hearing in reviewing these sites. The Board finds that a 50% reduction in Mr. Bissett's compensation for non-hearing time (163.50 hours) is warranted. At \$210 per hour, this results in reduction of \$17 167.50 plus GST.
- [90] The Board allows all of Mr. Bissett's hearing participation time of 30.25 hours; however, the rates claimed in the Bissett invoice are higher than permitted. The Board allows a rate of \$270.00/hour for Mr. Bissett's attendance at the hearing, which is the maximum rate allowed in *Directive 031*. This results in a reduction of Mr. Bissett's fees of \$1210.00 plus GST.
- [91] The Board confirms that claims for secretarial time are disallowed as it is the Board's view that this time is part of the overall internal expense of the Bissett office and is already incorporated into the billed time for the professionals at Bissett. This results in a reduction of \$1320.00 plus GST.
- [92] With respect to the expenses claimed by Bissett, the Board finds most of these appear to be reasonable and necessary. However, the Board declines to make an award for the full amount claimed for photocopying. As per *Directive 031*, Appendix E: Scale of Costs, photocopying will be awarded at \$0.10 per page. Therefore there will be a reduction in the amount of \$610.48 plus GST.
- [93] The Board notes that no supporting invoice or explanation has been provided for the amounts claimed for mapping and miscellaneous expenses on the invoice dated October 31, 2012. As indicated in section 6.1 of *Directive 031*, a receipt is required, and if an expense is not self-explanatory, an explanation should be provided. Therefore, the Board declines to make an award for these costs in the amount of \$700.00 plus GST.

Expert Fees - Brown and Associates

- [94] With respect to the Brown report, the Board notes that Mr. Venner did provide an opinion within his area of expertise. Regarding his time spent reviewing *Directive 060*, the Board finds that this was necessary in order to opine on the same. The Board further finds it was reasonable and necessary for expert opinion to be given on development issues, and Mr. Venner's analysis in this respect was relevant and material. As a result, the costs claimed by Brown will be awarded in full, other than for some secretarial time. As indicated above, secretarial time is disallowed as it is the Board's view that this time is part of the overall internal expense of Mr. Venner's office. This results in a reduction of \$46.00 plus GST.

The Bancrofts

- [95] In regard to the honoraria amounts, the Board agrees with Bernum's submission that without participation in the hearing, no honoraria can be claimed. Bernum's comments are consistent with *Directive 031*; however, despite Francis and Carol Bancroft not directly assisting in the process, Bernum does not dispute the payment of these honoraria, and the Board therefore confirms the payment of same.
- [96] The Board notes Bernum's objection to Ms. Bancroft's claims for printer and fax cartridges in the amount of \$85.41 and \$55.00, respectively, and the response that Carol Bancroft faxed and printed many documents for her elderly parents. It does seem reasonable to the Board that there would be instances where Carol Bancroft would print off faxes or copy documents from a printer in her residence so that the information contained therein could be conveyed to her elderly parents in paper format. Bernum points out that the Bancrofts' counsel has photocopying and external printing in the amount of \$1466.03 and that this amount demonstrates why there is no justification for Bernum having to bear the cost of Carol Bancroft's printer and fax cartridges. However, there is no indication that the copies from Ms. Bancroft's printer or fax are duplicates of documents already provided by the Bancrofts' counsel. The cartridge costs are small and will be allowed.
- [97] With respect to Carol Bancroft's mileage claims, the Board notes Bernum's request for documentation in support regarding the 360 kilometres travelled by her. It further notes the submission by Mr. Fitch that the mileage is for travel from her home in DeWinton to Govier Hall during the hearing phase of this proceeding, representing 36 kilometres one way. Despite no documentation providing an actual record of the distance driven, the Board accepts Mr. Fitch's statement regarding the distances and travel times. The mileage claim of Carol Bancroft is therefore allowed in its entirety. At the Board's reimbursement rate of \$0.505 per kilometre, this amounts to \$181.80.

ORDER

[98] The Board hereby orders that Bernum pay local intervener costs to the Bancrofts in the amount of \$111 409.81 and GST in the amount \$5397.64 for a total of \$116 807.45. This amount must be paid to McLennan Ross as the submitter of the claim at

McLennan Ross LLP
1000 First Canadian Centre
350 – 7 Avenue SW
Calgary AB T2P 3N9

Dated in Calgary, Alberta, on May 7, 2013.

ENERGY RESOURCES CONSERVATION BOARD

<Original signed by>

T. L. Watson, P.Eng.
Presiding Board Member

<Original signed by>

R. C. McManus, M.E.Des.
Board Member

<Original signed by>

G. Eynon, P.Geol.
Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is not available on the ERCB website. To order a copy of this appendix, contact ERCB Information Services toll-free at 1-855-297-8311.