

File No. 1726  
Board Order # 1726-1

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March 30, 2012

**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

SECTION 1 TOWNSHIP 85 RANGE 14 WEST OF THE 6<sup>TH</sup> MERIDIAN PEACE  
RIVER DISTRICT  
(The "Lands")

BETWEEN:

Vafrid Richard Velander

(APPLICANT)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

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**BOARD ORDER**

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Heard by written submissions closing February 20, 2012.

Thor Skafte and Richard Velander for the Applicant  
Peter Miller for the Respondent

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## INTRODUCTION

[1] This is Mr. Velander's application for costs of these proceedings to date and advance costs for the arbitration process.

[2] Mr. Velander applied to the Board pursuant to section 166 of the *Petroleum and Natural Gas Act* for mediation and arbitration to review the annual rent payable under a surface lease with Imperial Oil for the purpose of constructing and operating a wellsite on the Lands owned by Mr. Velander. The Board appointed a mediator, but the parties were unable to resolve the dispute. The mediator referred the application to arbitration. Mr. Velander seeks his costs of the mediation process and advance costs for the arbitration. Imperial opposes the application.

[3] The Board's power to award costs is found in Division 7 of the *Petroleum and Natural Gas Act*. The Board may order a party to an application to pay all or part of the actual costs incurred by another party in connection with the application (section 170). "Actual costs" is a defined term that includes actual reasonable fees and disbursements of legal counsel, a professional agent or expert witness, actual reasonable expenses incurred by a party in connection with a board proceeding, and an amount to account for the reasonable time spent by a party in preparing for and attending a board proceeding (section 168). The Board may also order an operator to pay to a landowner as advance costs, all or part of the amount the Board anticipates will be the landowner's actual costs awarded by the Board (section 169). An award of either costs or advance costs is discretionary.

## ISSUES

[4] There are two issues before me. The first is whether the Board should exercise its discretion at this point of the proceedings to require Imperial to pay Mr. Velander all or part of his costs incurred in the mediation process. The second is whether the Board should exercise its discretion to require Imperial to pay advance costs to Mr. Velander for the upcoming arbitration.

## ANALYSIS

[5] Rule 18 of the Board's Rules set out a process respecting applications for costs and the factors the Board will consider in making an order for payment of a party's costs. An application for costs must be in writing and include reasons to support the application, a detailed description of the costs sought and copies of invoices or receipts for disbursements. The factors the Board will consider in making an order for costs include: the reasons for incurring costs, the contribution of counsel and experts retained, the conduct of a party in the proceeding, whether a party has unreasonably delayed or lengthened a proceeding, the degree of success in the outcome of the proceeding, and the reasonableness of any costs incurred.

[6] As to advance costs, an application must be in writing and must summarize the nature of the actual costs and the amount the landowner anticipates will be incurred in connection with an application.

### Costs of Mediation

[7] The Board's Rules contemplate that in an application for a right of entry order and mediation and arbitration of associated compensation (an application under section 158 of the *Petroleum and Natural Gas Act*), the landowner will usually be entitled to recover their costs incurred in relation to the mediation process. This presumption in favour of the landowner does not apply to the arbitration process, nor does it apply to applications other than for right of entry, such as this one for mediation and arbitration of a rent review under section 166 of the *Act*.

[8] In applications other than under section 158 where a company requiring the right of entry will generally be required to pay the landowner's costs of mediation regardless of the outcome of the mediation, the Board cannot properly consider the factors set out in Rule 18 prior to the conclusion of its proceedings. The Board's usual practice, in the absence of any agreement by the parties with respect to costs, is to determine entitlement to costs and the amount of any costs payable after the proceedings have concluded.

[9] Both parties question the sincerity of the other in trying to reach a negotiated settlement and the merit of each other's case, and Imperial questions the reasonableness of the costs claimed. I cannot properly consider the factors set out in Rule 18 with the information before me or in advance of hearing the evidence and arguments in this case. In the absence of any presumption that the landowner will necessarily be entitled to recovery of his costs, I decline to order costs of the mediation process at this time. The determination of costs, if not resolved between the parties, can be dealt with at the conclusion of the arbitration process. I see no reason in this case to depart from the Board's usual practice in that regard.

### Advance Costs

[10] The *Petroleum and Natural Gas Act* gives the Board the unusual discretion to award advance costs. The Board has recently had the opportunity to consider the exercise of that discretion in *Canadian Natural Resources Limited v. Kerr*, Order 1715-2, November 29, 2011. The application for advance costs in *CNRL v. Kerr* arose in the context of an application by CNRL for right of entry and mediation and arbitration of associated compensation under section 158 of the *Petroleum and Natural Gas Act*. In that case, the factors the Board found compelling in exercising its discretion to award the landowner advance costs included the compulsory nature of the application, the landowner's personal and financial circumstances, the fact the landowner sought to advance novel arguments in his claim for compensation, the apparent need for expert evidence, and the fact that the landowner had not received any amount on account of his costs incurred in the mediation process to which he was presumptively entitled..

[11] None of the factors that the Board found compelling in *CNRL v. Kerr* exist in this case. There is no compulsory aspect to this application; it is an application for rent review, not right of entry. There is no presumption in favour of the landowner receiving his costs of the mediation process. This case does not appear to raise novel issues, nor does either party contemplate the need for expert evidence. I have no evidence with respect to Mr. Velanders personal or financial circumstances and am not satisfied that an award of advance costs is necessary to enable Mr. Velanders to effectively participate in the arbitration process. I decline to exercise the Board's discretion to award advance costs in the circumstances of this case.

### **CONCLUSION**

[12] I decline to exercise the Board's discretion to make an award of costs or advance costs at this time. The issues of entitlement to costs and the amount of any costs payable may be raised following the conclusion of the arbitration process, at which time the Board can properly consider the factors set out in Rule 18.

DATED: March 30, 2012

FOR THE BOARD



Cheryl Vickers, Chair