File Nos. 1786, 1787, 1788, 1789, 1790
Board Order No. 1786-90-2

November 21, 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

DISTRICT LOT 3185 PEACE RIVER DISTRICT EXCEPT PLAN 29177
DISTRICT LOT 3187 PEACE RIVER DISTRICT
DISTRICT LOT 3188 PEACE RIVER DISTRICT EXCEPT PLAN 29177

(The "Lands")

BETWEEN:

Wilderness Ranch Ltd.

(APPLICANT)

AND:

Progress Energy Canada Ltd.

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing August 13, 2013

Submissions by: Robert R. Yorke, for the Applicant
Daron K. Naffin, Bennett Jones LLP, Barristers and Solicitors, for the Respondent

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INTRODUCTION

[1] The Applicant, Wilderness Ranch Ltd. ("Wilderness"), seeks to recover costs of $18,425.95 it claims it incurred in concluding a recent rent review of five leases it has granted to the Respondent, Progress Energy Canada Ltd. ("Progress"). Progress submits Wilderness' claim is excessive and according to Progress' calculations only $2,593.29, or a lesser amount the Board considers reasonable, should be payable.

ISSUE

[2] The issue is to determine the amount Progress should pay to Wilderness for costs with respect to the five rent review applications.

BACKGROUND

[3] Progress holds five leases on Wilderness' Lands. The parties attempted to renegotiate the rental provisions in the five leases, without much success.

[4] On September 28, 2012, Wilderness applied to the Board for assistance with the rent review. The first issue the Board had to determine was "whether effective notice to renegotiate may be deemed to have been provided by Wilderness although a Form 2 or other written notification was not completed." After considering the parties' written submissions, the Board ordered (Order No. 1786-90-1, February 23, 2013) that "Notice pursuant to section 165(2) of the *Petroleum and Natural Gas Act* was effectively provided as of November 8, 2010."

[5] The hearing to determine the substantive issues relating to the annual compensation for the five leases was scheduled for May 13-14, 2013. On the morning of May 13, 2013, the parties met privately and reached a settlement of the annual compensation issues without the Board's assistance. They informed the Board that they will attempt to resolve the costs issue between themselves, and, if they are unable to, will contact the Board for assistance.

[6] The parties were unable to resolve the costs issue, and hence this proceeding.

ANALYSIS

[7] Division 7 of Part 17 of the *Petroleum and Natural Gas Act*, RSBC 1996, Chapter 361 (the "Act"), provides for costs in the context of entry on private land. Section 170 states that the Board may order a party to pay all or part of the actual costs incurred by another party in connection with the application.

[8] Section 168 of the Act provides as follows:

> 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 and attending a board proceeding;

[9] Rule 18(4) of the Board's Rules provides 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 a proceeding;
>
> (f) the reasonableness of any costs incurred; and
>
> (g) any other factor the Board considers relevant.

[10] Wilderness claims its actual costs in connection with its rent review applications for the five leases, which turned out to be a three-stage process, being the effective date, annual compensation and costs determinations.

[11] Progress does not object to Wilderness' entitlement to the costs of its applications, but objects to the quantum claimed. Therefore, I will only address the quantum of the various costs in the order that the parties have grouped them.

[12] A summary of Wilderness' claim and Progress' proposal is as follows:

Item	Wilderness' Claim	Progress' Proposal
Mileage	$3,156.29	$703.09
Preparation time: Effective date submissions May 13-14 rent review hearing	 $3,900.00 $5,925.00	 $600.00 $400.00
Meals and accommodation: Meal allowance for May 8-14 Accommodation for May 8-14	 $221.00 $1,324.54	 $50.00 $340.20
Aspen Grove/Elvin Gowman	$1,500.00	$0.00
Miscellaneous other expenses	$1,521.69	$500.00
Total	**$17,548.52 + $877.43 GST = $18,425.95**	**$2,593.29**

Mileage

[13] Wilderness claims 2,744.6 kilometers (km) at $1.15 per km with the distances travelled broken down into different periods. Progress says both the number of km travelled and the rate per km are excessive and unreasonable.

[14] Progress says the distances claimed for periods: November 18 to 21, 2012 ("Period 1") – 398 km; January 20 to 22, 2013 ("Period 2") – 380 km; May 9, 2013 (195 km); May 10, 2013 (196 km); and May 14, 2013 (195 km); totalling 1,364 km should not be compensated for. It says Wilderness' activities during Periods 1 and 2 – such as meetings with OGC officials, Rimrock Ventures and Elvin Gowman and/or the Farmer's Advocate office – could have been conducted over the telephone and did not necessitate a trip to Fort St. John or Dawson Creek. Furthermore, it says, checking well sites is not an activity properly compensable under a cost claim, but rather under the intangible nuisance and disturbance factor under s. 154(f) of the Act. With respect to the May 9 to 14 periods (collectively, "Period 3"), Progress says it was not necessary for Wilderness to take the additional trips to and from Fort St. John and Dawson Creek.

[15] Wilderness, of course, disagrees with Progress, and says it has claimed only one-third of the actual distances travelled during Periods 1 and 2 and has not claimed any other expenses such as meal or accommodation costs, and that its activities during these periods, including the site visits, were necessary to gather sufficient evidence to

make its case and challenge Progress' evidence. With respect to the Period 3 trips, Wilderness claims they were necessary mainly to have the documents for the hearing and invoices dropped off, typed, and picked-up.

[16] With respect to the 778 km for Periods 1 and 2, although I agree with Progress that some of the information gathering could have been conducted over the telephone, I will allow the mileage claim because Wilderness is claiming only one-third of the total distance travelled and is not claiming any other expenses, and also it was necessary to visit the sites to take photographs.

[17] However, with respect to the 586 km claimed for Period 3, I find that it was not necessary to have travelled back and forth between Dawson Creek and Fort St. John to have the documents and invoices typed, to pay Rim Rock Ventures, to enquire about mileage rates and to consult with Mr. Gowman. All of these activities could have been conducted by facsimile, telephone or other electronic means. I emphasize that both the Act and Rule 18(4) require that the actual costs be "reasonable". The implication is that applicants must be diligent in avoiding unnecessary costs; even though costs may be incurred in connection with a Board proceeding only such of those costs that are "reasonable" may be recoverable. Even though these trips are related to the proceedings before the Board, I do not find them reasonable in the circumstances. Therefore, I disallow the claim for the 586 km.

[18] In the end, of the 2,744.6 km claimed, the cost of 2,158.6 km is recoverable.

[19] With respect to the rate to be applied, Wilderness says $1.15 per km is the appropriate rate whereas Progress says it should only be $0.51 per km.

[20] Progress refers to the Board's decision in *Merrick v. Encana Corporation,* SRB Order No. 1697-6, April 19, 2013, at para 35, where the Board noted that mileage rates in excess of the rate "intended to equate to the rate allowed for provincial government employees on travel status in accordance with a Treasury Board Directive" were allowed in circumstances only where the evidence in those circumstances supported the higher rates (such as $1.15 in *Helm v. Progress Energy Ltd.,* SRB Order No. 1634-1, December 2, 2010 and in *Schlichting v. Canadian Natural Resources Ltd.,* SRB Order No. 1750-1, August 17, 2012).

[21] Wilderness refers to the *Helm* decision in support of the $1.15 rate, and Mr. Yorke, on behalf of Wilderness, also says "most of the Company's [*sic*] I inquired for information stated between $1.15 and $1.35 per Km. All the Energy Companies are paying more then [*sic*] the Government rate including Progress. If they did not pay, no one would drive their own pickups because they could not afford to."

[22] The difficulty I have with Mr. Yorke's statement is that he does not say which energy companies he contacted and he does not provide any direct evidence from any of the companies he says he contacted. He refers to Progress, but Progress is disputing the higher rate and is offering to pay only $0.51 per km. I have no reliable evidence to determine the going rate. Wilderness does not present any special

circumstances warranting a higher rate. Therefore, I am left to apply the BC government rate (being $0.52/km as of April 1, 2013) as the Board has on numerous occasions.

[23] Therefore, applying the $0.52/km rate to the 2,158.6 km, $1,122.47 is recoverable.

Preparation Time

[24] Wilderness claims 78 hours for the effective date submissions and 118.5 hours for preparing for the May 13-14 rent review hearing, whereas Progress submits only 12 hours for the effective date submissions and 8 hours for the rent review hearing are reasonable because of the brevity of Wilderness' submissions. Neither of them disputes the $50 per hour rate.

[25] Wilderness calls Progress' suggestion of the reasonable time "so far out of reality" and "ridiculous". It says it spent more hours than it has claimed in preparing for these proceedings. It claims that if Progress had negotiated with Wilderness in good faith prior to May 13, 2013, none of these costs would have been incurred.

[26] Progress refers to the Board's decision in *Schlichting, supra,* at para 8, where the Board discussed "reasonable time":

> The reasonable time spent in connection with an application, will include time to prepare and file an application, communications and discussions with the other party and the Board in relation to the scheduling and resolution of the application, reasonable time spent on research and preparation of Board proceedings, and attendance at Board proceedings.

[27] In *Schlichting, supra,* the Board accepted "time spent in preparation to file a Notice to Renegotiate as the commencement of time spent 'in connection with a Board proceeding'." In this case, the Board noted (Order No. 1786-90-1, para. 19) that "a review of all of the communications available reveals that as of early November, 2010, the parties had entered into discussions to renegotiate the rental provisions and offers were being made." I also note that the Board in *Merrick, supra,* at para. 44, said "[t]he Board requires a record of time spent when claiming costs. Maintaining this record is time spent in connection with the Board's proceedings."

[28] So, I fail to understand how Progress can suggest that a total of 20 hours is "reasonable time" when the parties have been dealing with these applications for about two and a half years (at least since November, 2010) negotiating, researching, attending telephone mediations, and preparing for and dealing with the Board proceedings.

[29] Wilderness claims it spent a total of 196.5 hours during Periods 1, 2 and 3. In reviewing Wilderness' breakdown of these hours, I find some excesses. For example, I find that some of the information gathering could have been done remotely, without having to physically be at different locations, thus avoiding the time and expense

associated with such efforts. I also find it was not necessary for Mr. Yorke to have been physically present in Dawson Creek from May 8, 2013 for a hearing scheduled for May 13, 2013, to be travelling back and forth between Dawson Creek and Fort St. John to do paperwork, and also when a settlement was reached on the morning of May 13, it was not necessary to have stayed in Dawson Creek until May 15 only to finish paperwork. The paperwork could have been completed by electronic and other means. Also, there appears to be excessive preparation time, particularly in May, 2013, on top of a fair amount of preparation time in January, 2013. I am not saying that Wilderness did not undertake extensive preparation, but the question is was the time spent "reasonable"? Considering there were five applications, and in the end, Wilderness did reach a settlement with Progress not only for the current rent review, but also for a future period, I find 100 hours of preparation time is not unreasonable.

[30] Therefore, applying the rate of $50/hr. to the 100 hours, $5,000 is recoverable.

<u>Meals and Accommodation</u>

[31] Having found that it was not necessary for Mr. Yorke to have been physically present in Dawson Creek from May 8 to 15, I find that meal allowance for only May 12 (the day travelling to the hearing), May 13 (the day of the hearing/settlement) and May 14 (the day travelling back home) and accommodation costs for only May 12 and 13 are reasonable.

[32] It is not clear on what basis Wilderness ($221.00) and Progress ($50.00) arrived at their meal allowance amounts. Therefore, I will apply the BC government current meal allowance rates, on the basis that Mr. Yorke has met the travel status and timing conditions – for May 12, all three meals, $49.00; for May 13, dinner only, as breakfast was included with the hotel rate and Progress bought lunch, $28.50; and May 14, all three meals, $49.00; that totals $126.50.

[33] The hotel rate is $197.99 per night, including all the taxes. So, for May 12 and 13, the amount recoverable is $395.98.

<u>Aspen Grove/Elvin Gowman</u>

[34] Progress objects to Wilderness' claim for $1,500 it paid to Aspen Grove Property Services for Mr. Gowman's assistance. Progress says it is not clear what assistance Mr. Gowman provided to Wilderness and that "Mr. Gowman confirmed in his May 8, 2013 email to the Board that he nor his company, Aspen Grove Property Services, were under contract to provide Mr. Yorke with advocacy services."

[35] In fact, Mr. Gowman's May 8, 2013 email to the Board said ". . . I want to confirm that the Farmers' Advocacy Office closed on February 28, 2013 and that neither I nor Aspen Grove Property Services are under contract to provide any such service."

[36] However, it is clear from Wilderness' submissions and its expense reports that it was communicating with Mr. Gowman regarding these proceedings. Mr. Gowman was

present on May 13, 2013, the day of Wilderness' hearing, to assist Mr. Yorke. He need not have been present if he was not assisting Wilderness in some fashion. To what extent he was instrumental or was of any assistance in the parties' settlement, I do not know. Therefore, I will allow two days' of Mr. Gowman's time (16 hours) at $50.00 per hour (rather than at the rate he has billed Wilderness), plus GST, totaling $840.00.

Miscellaneous Other Expenses

[37] Wilderness claims $1,521.69 (plus taxes) for various miscellaneous expenses such as typing services (Rim Rock Ventures Inc.), printing charges, maps, office supplies, and Surface Rights Board fees for copies of documents. Progress objects to some of these charges. I will deal with them in point form:

a. Walmart - $205.53 + $9.72 taxes = $215.25 – for photo printing and other supplies. Progress says this is excessive and includes transactions marked "Not Complete" and "Voided Bankcard". I agree. I will disallow the May 8, 2013 "Voided Bankcard Transaction" for $134.40 and allow the balance of $80.85. The January 21, 2013 receipt for $89.04 that Progress refers to was not submitted for reimbursement.

b. Staples - $409.28 + $44.57 taxes = $453.85 – for paper, binders, index tabs, a hole punch, a stapler and two units of printer ink. Progress says this is excessive, particularly considering the volume of paper and printer ink purchased in relation to the submissions made in these proceedings, and asks that the amount be reduced to $100. I agree that this cost is excessive. I also notice that some of the larger purchases date back to October, 2012, even before the effective date. I will allow one-third of this cost, being $151.28, as a more reasonable amount.

c. Rim Rock Ventures - $437.50 + $21.88 taxes = $459.38 – for typing on May 10 and 14, 2013. Progress says this is excessive considering the extent of the typed materials produced in these proceedings, and asks that the amount be reduced to $50. I agree that this cost is excessive for copy typing services. A generous estimate would be five hours per day at $15 per hour, which works out to $150 for the two days. I will allow $157.50 ($150 + $7.50 GST).

d. Purolator - $342.31 + $21.11 taxes = $363.42 – for courier services. Progress objects to three deliveries to Mr. Gowman, totaling $98.92. As I have found that Mr. Gowman did assist Wilderness with the Board proceedings, I will allow this amount. Therefore, the full amount of $363.42 is recoverable.

e. Remaining expenses – for Surface Rights Board ($49.50); Canada Post ($35.81 allowed; $26.14 disallowed as this was incurred prior to the effective date); and McElhanney Associates ($22.40) are allowed.

[38] The following is a summary of the costs claimed by Wilderness, countered by Progress, and allowed by the Board:

Item	Wilderness' Claim	Progress' Proposal	Allowed by the Board
Mileage	2,744.6 km @ $1.15/km = $3,156.29	1,378.6 km @ $0.51/km = $703.09	2,158.6 km @ $0.52/km = $1,122.47
Preparation time	196.5 hrs. @ $50/hr. = $9,825.00	20.0 hrs. @ $50/hr. = $1,000.00	100.0 hrs. @ $50/hr. = $5,000.00
Meals Accommodation	$221.00 $1,324.54	$50.00 $340.20	$126.50 $395.98
Aspen Grove/Elvin Gowman	$1,500.00	$0.00	$840.00
Miscellaneous other expenses	$1,521.69	$500.00	$860.76
Total	**$17,548.52 + GST of $877.43 = $18,425.95**	**$2,593.29**	**$8,345.71 (inclusive of taxes)**

Conclusion

[39] Having considered all of the factors under Rule 18(4) in light of all of the circumstances of this case, I find the amount Progress should pay to Wilderness for costs with respect to the five rent review applications is $8,345.71.

ORDER

The Surface Rights Board orders that Progress Energy Canada Ltd. shall forthwith pay to Wilderness Ranch Ltd. $8,345.71 for costs.

DATED: November 21, 2013

FOR THE BOARD

V. Chettiar

Valli Chettiar, Member