File No. 1868
Board Order No. 1868-3

October 13, 2016

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

THE NE 1/4 OF SECTION 24, TOWNSHIP 78, RANGE 18, W6M THAT PART LYING NORTH AND EAST OF PLAN H311 EXCEPT PLAN 23873,
PEACE RIVER DISTRICT, PID 008-746-443

THE SE 1/4 OF SECTION 25, TOWNSHIP 78, RANGE 18,
W6M PEACE RIVER DISTRICT, PID 014-738-601

(the "Lands")

BETWEEN:

ARC Resources Ltd.

(APPLICANT)

AND:

Darcy Dwayne Hommy

(RESPONDENT)

BOARD ORDER

Heard: by written submissions closing August 5, 2016
Appearances: Darryl Carter, Q.C., for Darcy Dwayne Hommy
Rick Williams, Barrister and Solicitor, for ARC Resources Ltd.

INTRODUCTION

[1] This is an application for costs following the arbitration of compensation payable by ARC Resources Ltd. (ARC) to Darcy Dwayne Hommy arising from ARC's right to enter a portion of the Lands owned by Mr. Hommy to construct and operate ten additional wells on an existing padsite. The arbitration was the first time the Board was asked to consider the issue of compensation for additional wells on an existing padsite.

[2] The parties have been unable to resolve the issue of costs. Mr. Hommy seeks to recover $23,338.26 in legal fees, disbursements and applicable taxes in accordance with accounts rendered by his counsel. ARC submits that the parties should be responsible for their own costs, or alternatively that the costs sought by Mr. Hommy should be substantially reduced.

ISSUES

[3] The issues are:

a) Should Mr. Hommy receive his costs in connection with ARC's application for right of entry and to determine compensation, and
b) If so, how much should he receive in costs?

BACKGROUND

[4] The Board granted a right of entry over a portion of Mr. Hommy's Lands allowing ARC to construct and operate ten additional wells on an existing padsite already containing nine wells, and already the subject of a right of entry order and agreement respecting compensation. The right of entry to construct the ten additional wells did not

increase the area of the Lands that ARC may use for its oil and gas activities. The parties were not able to agree on the additional compensation payable to Mr. Hommy arising out of the right of entry to drill the additional ten wells.

[5] At the arbitration, ARC submitted the initial compensation should be $1,000 per well whereas Mr. Hommy submitted it should be $2,000 per well. ARC submitted no additional annual compensation was required; Mr. Hommy sought annual compensation of $1,000 per well. In determining the compensation payable arising from ARC's right of entry to construct and operate the additional ten wells, the Board was required to answer two questions: a) How much should be paid in initial compensation per additional well? And b) Should there be annual compensation, and if so, how much? The Board determined that ARC should pay Mr. Hommy $2,000 per well in initial compensation and $250 per well annually (Order 1868-2, June 9, 2016).

[6] ARC made three offers to settle in advance of the arbitration. The Board's award equaled the third offer. The first and second offers exceeded the Board's award. Following ARC's initial offer, Mr. Hommy's counsel responded that ARC would need to offer $4,000 per well and $1,000 per well annually to reach a settlement.

LEGAL FRAMEWORK

The Board's authority to award costs

[7] The Board's authority to award costs to a party is found in section 170 of the *Petroleum and Natural Gas Act* which provides:

> 170 (1) Subject to any regulation, the board may order a party to an application under this Part or an intervener to pay all or part of the following:
>
> (a) all or part of the actual costs incurred by another party or intervener in connection with the application;

(b) ...

[8] There are no regulations limiting or otherwise directing the exercise of the Board's authority under this section.

[9] The term "actual costs" is defined in section 168 of the *Petroleum and Natural Gas Act* as follows:

> **"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.

The Board's Rules

[10] The Board has adopted Rules respecting costs. Rule 18(2) sets out a presumptive obligation on the person requiring a right of entry to pay the landowner's costs of the mediation process in connection with an application for a right of entry order. Rule 18(3) speaks to the requirements for an application for costs and Rule 18(4) sets out the factors the Board will consider in making an order for payment. These Rules are set out below:

> 18 (1) The Board may order a party to pay all or part of the actual costs of another party or intervener in connection with an application.
>
> (2) Regardless of Rule 18(1), unless otherwise ordered by the Board, in an application under section 158 of the Act, the person who requires a right of entry shall pay the landowner's costs in relation to the mediation of the application.
>
> (2.1) ...

(3) An application for costs under Rule 18(1) must be in writing and must include

(a) reasons to support the application;
(b) a detailed description of the costs sought; and
(c) copies of any invoices or receipts for disbursements.

(4) 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;
(g) any other factor the Board considers relevant.

SUBMISSIONS

Landowner

[11] Mr. Hommy submits he should be fully indemnified as required by principles applied in expropriation cases. Relying on *Dell Holdings Ltd. v. Toronto Area Transit Authority* (1997), 60 L.C.R 81 (SCC) and *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, he submits the *Petroleum and Natural Gas Act* should be read in a broad purposive manner to ensure the landowner is fully compensated. He submits landowners in Surface Rights Board cases ought to be entitled to costs on a solicitor-and-client basis and references *Cochin Pipelines Ltd. v. Rattray* (1981), 22 L.C.R. 198 (Alta. C.A.) and *Robertson v. Calgary Power Ltd.* (1981), 22 L.C.R. 210 (Alta. C.A.).

[12] Mr. Hommy submits that to the extent the Board's rules purport to restrict a presumption in favour of the landowner to mediation costs only and not arbitration costs, the rules are *ultra vires*. He submits the Board cannot use self-made rules to thwart the principle that landowners ought not to be out of pocket. He submits section 11 of the *Administrative Tribunals Act* allows the Board to make rules respecting practice and

procedure to facilitate the just and timely resolution of matters before it but not for other purposes.

[13] He submits that the Board's rule that it may consider the degree of success in the outcome of a proceeding is also *ultra vires*.

[14] He submits previous Board authority limiting costs to those incurred after the filing of an application is wrong, arguing the approach to costs should be no different than the approach to damages in expropriation cases where causation is the important factor. He submits landowners are entitled to be compensated for reasonable costs from the time they are approached by the oil company.

Right Holder

[15] ARC submits that in the circumstances of this case the parties should be responsible for their own costs or, alternatively, that the costs sought by the landowner should be significantly reduced. ARC disagrees with Mr. Hommy's position that the Board's rules are *ultra vires* or that there is any entitlement to full indemnification for costs in surface rights proceedings.

[16] ARC submits that in the circumstances the Board should refuse to exercise its discretion to award costs. ARC submits it made reasonable offers to settle the dispute, and that if Mr. Hommy had accepted those offers, he would have received no less or even more than the Board ultimately awarded.

[17] ARC submits Mr. Hommy has not provided evidence that the costs claimed were actually incurred and that there is insufficient detail to assess whether they are reasonable. ARC submits mere invoices are not sufficient evidence of actual costs.

[18] ARC submits that Mr.Hommy's conduct, in particular in not attending the hearing or providing evidence to substantiate his original claim and in refusing to accept reasonable offers, mitigates against his recovery of costs.

ANALYSIS

Entitlement to Costs under the *PNGA*

[19] Mr. Hommy argues that the principles of expropriation law should apply to the interpretation of the cost provisions of the *Petroleum and Natural Gas Act* giving rise to an entitlement to the landowner of full indemnification for his costs relating to ARC's right of entry and these proceedings. This submission, however, flies in the face of the clear discretion given to the Board in section 170(1) of the Act to award costs in whole or in part. Section 170(1) says the Board "may" order a party to pay "all or part" of another party's costs. The use of the word "may" gives the Board discretion to award costs, and that discretion extends to awarding "all or part" of a party's costs. In enacting specific provisions around costs giving the Board the discretionary authority to order a party to pay all or part of another party's costs, the legislature clearly distinguishes between costs and compensation, and expressly gives the Board the discretion not to award full costs thereby negating any entitlement in a landowner to full indemnity for costs in a proceeding before the Board. It is clearly not the legislature's intention that any principle of expropriation law with respect to full indemnity, particularly as it relates to costs, will necessarily apply to surface rights proceedings in British Columbia.

[20] *Smith v. Alliance Pipeline*, *supra,* is distinguishable and does not provide binding authority on this Board for the principle that landowners are entitled to receive full indemnity for costs incurred in proceedings under the *Petroleum and Natural Gas Act*. *Smith v. Alliance Pipeline* involved an interpretation of the *National Energy Board Act*, not the *Petroleum and Natural Gas Act*, and in particular section 99(1) of that Act which provides:

> 99 (1) Where the amount of compensation awarded to a person by an Arbitration Committee exceeds eighty-five per cent of the amount of compensation offered by the company, the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation.

[21] *Smith v. Alliance Pipeline* involved a long drawn out dispute over compensation to a landowner by the company who had failed to reclaim its right of way as required. Proceedings before a first Arbitration Committee were aborted (because a member of the panel had been appointed to the Bench) and a second Arbitration Committee awarded the landowner the costs he had incurred in asserting his claim before it as well as most of his costs incurred in the proceedings before the first Arbitration Committee and in defending related proceedings instituted by the company in Court. The second Arbitration Committee awarded the landowner compensation exceeding eighty-five percent of the amount offered by the company. In making the award for costs, the second Arbitration Committee was interpreting and applying section 99(1) of the *National Energy Board Act* quoted above.

[22] The issue before the Supreme Court of Canada on appeal was whether the second Arbitration Committee could reasonably find that it was entitled under section 99(1) of the *National Energy Board Act* to make the award for costs that it did. The Supreme Court of Canada found that

> The relevant words of s. 99(1) make it plain that the Committee was thus entitled – indeed bound – to order Alliance to pay Mr. Smith "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by [Mr. Smith] in asserting [his] claim for compensation" (emphasis in original judgment).

[23] The question before the second Arbitration Committee was whether "costs" in s. 99(1) of the *National Energy Board Act* refers solely to expenses incurred by an expropriated owner in the proceedings before it. The Committee found the costs awarded, including those incurred in the proceedings before the first Arbitration Committee and the Court to have been reasonably incurred in asserting the landowner's claim for compensation. The Court found that the Committee's broad interpretation of

section 99(1) and decision to award all of the costs that it did was reasonable and accorded with the plain words of the provision, its legislative history, its evident purpose and its statutory context, and rested "comfortably on the foundational principle of full compensation that animates both the NEBA and expropriation law generally."

[24] The result in *Smith v. Alliance Pipelines* is entirely a result of the statutory language in issue which was capable of being reasonably interpreted as it was and the circumstances of the case. It does not stand for a general proposition that in any expropriation, or indeed any surface rights proceeding, a landowner is entitled to full indemnification for his or her costs. The Supreme Court of Canada acknowledges that "[a]wards for costs are invariably fact sensitive and generally discretionary" (para. 30). Even section 99(1) of the *National Energy Board Act* does not require full indemnification for costs in every case, but only when the compensation awarded to the landowner exceeds eighty-five percent of the company's offer.

[25] If *Smith v. Alliance Pipelines* stands for any general legal principle with respect to the awarding of costs in expropriation or expropriation like proceedings, it is that where a statute authorizes an award of "all legal, appraisal and other costs", costs on a solicitor-and-client basis may be awarded. The costs provisions of the *Petroleum and Natural Gas Act* do not contain similar language.

[26] Other authorities cited by Mr. Hommy as supporting an entitlement to recover full indemnification for costs are also distinguishable in that they deal with awarding costs under different expropriation or surface rights regimes involving their own statutory provisions. None involve an interpretation of section 170 of the *Petroleum and Natural Gas Act.* Many of those cases also acknowledge the discretionary nature of costs awards, even in expropriation cases (see for example *Brese et al v. City of Edmonton* (2006), 93 L.C.R. 200 (Alta. C.A.).

[27] The *Petroleum and Natural Gas Act* does not require landowners to be fully indemnified for their costs but clearly makes an award of costs discretionary and clearly

allows that an amount less than full costs may be awarded. The clear wording of section 170 does not express a legislative intent that landowners must recover their costs incurred in relation to proceedings before the Board on a solicitor-and-client basis.

The Board's Rules

[28] Section 11 of the *Administrative Tribunals Act* authorizes the Board to make rules respecting practice and procedure. Section 11(1) provides:

> 11 (1) Subject to this Act and the tribunal's enabling Act, the tribunal has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of matters before it.

[29] The purpose of the Board's rules is expressed at Rule 1(1) as being "to facilitate the just and timely resolution of applications before the Board".

[30] Mr. Hommy argues that the Board cannot use its rules to circumvent basic legal principles that a landowner is to be fully compensated and not out of pocket. As discussed above, the clear wording of section 170 of the *Petroleum and Natural Gas Act* does not give effect to any such principle in the awarding of costs in proceedings under that Act. On the contrary, section 170 of the Act expressly gives the Board discretion to order payment of "all or part" of a party's costs. The Board's Rules provide some guidance for how the Board will exercise that discretion.

[31] Rule 18(3) provides a presumption in favour of the landowner receiving his or her costs of the mediation process in an application for a right of entry order. Given that section 170 does not create any presumption that a landowner will receive all of his or her costs in any surface rights board application, there is nothing contrary to section 170 with this rule.

[32] Rule 18(3) is intended to encourage settlement of applications at the mediation stage. There is nothing contrary to the *Petroleum and Natural Gas Act*, *Administrative*

Tribunals Act or otherwise inappropriate about that intent. If reasonable offers are made to settle at mediation, there is no reason for the parties to incur the cost of arbitration. The just and timely resolution of applications is not furthered by encouraging unnecessary or unreasonable process.

[33] The Rules do not, as argued by Mr. Hommy, require that lack of success automatically negates a party's entitlement to costs. The factors set out in Rule 18(4), including the degree of success, are factors the Board will consider, but they do not limit or prescribe how the Board will exercise its discretion in making an award of costs. The Board will consider these and any other factors it considers relevant in any particular case when determining whether costs should be awarded, and if so, how much. No one factor is determinative.

[34] Even in expropriation cases where there is statutory authority to award costs on a solicitor-and-client basis, a number of factors may be taken into account in determining the reasonableness of the costs incurred including the amount of money at stake and the degree of success attained (Mark M. Orkin, *The Law of Costs, Second Edition*, at 232.2(1); *Brese et al v. City of Edmonton, supra*). Enumerating the degree of success as one of the factors the Board will consider in determining an award of costs under the *Petroleum and Natural Gas Act* is not contrary to general costs principles applicable in expropriation proceedings generally.

[35] I find that the Board's Rules are not *ultra vires*.

Should the Applicant get costs in this case?

Sufficiency of the Application

[36] ARC argues the application does not provide proof that the claimed costs have actually been incurred. ARC provides no authority for the proposition that "mere invoices are not sufficient evidence of actual costs". In other expropriation contexts

where legislation authorizes a board to make an order directing an expropriating authority "to pay the reasonable legal and other costs actually incurred by the owner for the purposes of determining the compensation payable" the condition that costs be "actually incurred" requires that a bill, statement of account or invoice for fees be rendered, but that it need not have been paid (*Peloquin et al v. Junction Creek Conservation Authority* 1972 CanLII 672 (ON SC).

[37] I find that the term "actual costs" including "actual reasonable legal fees and disbursements" in section 168 of the *Petroleum and Natural Gas Act* does not require proof that an account for legal services has been paid.

[38] ARC also takes issue with the description of the costs and the lack of receipts for disbursements. As the disbursements are part of counsel's bill, in the absence of an unusual or extraordinary disbursement, I find there is no need for separate receipts. The account rendered is sufficiently detailed to meet the requirement of Rule 18(3) that an application include a detailed description of the costs sought. Any deficiency of detail may, however, be a factor in assessing the reasonableness of the costs claimed or in assessing whether the costs have been incurred "in connection with the application".

Costs "in connection with the application"

[39] ARC submits, in line with previous Board decisions, that Mr. Hommy should not recover any costs in advance of the date of the application being filed to the Board. ARC filed its application for mediation and arbitration services on August 14, 2015. Counsel's account includes several items prior to that date.

[40] Mr. Hommy submits that a landowner is entitled to costs as soon as he is approached by the company. He submits the approach to costs should be no different that the approach to damages where causation is the important factor, not timing.

[41] Section 170 of the *Petroleum and Natural Gas Act* gives the Board the discretion to order costs "in connection with the application". This wording is not as broad as provisions in other statutes, for example section 99(1) of the *National Energy Board Act* which allows for the recovery of "costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation".

[42] I accept that the phrase "in connection with the application" does not necessarily mean that it is the date the application is filed in every case that creates the earliest date for which costs may be claimed. The costs must reasonably be capable of being "in connection with the application" and must not be in connection with a different application or another proceeding altogether, such as for example proceedings before the Oil and Gas Commission. The Board may consider in each case whether costs were incurred "in connection with the application" although an application may not yet have been filed, particularly where it is not the party claiming the costs who filed the application and the timing of the application was not necessarily within that party's control. Both *Merrick v Encana Corporation*, Board Order 1697-6 and *Schlichting v. CNRL*, Board Order 1750-1, referred to by ARC, involved costs in relation to an application for rent review commenced by the landowner. In both cases, the landowners were not entitled to recover costs incurred in advance of filing the Notice to Negotiate. This case involved an application for right of entry and resolution of associated compensation which was commenced by the right holder.

[43] The first entry in counsel's account is dated August 4, 2015 and is described as "To receipt and review of email from Dwayne Hommy". August 4, 2015 is the date of Mr. Rosie's email to Dwayne Hommy advising when pad construction would commence and indicating the compensation that would be paid. That email was clearly forwarded to counsel as it is found on the trailing email from counsel to ARC's counsel dated August 10, 2015 with Mr. Hommy's response to the issue of compensation. The next items on counsel's account are dated August 10, 11 and 13, 2015 and refer to telephone calls and emails with ARC's counsel, as well as telephone calls and a meeting with Mr. Hommy. Mr. Hommy's counsel received an email on August 14, 2015 from ARC's

counsel's assistant. It is likely this is the same email sent to the Board and copied to Mr. Hommy's counsel attaching ARC's application. The timing of the few entries prior to August 14, 2015 and their correlation with other emails before me dealing with compensation for the additional wells, makes it probable that these entries are "in connection with the application" which was filed on August 14, 2015.

The Factors in Rule 18(4)

a) Reasons for incurring costs

[44] The costs claimed relate entirely to the landowner's legal fees and disbursements expended by counsel. While not expressly set out, the reason for incurring the costs was obviously for the purpose of receiving legal advice and being represented by counsel in connection with the right of entry and compensation proceedings.

[45] A significant portion of the costs relates to counsel's fees in connection with the arbitration. ARC submits that in exercising its discretion the Board should factor in Mr. Hommy's rejection of offers that would have resulted in equal to or more compensation than the Board orders. ARC submits that the arbitration was unnecessary.

[46] The fact that ARC made reasonable offers to settle the compensation that equaled or exceeded the Board's award is a factor that weighs against full recovery for costs.

b) Contribution of counsel and experts

[47] No costs in relation to experts are claimed. Counsel represented the landowner throughout the Board's proceedings including at the arbitration. This factor is not relevant in the circumstances of this case.

c) Conduct of the party

[48] ARC submits that the landowner's conduct in advancing the position early on that he would be willing to settle for $4,000 per well and $1,000 per well annually was not a reasonable, good faith effort to resolve the dispute and that, consequently, the presumption in favour of recovering his costs of mediation should not apply. ARC further submits that having rejected reasonable offers thus necessitating the arbitration, Mr. Hommy's failure to attend the hearing and provide evidence about how the additional wells would impact him or the Lands did not assist the Board and should weigh against him in determining costs.

[49] The evidence at the arbitration suggests that Mr. Hommy's original claim was higher than that being offered to others for additional wells. Neither party, however, produced any evidence of agreements involving similar circumstances to this case. This case presented the first opportunity for the Board to consider the issue of compensation for additional wells on an existing padsite. In the circumstances, I am not prepared to find that the presumption in favour of the landowner receiving his costs of the mediation process should not apply.

[50] Nor am I prepared to find that, in the context of this case, the landowner's conduct was egregious or of a nature to significantly negate recovery of all or part of his costs.

d) Whether a party has unreasonably delayed or lengthened a proceeding

[51] Mr. Hommy did not delay or lengthen the arbitration.

e) Degree of success

[52] If measured against the position advanced early on, Mr. Hommy was not successful. If measured against the position advanced at the arbitration, Mr. Hommy was mostly successful. The Board awarded $2,000 per well, which was the

compensation sought by Mr. Hommy at the arbitration. While not awarding the amount of annual compensation advanced by Mr. Hommy, the Board accepted that annual compensation should be paid, rejecting ARC's position that there should be no annual compensation.

[53] Mr. Hommy's success is a factor that weighs in favour of recovery of costs.

f) The reasonableness of any costs incurred

[54] The lack of detail in counsel's account makes it difficult to assess the reasonableness of some of the costs claimed. Most of the legal fees are billed for 0.2 hours of time in connection with the receipt and review of emails, often with several similar entries on the same day. Some of the communications with members or staff of the Board relate to the scheduling of events, receipt of the right of entry order, receipt of routine correspondence, or other brief communications. It seems unlikely that some of these communications would involve as much as 0.2 hours of counsel's time. Other entries with respect to preparation for and attendance at conference calls, drafting submissions, reviewing submissions, reviewing the law, and preparation for and attendance at the arbitration do not appear to be unreasonable.

[55] The entire account for $23,338.26 seems high in relation to the amount involved in the proceedings. In assessing the reasonableness of legal fees in expropriation proceedings, the amount of money at stake is a factor that may be taken into account (*Brese, supra*).

[56] Considering all of the factors above, I am satisfied that Mr. Hommy should recover part, but not all, of his costs incurred in connection with ARC's application.

How much?

[57] Considering all of the factors above, I find the legal fees claimed should be reduced by approximately ¼ from 36.5 hours to 27 hours, principally because I am not satisfied the whole of the account is reasonable in relation to the services provided and the amount at stake, and because the arbitration could have been avoided. Mr. Hommy shall recover costs in the amount of $17,010.00 on account of legal fees and GST, and $343.26 on account of disbursements and GST, for a total of $17,353.26.

ORDER

[58] ARC Resources Ltd. shall forthwith pay to Darcy Dwayne Hommy the amount of $17,353.26 in costs.

DATED: October 13, 2016

FOR THE BOARD

Cheryl Vickers, Chair