

**August 22, 2013**

**SURFACE RIGHTS BOARD**

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

**AND IN THE MATTER OF**

**THE SOUTH WEST ¼ OF SECTION 26 TOWNSHIP 77 RANGE 15 WEST OF THE 6<sup>TH</sup>  
MERIDIAN PEACE RIVER DISTRICT (the Lands, 1734)  
THE SOUTH EAST ¼ OF SECTION 27 TOWNSHIP 77 RANGE 15 WEST OF THE 6<sup>TH</sup>  
MERIDIAN PEACE RIVER DISTRICT THE NORTH EAST ¼ OF SECTION 27  
TOWNSHIP 77 RANGE 15 WEST OF THE 6<sup>TH</sup> MERIDIAN PEACE RIVER  
DISTRICT THE SOUTH EAST ¼ OF SECTION 34 TOWNSHIP 77 RANGE 15  
WEST OF THE 6<sup>TH</sup> MERIDIAN PEACE RIVER DISTRICT (the Lands 1735)**

**BETWEEN:**

**Encana Corporation**

**(APPLICANT)**

**AND:**

**507788 British Columbia Ltd. and  
Loiselle Investments Ltd.**

**(RESPONDENTS)**

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**BOARD ORDER**

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Heard by written submissions closing July 31, 2013

Brent R.H. Johnston, Barrister and Solicitor, for the Landowners  
Lars H. Olthafer, Barrister and Solicitor, for Encana Corporation

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## INTRODUCTION

[1] This is an application by Loiseau Investments Ltd. and 507788 British Columbia Ltd (the Landowners) for advance costs from Encana Corporation (Encana) pursuant to section 169 of the *Petroleum and Natural Gas Act (the Act)*. In August 2011, Encana applied to the Board for mediation and arbitration services respecting right of entry to the Lands owned by the Landowners for the construction and operation of a flowline, and with respect to the compensation payable to the Landowners. On October 4, 2011 and October 14, 2011, the Board granted orders authorizing Encana's entry to and use of the Lands, and ordered partial payment to the Landowners and payment of security deposits (Orders 1735-1 and 1734-1). The Board continued to mediate the compensation payable to the Landowners, but the parties were unable to agree on the amount payable, and the mediator referred the files for arbitration. Dates for the arbitration have not been scheduled.

[2] The Board's orders authorize Encana's use and occupation of approximately 20 acres of the Lands for the construction and operation of a flowline, inclusive of both permanent right of way and temporary workspace. Part of the Lands are located within the Agricultural Land Reserve (ALR) and the Landowners use the Lands as part of a ranching and farming business. The Landowners allege they had commissioned plans to subdivide the non-ALR Lands, prior to Encana exercising their right of entry, and that as a result of Encana's activity on the Lands, the subdivision cannot continue as planned. The Landowners further allege they have incurred other losses arising from the loss of use of a commercially viable shale and sandstone resource, the loss of use of a public right of way, and contamination of a fresh water resource on the Lands. They advise that they anticipate claiming compensation in excess of \$500,000.

[3] The Landowners estimate they will incur costs of approximately \$111,500 to \$141,500 in bringing their claim to conclusion by way of an arbitration before the Board. This estimate comprises:

a) Counsel fees	\$30,000
b) Hydrology Expert	\$19,000 - \$36,000
c) Geotechnical Expert	\$37,500 - \$45,500
d) Appraiser/Valuator	\$15,000 - \$20,000
e) Subdivision plans revision	\$5,000
f) Administrative	\$5,000

TOTAL \$111,500 - \$141,500

[4] Relying on the Board's decision in *CNRL v. Kerr* (SRB Order 1715-2, November 29, 2011), the Landowners seek an award of advance costs in the amount of \$100,000. Also relying on *CNRL v. Kerr*, Encana submits the claim should be denied in its entirety or, in the alternative, that the Board should only award a minimal amount.

[5] In *CNRL v. Kerr*, the Board identified several factors that it found relevant to exercising its discretion to make an award of advance costs. These factors included: the compulsory aspect of the application, the personal and financial circumstances of the landholder, the fact that the landholder sought to advance novel arguments the Board had not previously had the opportunity to consider and the apparent need for expert evidence to support his case, the fact that the landowner had not received any amount on account of his costs of the Board's mediation process, and that there was no suggestion an award of advance costs would pose an unfair burden on the operator.

[6] The Landowners argue that many of the factors the Board found compelling in the *CNRL v. Kerr* case are present in this case and weigh in favour of the Board exercising its discretion to make an award of costs. Encana argues that despite enumerating various factors in *CNRL v. Kerr*, the determinative factor for the Board was the landholder's inability to participate in the process without hardship. Encana argues that as the Landowners in this case do not contend they will be unable to participate in the Board's proceedings without an award of advance costs, no award should be made. The Landowners counter that financial wherewithal is only one of several factors to be considered, and that *CNRL v. Kerr* expressly contemplated that an award of advance costs could be made despite a landholder having financial wherewithal.

[7] Encana further submits the costs claimed are unreasonable and lack sufficient detail. It submits there is no evidence that the involvement of experts in hydrology and geotechnical matters is reasonably necessary to determine compensation, and that an award of advance costs is premature. It alleges it has engaged in significant remediation to mitigate the Landowners' potential losses arising from Encana's activity on the Lands, and that there is a real risk that the actual costs associated with legal and expert representation of the Landowners will be denied by the Board upon the conclusion of the arbitration proceedings.

## ISSUE

[8] The issue is whether the Board should exercise its discretion to make an order of advance costs in favour of the Landowners, and if so, for how much. In considering whether to exercise its discretion to award advance costs, the Board is essentially being asked to revisit and clarify its decision in *CNRL v. Kerr* with respect to:

- whether a landowner's ability to effectively participate in the Board's proceeding is a determinative factor for an award of advance costs, and
- the level of detail and certainty respecting the amount and necessity of anticipated costs that is required in making an application.

## **THE LEGISLATIVE FRAMEWORK**

[9] Section 169 of the *Act* enables the Board, on application, to order an operator to pay all or part of the amount the Board anticipates will be the landholder's actual costs awarded by the Board as follows:

- 169 (1) Subject to any regulations, the board may, on application, order the operator to pay to the landholder, as advance costs, all or part of the amount that the board anticipates will be the landholder's actual costs awarded by the board under section 170.

[10] There are no regulations with respect to costs or advance costs. "Operator" and "landholder" are defined terms; there is no dispute that Encana is an "operator" or that the Landowners are "landholders" within the meaning of section 169.

[11] Section 170 provides that the Board may order a party to pay all or part of the actual costs incurred by another party in connection with an application. It goes on to provide that if actual costs are awarded to a landholder who has received an amount as advance costs that exceeds the amount awarded, the operator may deduct the difference from any amount of rent or compensation payable and, if rent or compensation has been paid, the Board may order the landholder to pay the excess to the operator. "Actual costs" are defined in section 168 as follows:

- 168 In this Division  
"actual costs" includes, without limitation, the following:
- (a) actual reasonable legal fees and disbursements;
  - (b) actual reasonable fees and disbursements of a professional agent or expert witness;
  - (c) other actual reasonable expenses incurred by a party in connection with a board proceeding;
  - (d) an amount on account of the reasonable time spent by a party in preparing for an attending a board proceeding.

## **ANALYSIS**

[12] The Landowners submit there are two fundamental flaws with Encana's submission opposing their application for advance costs. They submit Encana

misstates the Board's decision in *CNRL v. Kerr* to construct a threshold test of impecuniosity, and that Encana requires a degree of proof, particularity and certainty in support of an application for advance costs that is incongruent with the applicable legislative and regulatory language. With respect to this second argument, I agree that the statutory language expressly contemplates estimation, using such terms as "summarize", "estimate" and "anticipate". For the most part, I do not agree with Encana's submissions that the claim in this case is insufficiently particular or speculative, and would not deny the claim on that basis. With respect to the first argument, however, while I disagree that *CNRL v. Kerr* constructs a threshold test of impecuniosity, it does require that the Board's discretion to award advance costs be exercised for the purpose of ensuring the effective participation of a landholder. If the tool of advance costs is not required for that purpose, then there is no reason for the Board to exercise its discretion.

### The Purpose of Advance Costs

[13] In *CNRL v. Kerr*, the Board considered for the first time, its authority and discretion under section 169 of the *Act* to make an order for advance costs, and the factors that the Board would consider in exercising that discretion. The Board reviewed the scheme of the *Act* and the context for the legislative provisions for advance costs. With respect to the legislative context the Board said at paragraph [23]:

An entry order is a compulsory taking. While a landowner is entitled to be compensated, in the absence of an agreement with the operator, the landowner has no choice but to engage in the Board's processes to advance a claim. Landowners are frequently unable to support a claim because they present little or no evidentiary support, or because they cannot establish the legal basis for a claim beyond those commonly recognized in law. A landowner is disadvantaged in the absence of effective legal assistance with advancing the evidence and arguments to support alleged loss or damage. The right to compensation provided by the legislation cannot be effectively explored, tested or advanced if one party to the dispute does not have proper representation. The Board's ability to effectively adjudicate a claim for loss or damage is compromised if one side of the dispute is not effectively represented.

[14] In light of this legislative context and the Board's experience, the Board found that "the intent of the legislature in enacting section 169 must have been to give the Board a tool to ensure that both sides of a dispute before it would be able to effectively participate in its processes and have the ability to engage the professional resources necessary to advance the evidence and legal arguments necessary to support a claim." The purpose of the advance costs provision is to ensure the effective participation of landholders and the provisions are intended to be used by the Board for that purpose.

[15] In applying its discretion to award costs to ensure the effective participation of landholders, the Board found it was not bound to apply the extremely high bar established by the common law for an award of advance costs in a litigation context. One of the tests established by the common law for an award of advance costs was the “impecuniosity test”. This test requires that the party seeking advance costs “genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were made” (*British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). The test requires that an applicant must “satisfy a court that all funding options have been exhausted”. It contemplates that an applicant must have explored the possibility of obtaining a loan, thereby incurring debt, and having counsel act on a contingency fee as two possible funding options.

[16] Concluding the legislature must not have intended that an applicant for advance costs demonstrate impecuniosity as required by the common law, the Board said at paragraph [19]:

Section 169 authorizes the Board to exercise its discretion to order advance costs to a landholder. A landholder is an owner of land or occupant who is a party to a Board proceeding. An owner of land will generally have the option of mortgaging the land to raise funds to advance their claim. While there certainly could be circumstances where a landholder could be found to be impecunious to the extent that there is no way they could participate in the Board’s proceedings without financial assistance, the legislation expressly grants the discretion to award advance costs in circumstances where parties generally will have some financial wherewithal, and where it will often be impossible to demonstrate there is “no other realistic option”.

[17] The Board found that in authorizing the Board to exercise its discretion in favour of a landholder, the legislation contemplates the discretion to award advance costs in circumstances where parties will rarely, if ever, meet the “impecuniosity test”. In making an application for advance costs, an applicant does not have to demonstrate “impecuniosity” as required by common law. An applicant does not have to demonstrate they have exhausted all funding alternatives, or that there is “no way” they could participate in the Board’s proceedings without an award of advance costs. An applicant does not have to explore options of incurring debt or engaging counsel on a contingency fee basis. That is not to say, however, that financial wherewithal is not a factor to be considered. An applicant does have to show that an award of advance costs is required to ensure effective participation in the process, without hardship or without exploring options the common law “impecuniosity test” would have required.

[18] There will likely be many cases where a landholder's financial wherewithal, while not meeting the "impecuniosity test", will not permit a landholder to effectively participate in the Board's proceedings without hardship, or without incurring debt or exploring other options that the common law test would have required. A landholder is not expected to exhaust all possible resources or put themselves in a position of hardship before requesting advance costs. Such a requirement would not operate to "level the playing field" and ensure effective participation of landowners, but only serve to perpetuate the circumstance of landowners not being able to properly advance a claim and the Board not being able to effectively adjudicate. But, if a landholder is able to effectively participate in the Board's proceedings without hardship and without the assistance of advance costs, there is no reason for the Board to exercise its discretion to require the operator to assist by funding in advance the landholder's participation. If the landholder can effectively participate without assistance, the Board does not need to use the advance costs tool to ensure the landholder's effective participation.

[19] I agree that many of the factors the Board found compelling in *CNRL v. Kerr* also exist in this case. The claim for compensation arises in a right of entry context. The claim for compensation is complex and will require expert evidence to establish both the quantum of the alleged loss and that the loss was incurred as a result of Encana's activity on the Lands. Some of the compensation claims present issues the Board has not considered in the past. I agree it is appropriate the Landowners are represented by counsel and do not doubt, in the context of this case, that the participation of counsel will assist both the Landowners and the process. Encana has not established it would face an unfair burden if required to pay advance costs. I make no comment or finding with respect to Encana's argument that there is a significant risk the Landowners will not be able to substantiate their claim for compensation and may ultimately not be entitled to their costs of the arbitration process, but do not accept there is a significant risk that the Landowners will not be able to repay costs if the Board were ultimately to make that order. The Landowners have not received any amount for their costs incurred in the Board's mediation process.

[20] Despite all of those factors, however, the Landowners do not contend that they would be unable to participate without an award of advance costs in the amount sought, or that their effective participation in the arbitration will create hardship. If the Landowners can effectively participate in the Board's proceedings without an award of advance costs, the Board does not need to ensure the Landowner's effective participation and its authority and discretion to do so is not required.

#### Degree of Detail Required for Advance Costs

[21] Although not necessary for the disposition of this application, in order to provide some guidance for future applications, I will briefly address the arguments respecting the degree of proof, particularity and certainty required to support a claim for advance costs.

[22] In this application, the Landowners describe their alleged losses, identify the experts approached to provide opinions with respect to the alleged losses, and summarize the scope of the opinion that each expert will provide. They provide the range of fees quoted to them for the services of each expert and a breakdown of the estimated legal fees and disbursements budget.

[23] With respect to legal fees, while I encourage future applicants to include either the hourly rate of counsel or the number of hours anticipated to be spent for the itemized work to better assist the Board with determining the reasonableness of the anticipated fees, the need for legal services is evident from the application and the budget is sufficiently particular in estimating fees for various anticipated legal services and specific disbursements.

[24] With respect to expert fees, again I would encourage future applicants to provide either the hourly rate or the estimated number of hours behind the global fee estimates provided to assess the reasonableness of the anticipated cost. The landowner must link the anticipated opinion of an expert to an alleged loss, but I would not necessarily expect an applicant to prove the assertions that will be the very subject of the proposed expert evidence beyond being able to demonstrate that there is some basis for a claim and that a claim is not entirely speculative. In this case, Encana refutes the need for some of the proposed experts by alleging it will be able to demonstrate the alleged loss has either been avoided or mitigated, or is otherwise not caused by Encana. These will be the very issues in the arbitration and the very issues that will require the evidence of experts to resolve. The purpose of an advance costs award to ensure landowners have the access to experts that may be necessary to prove a claim would be defeated if significant funds towards substantiating a claim had to be expended to demonstrate the need and worth of an expert's opinion in advance of that evidence being tendered. At the end of the day, the Board may assess whether costs incurred were both necessary and reasonable and has the discretion to require repayment of advance costs should the Board find repayment appropriate in the circumstances.

## **CONCLUSION**

[25] The application for advance costs is dismissed on the basis that the Board does not need to exercise its discretion, in the circumstances of this case, to ensure the Landowners' effective participation in the arbitration process. Issues respecting costs of the arbitration process will be left for the conclusion of the arbitration.

[26] As these proceedings arise out of Encana's application for a right of entry, there is a presumption that the Landowners shall be entitled to receive their actual costs of the Board's mediation process in accordance with Rule 18(2) of the Board's Rules. In the absence of some compelling reason why this presumption should not apply in this case,



the Landowners need not wait until the conclusion of the arbitration process to advance a claim for their costs incurred in the mediation process. If the parties are unable to resolve whether mediation costs are payable and the amount of those costs, the Board may determine any issues around payment of mediation costs in advance of the arbitration.

DATED: August 22, 2013

FOR THE BOARD



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Cheryl Vickers, Chair