Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd.

Part 2 of Proceeding No. 1457147
Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields

Cost Awards

Alberta Energy and Utilities Board

ALBERTA ENERGY AND UTILITIES BOARD
Energy Cost Order 2007-006:
Bearspaw Petroleum Ltd., Devon Canada Corporation, and Fairborne Energy Ltd.
Part 2 of Proceeding No. 1457147 – Review of Certain Well Licences and Compulsory Pooling and Special Well Spacing (Holding) Orders in the Clive, Ewing Lake, Stettler, and Wimborne Fields
Application No. 1457147

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Contents

ALBERTA ENERGY AND UTILITIES BOARD

Calgary, Alberta

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Cost Application No. 1498752

1. INTRODUCTION

At various times in 2005 and 2006, Bearspaw Petroleum Ltd. (Bearspaw), Devon Canada Corporation (Devon), and Fairborne Energy Ltd. (Fairborne) filed 28 applications with the Alberta Energy and Utilities Board (EUB or Board). The applications resulted in the issuance of well licences, compulsory pooling, and special spacing (holding) orders. The Board considered the applications, and related objections filed by EnCana Corporation (EnCana) and Luscar Ltd. (now Carbon Development Partnership [CDP]), dismissed the objections, and approved each of the applications without holding a public hearing.

Subsequently, the Board received review and variance applications from CDP and EnCana requesting that the Board conduct a review hearing in connection with the well licences, special well spacing (holding) and compulsory pooling orders. By letter dated March 9, 2006, the Board determined that CDP and EnCana, as the coal owners, were affected parties pursuant to section 40(1) of the *Energy Resources Conservation Act* (ERCA), and granted their requests for a review hearing (the Phase 2 Proceeding).

The Board split the Phase 2 Proceeding into two parts:

- Part 1: consideration of whether interim conditions should be imposed for the measurement and accounting of CBM production in connection with wells that have been licensed to Bearspaw, Devon, or Fairborne; and

- Part 2: consideration of the issue of legal entitlement to CBM being produced or intended to be produced from the wells.

After reviewing submissions filed by Bearspaw, CDP, Devon, EnCana, and Fairborne, the Board decided that it was not efficient to conduct a proceeding dedicated to the issue of measurement and accounting of CBM. On June 15, 2006 the Board issued a Notice of Cancellation of Hearing cancelling the Part 1 Proceeding.

With respect to Part 2, the Board held a public hearing in Calgary, Alberta, from October 16 to 26, 2006. The Panel assigned to consider the matter consisted of Board Members M. N. McCrank, Q.C., P.Eng. (Presiding Member) and A. J. Berg, P.Eng., and Acting Board Member C. A. Langlo, P.Geol. The Board received final argument after the close of the hearing, with final submissions filed on February 12, 2007. On the basis of the final submission filed on February 12, 2007, the Board considers the hearing to have closed on February 12, 2007.

On March 28, 2007 the Board issued Decision 2007-024.

On January 12, 2007 the Board received a cost claim in the amount of $81,283.37 from Rae and Company, counsel for the Freehold Petroleum and Natural Gas Owners Association (FHOA). Following the close of the hearing, on March 30, 2007 the Board invited comments regarding the cost claim, and an opportunity for FHOA to respond. The Board received comments from various participants on or about April 13, 2007 and FHOA's response on April 27, 2007.

The Board reviewed the comments and FHOA's response to the comments; and on May 24, 2007 requested further information from FHOA. Specifically, the Board requested FHOA to confirm the name of the freeholder that has an interest in an EnCana lease that was the subject of one of the applications considered in Decision 2007-024, provide details of what the interest is, and identify the particular EnCana lease.

On May 31, 2007, FHOA provided the additional information to the Board. This additional information indicated, among other things, that:

- Ms. Dorothy Jean Gillette of Rimbey, Alberta and Mr. James Senecal, of Calgary, Alberta are members of FHOA.

- Ms. Gillette is:

    - the registered owner of an undivided 1/3 interest in an estate in fee simple with respect to all mines and minerals except coal within, upon, or under certain portions of the NE ¼ and SE ¼ of Section 27, Township 39, Range 24 W4M (as more particularly described and set forth in certificate of title 902 169 510 +3); and

    - a successor in interest to certain mineral interests leased by a predecessor in interest in the above-noted lands under the Lease and Grant issued by The Director, The Veterans' Land Act on January 20, 1961 to Canadian Superior Oil of California Ltd. (a description of the leasehold interest and a copy of the lease is found in Fairborne Exhibit No. 06-023b-2006-08-26). The Gillette Lands and the above-noted lease formed part of Fairborne Application No. 1446453 (Approval No 0353789).

- Mr. James Lee Senecal of Ontario is the registered owner of an undivided 69/192 interest in an estate in fee simple with respect to all mines and minerals except coal within, upon, or under Section 17, Township 39, Range 24 W4M (as more particularly described and set forth in certificate of title 942 210 295) and the lands in which Mr. James Lee Senecal has a registered interest formed part of Fairborne Application No. 1446462.

- FHOA, has not, at this time been able to confirm whether Mr. James Senecal, of Calgary, is the same individual as Mr. James Lee Senecal of Ontario.

On June 4, 2007 the Board invited interested parties to comment on the additional information. On June 7, 2007 the Board received a response to the additional information from CDP, and on June 8, 2007 the Board received a response from EnCana.

For the purposes of this Cost Order, the Board considers the cost process to have closed on June 8, 2007.

2. VIEWS OF THE BOARD – Authority to Award Costs

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

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

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

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

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

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

3. INTERVENER STANDING

3.1. Views of the Parties (Excluding FHOA)

As noted above, the Board received initial comments from various participants on or about April 13, 2007 and further comments from some of these participants on June 7, 2007 and June 8, 2007.

With respect to the April 2007 submissions, the Board received comments from the following parties: Bearspaw; CDP; Computershare Trust Company of Canada (Computershare); Devon; EnCana; and Fairborne. With respect to the June 2007 submissions, the Board received further comments from the following parties: CDP; and EnCana.

A summary of the April 2007 and June 2007 submissions are set out in the paragraphs below.

Computershare does not take a position with respect to the cost claim; the amount of the claim; or who the Board should direct to pay the claim, other than it not be Computershare.

The remaining parties (Parties) submit comments, all taking similar views to one another, in that they all oppose FHOA's eligibility to claim costs. The Parties submit that FHOA does not qualify as a local intervener within the meaning of section 28(1) of the ERCA. To support their submissions, the Parties referenced or directly quoted the following from the Board's letter of July 19, 2006.

> The Board notes that only Canpar and Computershare have asserted any rights of ownership or other rights in relation to any of the lands and the corresponding applications which are the subject to the proceeding. As such, it is the Board's view that only Canpar and Computershare can be considered persons who may be directly and adversely affected by the Board's decision in connection with certain applications within the proceeding.

CDP and Bearspaw suggest that if FHOA had concerns with the Board's decision in its letter of July 19, 2006, FHOA should have requested a review of that decision at that time.

Devon and Fairborne also noted that Decision 2007-024, at page 4, reiterated the Board's July 19, 2006 letter.

In its April 13, 2007 submission, EnCana argues that FHOA also be denied "local intervener" status given the lack of evidence to support that FHOA is a group or association of persons with an interest in lands that may be directly and adversely affected by a decision of the Board. EnCana states the following:

> Freeholders own conventional natural gas rights under the following lands at issued in this proceeding: the SE¼ of section 15, 34-26-W4M: the NW¼ and S½ of section 21, 38-20-W4M; and 279.5 acres of section 13, 37-21-W4M. FHOA offered minimal evidence on its members' interest in these lands. Its witness, David Spiers, stated:
>
> > While FHOA has not yet had the opportunity to cross-correlate its database with the names of all of the lessors provided in direct evidence by Devon and Fairborne, FHOA can confirm that at least one of those lessors is a member of FHOA. Clearly, the Board's decision has the potential to directly and adversely affect the interest of that particular FHOA member. [*transcripts p. 607, lines 4-11]*
>
> No further information was provided. The location of the lessor's interest, the name of the lessor, the nature of the ownership, and the position of that lessor on the issues are not in evidence.

In its April 13, 2007 submission, EnCana further argues that only the land that is the subject of the Devon, Fairborne, and Bearspaw approvals may be "directly" affected by the issuance of approvals and licenses for those lands. EnCana notes the following from Energy Cost Order 2007-001[1] and Energy Cost Order 2007-003[2].

> …local intervener cost awards are intended to benefit persons who have a legally recognized interest in specific lands, and who choose to participate in a Board proceeding in order to safeguard the benefits they are entitled to enjoy by virtue of their ownership of those interests.

In its June 8, 2007 submission, EnCana argues that Ms. Gillette's interest was not an issue in the EnCana objections, and is not in a section where EnCana owns coal. FHOA's witness testified at the hearing that he was representing the association, and was not acting in the capacity of an agent for a particular landowner.[3] EnCana is of the view that FHOA did not participate in the hearing to address the concerns of Ms. Gillette, and further, that it does not appear to EnCana that FHOA was aware of Ms. Gillette's interest in lands at the time of the hearing.

In its April 13, 2007 submission, CDP argues that FHOA did not provide any evidence during the hearing that identified a particular freehold mineral owner as being part of FHOA's membership, and further that FHOA was representing a particular individual at the hearing. CDP notes that during cross-examination, FHOA's witness, David Spiers, acknowledged that he was appearing for the organization, not a particular landowner. CDP references transcript, Vol. 4, p. 611, line 25 to p. 612, line 6. Therefore, CDP submits that FHOA was not acting as an agent for Ms. Gillette at the time of the hearing.

In its June 7, 2007 submission, CDP argues that there is no evidence that Ms. Gillette supports FHOA's position, or authorized FHOA to act on her behalf. Lastly, CDP notes FHOA's comments with regard James Lee Senecal of Ontario, and James Senecal of Calgary. FHOA expressed that it is unable to determine whether the two individuals are the same person, and therefore it is unreasonable to expect that the Board could conclude that they are same person.

3.2. Views of FHOA

As noted above, FHOA responded to the Parties' initial comments on April 27, 2007 and provided additional information requested by the Board on May 31, 2007. A summary of the Board's request for additional information with respect to any FHOA members that may have an interest in any of the specific lands that formed the subject matter of Decision 2007-024 is set out in section 1 of this decision.

With respect to the request for intervener standing, FHOA notes that the request it made was pursuant to section 26 of the ERCA. FHOA submits that while it considers that the Board used a narrow and specific set of criteria in making its decision on intervener standing, it did grant FHOA the right to present relevant evidence, conduct cross-examination, and file argument. The application under section 28 of the ERCA is a separate application from that of section 26, and while the Parties suggest that the Board's decision of July 19, 2006 is determinative, FHOA

[1] Suncor Energy Inc., North Steepbank Extension and Bitumen Upgrading Facility
[2] Albian Sands Energy Inc., Muskeg River Mine Expansion
[3] Transcript at page 611, line 24 to page 612, line 5.

submits that the decision is only one of many factors the Board should consider when determining eligibility under section 28 of the ERCA.

FHOA submits that while it did not file evidence that would support a finding of standing under section 26 of the ERCA, the written and oral evidence provided throughout the proceeding reflects the criteria required in section 28 of the ERCA. FHOA provides the following at page 2 and 3 of its response.

a. FHOA is a federally-incorporated not-for-profit corporation whose mandate includes acting as the common voice of freeholders;

b. 3,100 individuals have joined FHOA, who represent in excess of 15,000 of the estimated 40-50,000 individuals who own freehold mineral rights in Alberta;

c. 40% of FHOA's members hold title to split title mineral rights;

d. At least one of the Devon or Fairborne lessors is a member of FHOA; and

e. The Board's decision could potentially or directly and adversely affect the 40% of its members with split title rights.

With respect to whether or not the Board's decision directly and adversely affects members of FHOA, FHOA is of the view the Board itself recognized adverse impacts through its decisions for this proceeding. In particular, FHOA notes the Board's decision with respect to the issue of quiet title and jurisdiction, rescinding Bulletin 2006-19, and the Board's concluding statement in section 11 of Decision 2007-024, which states the following.

> The Board's conclusions in this decision provide a sound basis for the Board's consideration of pending and future well licence, special well spacing (holding), compulsory pooling, and any other applications involving the right to produce CBM from split-title lands where objections based on disputed entitlement or ownership to CBM are filed. That is not to say that the Board will simply dismiss such objections without any consideration of the unique facts and circumstances of the particular objection. The Board will, however, where appropriate, consider such objections in light of the conclusions made in this decision, in particular about the nature of CBM and coal and the vernacular meaning of coal and CBM at the relevant time in the decision.

Should the Board determine that FHOA's cost claim does not meet the criteria of section 28 of the ERCA, FHOA submits that the Board should exercise its discretionary power and approve costs pursuant to section 15 of the *Alberta Energy and Utilities Board Act*, and section 7 of the *Rules of Practice*. FHOA was only party representing the views of the natural gas titleholders and lessors. FHOA submits that without their participation, the Board would have rendered a decision regarding the rights and titles of freehold natural gas titleholders without the benefit of their position.

3.3. Views of the Board

After considering the submissions, the Board has determined that FHOA is eligible to apply for cost recovery as a local intervener under section 28 of the ERCA. In this particular case, the Board finds that FHOA has demonstrated that one of its members, Ms. Gillette, who is the registered owner and holder of a leasehold interest for certain minerals rights within, upon, or under NE ¼ and SE ¼ of Section 27, Township 39, Range 24 W4M that are subject to Fairborne Application No. 1446453 (Approval No 0353789), may be directly and adversely affected by the Board's Decision 2007-024.

4. QUANTUM OF COST CLAIM

4.1. Views of the Parties

In their comments regarding the cost claim, EnCana and CDP both commented on the quantum of the FHOA cost claim.

EnCana submits that FHOA's presence was not necessary and did not contribute to a better understanding of the issues, and the positions of FHOA were duplicative of ten other participants. With respect to the hourly wages, EnCana notes that in some instances the rates are above the Scale of Costs. And lastly, with respect to the honoraria claimed for David Spiers, EnCana submits that FHOA did not justify this portion of the claim, nor is there any indication that Mr. Spiers contributed substantially to the preparation of the intervention.

CDP submits that the positions taken by FHOA at the hearing were repetitive of those presented by many, if not all, of the gas producers. As such CDP is of the view that FHOA added little to the record.

FHOA responded to the comments, by noting the following.

- The Board relied upon specific portions of FHOA's materials, evidence, and submissions (Decision 2007-024 footnotes: 2, 3, 78, 79, and 104).

- FHOA was the only party that purported to, and was recognizes as, representing the positions of the natural gas lessors on split title lands.

- Without FHOA's participation, the Board would have rendered a decision that directly impacted and adversely affected; the rights and title of all split title freehold natural gas lessors, without the benefit of understanding the positions of this particular class of individuals.

- FHOA's submissions were different from those of the natural gas lessees. Examples of unique arguments may be found at paragraphs 45-55 of FHOA's Reply Submission dated December 13, 2006.

- FHOA was the only party to argue that CDP and EnCana's position on the requirement of quiet title would result in the sterilization of oil and gas development throughout extensive areas of Alberta. The Board appeared to agree with this argument at page 12, section 5.1.4 of Decision 2007-024.

4.2. Views of the Board

The following table summarizes the FHOA cost claim.

	Fees	Expenses	GST	Total
Rae and Company	$69,659.50	$7,057.36	$4,566.51	$81,283.37
David Spiers	$1,100.00	$0.00	$0.00	$1,100.00
Total	**$70,759.50**	**$7,057.36**	**$4,566.51**	**$82,383.37**

The Board finds the submissions and arguments provided by Rae and Company to be of assistance when assessing the subject applications.

While the Board is not reducing the claim on the basis of value and contribution, it does have concerns with respect to the hourly rates claimed above the Scale of Costs. The Board notes that the Affidavit of Fees and Disbursements, provided by counsel for FHOA, stated that "the claimant should be entitled to recover such costs because the matter was extremely complex and required a great deal of experience".

The Board recognizes that Rae and Company engaged four lawyers from its firm, ranging in experience from 3, 10, 14, and 33 years. Other than Mr. Tibor Osvath, all the hours incurred are related to preparation. Mr. Osvath attended the hearing and prepared Argument and Reply. In that regard, 185 hours were incurred for preparation, 43.3 hours for attendance, and 41.5 hours for Argument and Reply.

The Board has considered the justification; however the Board does not find that FHOA has advanced a persuasive argument to show that the Scale of Costs is inadequate given the issues of the proceeding and the contribution by FHOA in this particular instance. The Board finds that the Scale of Costs is adequate for a four member legal team with various ranges of legal experience. Accordingly, the Board reduces the following hourly rates, resulting in an overall reduction of $2,973.00 to the legal fees.

Douglas Rae (15.2 hours)	$295.00/hr reduced to $250.00/hr	Reduction:	$684.00
Tibor Osvath (227.9 hours)	$260.00/hr reduced to $250.00/hr	Reduction:	$2,276.00
Evan Dixon (1.3 hours)	$250.00/hr reduced to $140.00/hr	Reduction:	$13.00
		Total:	**$2,973.00**

In addition, Rae and Company includes fees of $392.50 for two legal assistants. The accounts show that the work performed includes preparation of a disk; preparation of covering letters enclosing material; copying and scanning; document revision; obtaining copies of well license applications from the EUB; and attending at the EUB to file documents. The Scale of Costs provides for approval of costs incurred by a paralegal when a claimant demonstrates that the services provided required such expertise. Based on the activities described in the accounts, the Board does not find these services to be reflective of a paralegal position. Therefore, the Board disallows this portion of the cost claim.

The Board has reviewed the disbursements incurred by Rae and Company, and finds them to be reasonable, and approves them in full.

With respect to the honorarium claimed for David Spiers, the Board notes that this amount is comprised of a $200.00 preparation honorarium, and a $900.00 attendance honorarium. The Board is of the view that both amounts are reasonable in light of Mr. Speirs attending as a witness for FHOA. The Board approves this portion of the claim in full.

In summary, the Board approves legal fees of $66,294.00, disbursements of $7,057.36, and related GST of $4,388.13, for an overall award of $77,739.49. The Board approves honoraria in the amount of $1,100.00.

5. PAYMENT OF COST AWARD

5.1. Views of the Parties

In their comments regarding the cost claim; EnCana, CDP, Bearspaw, and Devon and Fariborne, all commented on who should be responsible for bearing any cost awards made by the Board.

EnCana submits that it should not be liable for the costs of any participants in the hearing. Pursuant to Rule 56 of the *Rules of Practice*, in a proceeding that relates to a specific licensee or approval-holder, the licensee or approval-holder shall pay the costs awarded to a participant unless the Board directs otherwise. The applicants in this matter should bear any costs ordered by the Board.

CDP submits that any cost award should be borne by the original applicants, rather than CDP. The Board's normal practice is that applicants bear local intervener costs. CDP references the following from the Board's letter of April 21, 2006.

> Given that the requests for review have been accepted by the Board pursuant to Section 40 of the Energy Resources Conservation Act, the applicants for the original applications under review (as opposed to the review applicants) are considered to be the applicants in the review hearing process.

Bearspaw submits that any cost award should be the responsibility of the Coal Owners. Neither FHOA, nor any of those persons whom it purports to represent, took a position with respect to the original applications.

Devon and Fairborne submit that EnCana and CDP should be responsible for paying any cost awards, as they are the parties who instigated the review. Further, the Board determined that the well licences and holding orders were properly issued. In the circumstances, it would be both extraordinary and extraordinarily unfair, if parties other than EnCana and CDP were required to pay costs.

FHOA supports the position of Bearspaw, and Devon and Fairborne, on the grounds that FHOA's participation in these proceedings was the result of EnCana and CDP seeking a review of the applications. It was CDP and EnCana that sought a disposition and relief that would directly impact the rights and title of split title freehold natural gas owners.

5.2. Views of the Board

Section 56(a) of the *Rules of Practice* reads as follows:

> 56 Unless the Board otherwise directs,
>
> (a) in a proceeding that relates to a specific licensee, operator or approval holder, the licensee, operator or approval holder shall pay the costs awarded to a participant,

In accordance with this provision, it is the Board's long-standing practice that the licensee or operator filing the proposed energy development application, pay the costs awarded to a participant. The rationale for this rule is based on the fact that, had the applicant whose proposed energy development is the subject of the proceeding not been filed, no costs would have been incurred by the intervener for this site-specific application. However, the Board believes that it is within the Board's discretion to review this long-standing practice of awarding costs when significant facts and issues of public interest, which concern the Board's enabling statutes, are the subject matter of a particular Board proceeding. As noted in section 3 of Decision 2007-024, the Board addressed five issues:

- technical evidence regarding the nature and development of CBM,
- jurisdiction of the Board to consider the issue of the legal entitlement to CBM in these applications,
- standard of proof required to satisfy the Board as to who has the right to produce the CBM,
- demonstration of entitlement to produce CBM, and
- review of instruments filed by the parties to demonstrate CBM entitlement.

Having regard to the evidence and arguments filed, it is clear to the Board that all of the participants recognized that significant facts and issues of public interest, involving a wide range of stakeholders, were being addressed in this proceeding. Accordingly, the Board finds it appropriate that the natural gas rights holders who were granted standing (namely, Apache, Bearspaw, Canpar, Computershare, Devon and Fairborne), and the coal owners who were granted standing (namely, CDP and EnCana), are all responsible for the approved costs. The costs shall be equally apportioned between the above-noted parties.

6. ORDER

IT IS HEREBY ORDERED THAT:

(1) Intervener costs are approved for the Freehold Petroleum and Natural Gas Owners Association in the amount of $78,839.49.

(2) The following parties are responsible for an equal share of the approved intervener costs.

Apache Canada Ltd.	$9,854.94
Bearspaw Petroleum Ltd.	$9,854.94
Canpar Holdings Ltd.	$9,854.94
Computershare Trust Company of Canada	$9,854.94
Devon Canada Corporation	$9,854.94
Fairborne Energy Ltd.	$9,854.93
Carbon Development Partnership	$9,854.93
EnCana Corporation	$9,854.93
Total	**$78,839.49**

(3) Payments under this Cost Order are to be made within 30 days of the date of this Cost Order, and are to be made to:

Rae and Company
Attention: Tibor Osvath
2910, 715 – 5th Avenue S.W.
Calgary, AB T2P 2X6

Dated in Calgary, Alberta on this 16th day of July, 2007.

ALBERTA ENERGY AND UTILITIES BOARD

<Original Signed by Thomas McGee>

Thomas McGee
Board Member