

File No. 1697
Board Order No.1697-6

April 19, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

PARCEL A (P2913) OF SECTION 1 TOWNSHIP 77 RANGE 15
WEST OF THE 6TH MERIDIEN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

George Merrick and Irene Merrick

(APPLICANTS)

AND:

Encana Corporation

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing March 27, 2013

Appearances: Leslie J. Mackoff and Ellen S. Hong, Barristers and Solicitors,
for the Applicants
Thomas R. Owen, Barrister and Solicitor, for the Respondent

INTRODUCTION AND ISSUE

[1] Mr. and Mrs. Merrick seek to recover their personal costs in the amount of \$7,199.44 in relation to this rent review proceeding. Encana Corporation (Encana) submits no costs should be awarded. In the alternative, Encana disputes the amount of the claim and submits any award should be limited to \$2,674.72.

[2] The Board may require a party to pay all or part of another party's costs in relation to a Board proceeding. Costs are discretionary. Other than in relation to the mediation process in an application for a right of entry order, there is no presumption in favour of a landowner recovering costs of a Board proceeding. In exercising its discretion to determine whether a party should pay all or part of the costs of another party, the Board will consider various factors including: the reasons for incurring costs; the contribution of counsel and experts retained; the degree of success in the outcome of a proceeding; and the reasonableness of any costs incurred.

[3] The issue is whether the Board should exercise its discretion to make an award of personal costs in favour of the Merricks in relation to these proceedings, and if so, to determine the amount. Encana agreed in advance to pay the Merricks' reasonable legal fees and disbursements, and the parties have settled that amount. This application is limited to personal costs.

BACKGROUND

[4] In October 2010, the Merricks sent a notice to negotiate the rent payable under their surface lease with Encana, and in December 2010 applied to the Board for mediation and arbitration. Encana disputed the Board's jurisdiction to entertain an application for rent review. By decision rendered January 20, 2011, the Board determined it had jurisdiction (Order 1697-1).

[5] In February 2011, Encana submitted a request for reconsideration of the Board's decision that it had jurisdiction. The Merricks sought advance costs so that they could retain legal assistance. Encana conceded liability to pay the

Merrick's reasonable legal fees and disbursements, and the Merricks agreed to withdraw their application for advance costs. The Board issued a Consent Order to that effect on March 2, 2011 (Order 1697-2). On June 21, 2011, in response to a joint submission from the parties respecting Encana's request for reconsideration, the Board issued a reconsideration decision (Order 1697-3), determining the Board had jurisdiction to entertain the application and confirming the effective date of the rent review, but providing different reasons.

[6] The Board conducted two mediation teleconferences. As the parties were unable to resolve the rent payable, the Board refused further mediation in October 2011, thus requiring the application to proceed to arbitration.

[7] On February 22, 2012, the Board issued a decision following a contested application for the production of documents brought by the Merricks (Order 1697-4).

[8] The Board conducted an arbitration in Fort St John in July 2012, and rendered its decision on November 28, 2012 (Order 1697-5). The Board ordered that the annual rent increase from \$6,000.00 to \$7,500.00 effective July 19, 2010. At the arbitration, the Merricks had sought annual rent of \$17,150.00. Encana submitted the rent should remain at \$6,000.00.

[9] In February 2013, the Merricks made this application to recover their personal costs. They claim costs of \$7,199.44 on account of their time spent and mileage for travel in relation to the proceedings, and for disbursements. Encana objected to the application arguing that as a result of Order 1697-2, the Merricks were not entitled to submit any claims for costs. By letter dated March 6, 2013, I determined that Order 1697-2 was intended only to resolve the issue of legal costs and disbursements and did not preclude the Merricks from seeking personal costs. Both parties have provided submissions respecting whether the Merricks should receive anything on account of their personal costs and, if so, respecting the quantum of costs claimed.

ANALYSIS

[10] The *Petroleum and Natural Gas Act (PNGA)* gives the Board the discretion to order a party to pay all or part of the actual costs incurred by another party (section 170). "Actual costs" include actual reasonable expenses incurred by a party in connection with a board proceeding and an amount on account of the reasonable time spent by a party in preparing for and attending a board proceeding (*PNGA*, section 168).

[11] The Board's Rules provide that in making an order for the payment of a party's costs, the Board will consider:

- a) the reasons for incurring costs;
- b) the contribution of counsel and experts retained;
- c) the conduct of a party in the proceeding;
- d) whether a party has unreasonably delayed or lengthened a proceeding;
- e) the degree of success in the outcome of the proceeding;
- f) the reasonableness of any costs incurred, and
- g) any other factors the Board considers relevant.

[12] The contribution of counsel and experts is relevant to a claim in relation to costs for legal or expert fees, and not a claim for personal costs. Other than this consideration, I will now review each of the other relevant considerations in considering the issue of whether any costs should be awarded, and if so, how much.

Should the Board exercise its discretion to award the Merricks any amount for personal costs?

The reasons for incurring costs

[13] The Merricks submit they are involuntary parties to the oil and gas operations undertaken by Encana on their Lands. They argue that they have had to set about educating themselves with respect to the appropriate compensation payable. They feel they had no choice but to commence these proceedings in light of the history of their interactions with Encana and previous attempts to renegotiate annual compensation.

[14] Encana disputes that the Merricks are involuntary parties as it is their application for rent review. Encana argues that if the Merricks had accepted an offer advanced by Encana, the matter could have been resolved and no arbitration would have been necessary. The Merricks, in turn, deny receiving an offer. Counsel explains the offer was made verbally and in the context of other proceedings.

[15] I agree with counsel for Encana that it is incompatible with the goal of resolution of disputes that one party should consider they will have their costs paid even if they reject a reasonable offer. In the circumstances, however, in light of the Merricks' denial that an offer was made, and counsel's explanation that it was a verbal offer in the context of other proceedings, I do not accept that the Merricks should be precluded from seeking costs solely on the basis of a reasonable offer for settlement having been made. If a party were to make an

offer in writing for the settlement of a claim, with clear explanation that the offer was without prejudice to the position that party would take at arbitration, and with clear explanation of the anticipated position that party would take on a claim for costs in the event the offer is not accepted and the Board's decision on the claim was less than the offer, the Board may be more inclined to accept the argument that no costs should be awarded.

[16] As the parties had not renegotiated rent following the Notice to Negotiate, it was not unreasonable for the Merricks to seek the Board's assistance. Having commenced a Board proceeding, it is not unreasonable that landowners will spend time researching and investigating in relation to advancing a claim and determining whether to retain counsel. Additionally, landowners will incur time in attending Board proceedings. These are all valid reasons for incurring costs. The Board may still consider whether the costs are reasonable and whether they should be awarded in whole or in part.

The conduct of a party in the proceeding

[17] The Merricks submit that at all times during this proceeding they conducted themselves appropriately. I agree.

Whether a party has unnecessarily delayed or lengthened a proceeding

[18] Encana submits that the Merricks application for production of documents was a waste of time, that it took extra time at the hearing to deal with irrelevant documents in the Merricks' material, and that the evidence of their expert was an unnecessary waste of time. While the application for production of documents was largely unsuccessful, it was not a significant factor in delaying the proceedings. Some time, but not a lot, was incurred at the arbitration dealing with irrelevant documents. The Board found the evidence of Encana's expert to be largely unhelpful as well, and gave no weight to the opinions offered by either expert. I do not attribute any excessive delay or lengthening of the proceedings to the Merricks.

The degree of success in the outcome of the proceedings

[19] The Merricks characterize the outcome of the proceedings, awarding a 25% increase to the annual rent as a success. Encana characterizes it a failure given their request for in excess of \$17,000. Encana likewise failed to have the rent remain at \$6,000. Neither party was wholly successful in the outcome of the proceedings, but in relation to the positions advanced at the arbitration, a greater degree of success can be attributed to Encana than to the Merricks.

[20] The Merricks incurred personal costs, however, with respect to Encana's application respecting the Board's jurisdiction prior to their retention of counsel. This application was determined in the Merrick's favour and upheld, albeit with different reasons, on reconsideration.

Conclusion on whether any costs should be awarded

[21] Considering all of the above factors, I am prepared to exercise the Board's discretion to award the Merricks part of their actual costs in connection with the proceeding. I am inclined to award a substantial portion of their reasonable costs related to proceedings prior to involving counsel in late February 2011, including their spent in initiating the proceedings, and in dealing with the application respecting the Board's jurisdiction. I must still determine whether these costs are reasonable. As the Merricks were only modestly successful in their claim for increased rent, however, I am not prepared to exercise the Board's discretion to require Encana to pay all of their costs in connection with the arbitration process. Given the Merrick's limited success in relation to the claim advanced, I find the portion of recoverable costs incurred after the end of February, 2011 should be limited to approximately one third of reasonable costs claimed.

Determining the Amount

[22] Some of the costs claimed by the Merricks relate to time and mileage in advance of the Notice to Negotiate having been sent to Encana. In this respect, they are not "costs in connection with a Board proceeding" and must be deducted from the claim.

The reasonableness of the costs claimed

[33] The Merricks provided an itemization of their costs showing the time spent on various activities and the mileage incurred. They claim mileage at \$1.00 per kilometer and time at \$50 per hour. Encana objects to the per kilometer rate, submitting that if mileage is to be awarded it should only be at the rate allowed for witnesses of .47/km. Encana does not object to the per hour rate claimed for time, but objects to some of the time claimed for certain activities, and the associated mileage, as being unnecessary or unreasonable. The activities that Encana submits were either unnecessary or unreasonable include attendance at other arbitrations, consulting with the Farmers' Advocate and computer time at the Farmers' Advocate's office, attendance at an Encana community barbeque, mediation, and time spent accounting for time. The Merricks submit the kilometer rate is not unreasonable given they drive a ¾ ton diesel truck, and submit all of their time was both necessary and reasonable. They refer to other Board decisions on costs including *Helm v. Progress Energy Ltd*, Order 1634-1

and *Encana Corporation v. Merrick*, Order 1599-2, to support various aspects of their claim. I will consider each of Encana's objections below.

[34] As to disbursements claimed, Encana does not dispute the necessity or reasonableness of the disbursements themselves, other than a small claim for unidentified stationary supplies and associated mileage.

Mileage Rate

[35] The Board has awarded mileage at .50/km (*Miller v. Penn West Petroleum Ltd*, Order 1620-1) and at \$1.15/km (*Helm v. Progress, supra*; *Schlichting v. Canadian Natural Resources Ltd*, Order 1750-1). The Board's Rules require the payment of .47/km to witnesses served with a Summons. That rate was intended to equate to the rate allowed for provincial government employees on travel status in accordance with a Treasury Board Directive. The rate provincial government employees on travel status may claim has since been raised to .51/km. In *Helm*, the Board recognized that the claimed rate of \$1.15 was higher than had previously been allowed, but on the strength of the evidence from the landowner's agent respecting the rate charged and paid normally in her professional capacity, and noting that the agent's claim for time was on the light side, the Board allowed the claim for \$1.15/km. In *Schlichting*, the mileage claim related to a single trip to Fort St. John in connection with filing and serving the application, and was not objected to. The Board acknowledged that the landowner had likely incurred other disbursements that he had neglected to retain receipts or records to substantiate.

[36] While the Merrick's have advised they drive a ¾ ton diesel truck, they have provided no other evidence to support the claim of \$1.00/km. I will apply .51/km to allowable mileage.

Attendance at other arbitrations

[37] The Board generally encourages parties who are anticipating participating in an arbitration hearing to attend a hearing to become familiar with the process, particularly if they intend to represent themselves. It is not reasonable, however, to expect that all of the time spent attending other arbitrations, together with associated mileage, should be reimbursed. In this case, I am prepared to allow 4 of the 12 hours claimed as necessary research and preparation for attendance at an arbitration, but will not allow the claim for any associated mileage.

Consulting with the Farmers' Advocate and computer time

[38] Encana submits consulting with the Farmers' Advocate was unnecessary once counsel was retained. The Merricks submit consulting with the Farmers'

Advocate ultimately served to reduce legal costs by eliminating the need for counsel to conduct research into matters. Further, it is apparent that some of the time consulting with the Farmers' Advocate was incurred prior to counsel being retained.

[39] As to computer time, the Merricks advise that they only have a low speed DSL connection at home, which causes difficulty when sending lengthy documents. They utilized the resources at the Farmers' Advocate's Office to send documents to their counsel and retain copies for themselves. I accept that using the Farmers' Advocate's computer likely reduced time that would otherwise be spent in sending documents.

[40] I accept that the claim of 9.5 hours for consulting the Farmers' Advocate between November 12, 2010 and the end of February 2011 is reasonable, and allow reimbursement in full. I accept that time spent consulting the Farmers' Advocate after counsel was retained may have reduced counsel time, but am not inclined to reimburse all of this time in full after the end of February 2011. A total of 7.85 hours is claimed in relation to the Farmers' Advocate after the beginning of March 2011. I allow just over one third of this time or 3 hours.

[41] As to mileage, I allow the claimed mileage of 240 kilometers associated with consulting the Farmers' Advocate between November 12, 2010 and the end of February 2011. After the end of February 2011, I find the mileage specifically identified as associated with computer time to be reasonable. As a trip to Dawson Creek is not necessary simply to consult other than if having to use the computer, I disallow these mileage claims. Mileage on March 3, 2011, October 14, 2011 and May 14, 2012 totaling 144 kilometers, is allowed at .51/km, but not the mileage associated with the claims on March 4, 2011 and April 1, 2011.

Attendance at Encana Open House and Barbeque

[42] I do not consider attendance at a community open house and barbeque, even if for the purpose of meeting a representative of Encana to attempt to get an agreement to renegotiate rent as a cost in connection with the Board's proceedings. The claim for one hour of time in connection with this event and associated mileage is not allowed.

Mediation

[43] Encana argues that as mediation was not successful, and as mediation was not forced upon the Merricks as in a right of entry situation, that each party should bear their own costs. In other rent review cases where the landowner has not been successful in the arbitration, the Board has required reimbursement of the landowner's time in relation to the mediation process, while denying or

substantially reducing the claim for time spent in the arbitration process. (See for example, *Velander v. Imperial Oil Resources Limited*, Order 1726-2 and *Nelson v. Imperial Oil Resources Limited*, Order 1763-1.) I will allow the claim for 2.5 hours spent in mediation but will reduce the 12 hours claimed for attending the arbitration by two thirds to 4 hours.

Time to update time spent

[44] I allow one hour of the two hour claim on October 12, 2011 for updating time spent as reasonable. The Board requires a record of time spent when claiming costs. Maintaining this record is time spent in connection with the Board's proceedings. The claim is reduced to allow partial recovery in accordance with my finding above that time spent after the end of February 2011 will not be fully recovered.

Disbursements

[45] The Merricks claim \$144.68 for postage, title search, commissioner of affidavits and stationary supplies. The disbursements were all incurred prior to the mediation and are not unreasonable. I allow the full claim.

Remaining Time and mileage

[46] The claim for activities not specifically discussed above includes approximately 52 hours and 444 kilometers related to commencing the proceedings, attending to mailing of documents, phone calls and emails with Encana personnel and counsel, reviewing documents and submissions, conducting research, and preparation for mediation and arbitration. An additional 392 kilometers is claimed in relation to travel to the arbitration. Thirteen hours and 104 kilometers are in relation to activities up to the end of February 2011. I allow the claim for this time and mileage (at .51/km). The time and mileage claimed after the end of February 2011 amounts to 34.46 hours and 732 kilometers. The Merricks may recover costs representing approximately one third of this time and mileage, or 12 hours and 244 kilometers at .51/km.

Calculation of Costs

[47] Applying my findings above, I find the Merricks are entitled to personal costs calculated as follows:

Time: 48 hours @ \$50/hr	\$2,400.00
Mileage: 732 kms @ .51/km	\$373.32
Disbursements	\$144.68
Total	\$2,918.00

ORDER

[48] Encana Corporation shall forthwith pay to George and Irene Merrick the sum of \$2,918.00 on account of their personal costs in connection with these proceedings.

DATED: April 19, 2013

FOR THE BOARD



Cheryl Vickers, Chair