Mediation and Arbitration Board
 # 310 9900 100th Ave
Fort St. John, BC V1J 5S7

FILE NO. 1565
Date: ~~**September 24, 2007**~~ January 14, 2008
Board Order No. 403C
Amended

BEFORE THE ARBITRATOR:

IN THE MATTER OF
THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361 as amended
(THE ACT)

AND IN THE MATTER OF
SW 29-84-21 W6M PID 011-099-224,
SE 31-84-21 W6M PID 044-384-148
(THE LANDS)

BETWEEN:

TERRA ENERGY CORP.

(APPLICANT)

AND:

RHYASON RANCH LTD.

(RESPONDENTS)

ARBITRATION ORDER

Appearances:

Mr. Robert R. Bourne, counsel for Terra Energy Corp.
Ms. Shawn Specht, counsel for Rhyason Ranch Ltd.

ORDER

I. INTRODUCTION AND BACKGROUND

This decision deals with Rhyason Ranch's application for costs.

Terra Energy Corp. ("Terra") applied to the Mediation Arbitration Board on June 15, 2006, under Section 16(1)(a) of the ***Petroleum and Natural Gas Act***, R.S.B.C. 1996, c. 361, for right of entry for the purposes of oil and gas exploration. Terra holds drilling licenses for the Lands.

Communications between the parties following the initial contact in late March 2006 did not produce any agreement on right of entry and in mid June, Terra applied to the Board. On August 28, the Board conducted a mediation meeting. As the parties failed to agree, the Board ordered the matter to proceed to arbitration. Terra agreed to hold off conducting a survey of the Lands until after November 22 to accommodate the hunting season on the ranch.

The arbitration was preceded by a pre-hearing conference on October 12, 2006. Following the conference, I made a number of orders regarding the conduct of the arbitration, including timelines for production of documents, submissions, and witness lists. I also scheduled the hearing for one day on January 23, 2007 in Fort St. John, B.C. The timelines, hearing date and length of hearing were scheduled in full consultation with the parties. Mr. Arthur Hadland represented or assisted Mr. Greg Rhyason, the principal of Rhyason Ranch, from March 2006.

On January 9, 2007, the Board received an application for an adjournment of the hearing from counsel for Rhyason Ranch. She advised that she was in the process of being engaged by Mr. Rhyason. The Board rejected the adjournment request. On January 16, counsel renewed her request for an adjournment. I denied the request, among others because it was made close to the hearing date, the hearing had been set in consultation with the parties, and Rhyason Ranch had had ample time to engage and instruct counsel. I noted, as well, that

Rhyason Ranch had been represented and assisted by Mr. Hadland who, while not a lawyer, was "experienced in the area," according to Rhyason Ranch.

Terra's application was heard at a two day arbitration, January 23 and 24, 2007. Following extensive written submissions from the parties, I issued a decision on the merits on March 5, 2007 (***Terra Energy Corp. v. Rhyason Ranch Ltd***. MAB Order No. 403A).

At the arbitration, Rhyason Ranch opposed the application based on Terra's alleged failure to negotiate in good faith prior to applying to the Board. Rhyason Ranch argued that there was a statutory duty to do so. I concluded that there was no merit to Rhyason Ranch's position. I also found there was little evidence to support the position that Terra did not negotiate in good faith. Both parties engaged in the process as self-interested agents to make the best "deal" possible. They were not successful and their dispute ended up in arbitration.

Rhyason Ranch's position was that right of entry should also be denied because Terra failed to show that its proposal, in particular the proposed access road, was appropriate for the Lands, raising environmental, ecological, archaeological, financial and other concerns, and, therefore, that I ought to consider a more appropriate access route to the well sites, through a neighbour's property. Terra argued that I did not have the jurisdiction to consider the appropriateness of the proposed road access. I concluded that I had the jurisdiction to set the terms with respect to the entry, occupation and use within the context of the application before me, something that necessarily involved consideration of the substantive merits of the proposed access. In the circumstances, I issued the right of entry as proposed by Terra.

Finally, the arbitration dealt with terms of the right of entry, including such matters as road construction, fencing, and compensation issues, such as land value, loss of rights, nuisance, temporary and permanent damage, severance and other factors set out in Section 21 of the ***Act***.

The parties' submissions on the merits only addressed costs in a rather general manner, and in my view, further submissions were required and requested. Rhyason Ranch filed a submission on April 3, 2007, Terra made its response on April 13, and Rhyason Ranch replied on April 18.

II. ISSUES

This is the first opportunity for the Board to deal with costs in the context of Section 47 of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 ("***ATA***"). Prior to the ***ATA***, the Board had the power to award costs or compensation on the basis of the now repealed Section 27 of the ***Act*** (repealed S. B.C. 2004, c. 45, s. 152, effective October 25, 2004, B.C. Reg 425/2004)). Broadly framed,

the issues are: When does the Board order costs? On the basis of what principles? What is included in an order for costs?

Specifically, this case raises three issues:

1. Whether the landowner is entitled to compensation for the legal costs and disbursements and, if so, how much?
2. Whether the landowner is entitled to compensation for other "representational" and expert costs and disbursements and, if so, how much?
3. Whether the landowner is entitled to reimbursement for the time spent and expenses incurred dealing with the subject matter of the application, including negotiations prior to the Board's process being engaged?

III. SUBMISSIONS OF THE PARTIES

Rhyason Ranch claims total costs in the amount of $44,088.61. Its submissions on costs are supported by affidavits of a paralegal from the law firm representing Rhyason Ranch and of Mr. Greg Rhyason, the principal of Rhyason Ranch.

The first affidavit attaches an invoice from Mr. Hadland, detailing his activities on behalf of Rhyason Ranch and an invoice from counsel for her professional services. Counsel's account is for a total of $14,060.00 at $200.00 per hour (presumably including applicable taxes as the account does not indicate otherwise), plus $517.00 in costs and disbursements. The affidavit also notes that the "professional services descriptions are not shown for matters of client confidentiality."

Mr. Hadland invoiced 84 hours at the rate of $125.00, for a total of $10,500.00 plus GST, for the period from March 29, 2006 until the last day of the arbitration, January 29, 2007. A substantial portion of his time, 37 hours, was charged to preparation for the arbitration between January 12 and 17. He also invoiced for unspecified registry services (January 3, 2007), office expenses, and 10 days of vehicle use at $50.00 per day.

According to Mr. Rhyason's affidavit, he charged $150.00 per hour for his activities in connection with Terra, 84 hours like Mr. Hadland, and for the same activities, for a total of $12,600 plus GST. He also charged office expenses, telephone, mail etc. ($1,214.71) and clerical staff expenses – "2 girls @ 2 days (10 hours/day) @ 36.00" – for $1,440.00. He charged for his use of his vehicle, also for 10 days, at $150.00 per day.

Rhyason Ranch argues that Section 47 of the ***ATA*** gives me wide discretion to award costs. Rhyason Ranch argues that it is entitled to $44,081.61 in costs in the circumstances. It says that the arbitration and the associated expenses

resulted from Terra's failure to negotiate in good faith. Terra did not put forward its "suggested financial and other considerations for the proposed well sites" until the arbitration. The fact that Terra was successful obtaining right of entry should not preclude Rhyason Ranch from recovering costs. Costs serve multiple purposes, including encouraging parties to make reasonable efforts to settle their disputes (***Skidmore v. Blackmore*** (1991), 122 DLR (4^{th}) 330).

Rhyason Ranch refers to ***AEC Oil & Gas v. Nobbs*** (MAB Order No. 352A, May 21, 2002) for the proposition that costs is an aspect of the balancing of interests between landowners and oil companies and, as well, ought to reflect the involuntary nature of the process. In this case, if the landowners' costs are not granted, they will eat up most of the compensation awarded in the arbitration. Rhyason Ranch says that a landowner is entitled to his personal time spent on this and out-of-pocket expenses (***Star Oil & Gas Ltd. v. Maclean*** (MAB Order No. 344A, June 10, 2002).

The costs of Mr. Rhyason are attributable to the time he had to divert from his other business ventures to deal with Terra from the first site visit in March 2006 until the arbitration. The hourly rate is Mr. Rhyason's "business rate" for his contracting business and the 84 hours claimed is "a conservative estimate." The rate claimed for his vehicle is his business rate for vehicle use.

While Terra agrees that the arbitrator has the discretion to award costs under Section 47 of the ***Administrative Tribunals Act***, Terra argues this is not a case where it should be exercised. The arbitrator must consider a number of factors, including the nature of the costs incurred, the reasons for incurring them, the contributions of counsel or advisors, fairness in the Board's process, and whether parties have taken a "realistic approach" in dealing with the issues before the Board (***Nurnberger v. Orefyn Energy Advisors Corp***. (MAB Order No. 345A, December 13, 2001; ***Thompson v. Calpine Canada Resources Ltd***. (MAB Order No. 341A, July 30, 2001). Rhyason did not take a realistic approach and devoted time to issues of little relevance and unsupported by the evidence, denial of right of entry and appropriateness of the proposed access route. Mr. Rhyason's unrealistic demands, including $25,000 per right of entry, were the reasons the parties ended up in arbitration. Success is an important factor that the Board should consider in its cost award (***Superintendent of Real Estate v. Real Estate Council B.C. et al.***, FST 05-007, January 13, 2006; ***Cheema v. Insurance Council of B.C. et al.***, FST 05-019 June 15, 2006; ***Thomson v. Superintendent of Real Estate***, FST 04-001, April 4, 2005). Here, the Board found in favour of Terra on a majority of issues.

Terra argues that there is no precedent for awarding costs on a client-solicitor basis (***Penn West Petroleum v. Silver Hammer Farms*** (MAB Order No. 308A, May 30, 2000). In any event, Rhyason Ranch provides no particulars of the work performed and some the legal fees claimed are related to unsuccessful adjournment applications. Disbursements claimed should not reflect that

counsel does not reside in the area. Terra also points to the Board's statement in ***AEC Oil***, that the oil company was not "responsible for any of the account of [the landowner's counsel]." There was no evidence that the account was paid or intended to be paid. The lawyer did not appear at the mediation or arbitration.

Terra also says that Rhyason Ranch's claim for the invoiced costs of Mr. Hadland is not appropriate. His credentials as an expert were never established and Mr. Hadland's dual role as representative and expert compromised any evidence he provided. His positions were unreasonable and unsupported by the authorities and the ordinary practice in the industry. Mr. Hadland's appraisal was not prepared for the arbitration but for other unrelated reasons. Moreover, there is no evidence that the invoices have actually been paid (***ACE***).

Terra disagrees with Mr. Rhyason's claim for his time at $150.00 per hour, based on his hourly business rate, vehicle use at $150.00 per day, and 40 hours of clerical time. These costs are inappropriate. There is no evidence of lost wages or profits and the total claim is out of line with Board orders for costs ranging between $200.00 and $3,000.00 (***Thompson v. Calpine Canada Resources Ltd.***;***Rose Prairie Wolfe Ranch Ltd. v. Encal Energy Ltd.***, MAB Order No. 338ARR, May 11, 2001; ***Talisman Energy Inc. v. Beresheim***, MAB Order No. 336A, May 11, 2001; ***Iten v. Devon Canada Corp.***, MAB Order No. 360A, November 19, 2002; ***Baxter v. Search Energy Inc.***, MAB No. 352ARR, May 23, 2002; ***Baxter v. Search Energy Inc.***, MAB No. 351ARR, May 23, 2002; ***AEC Oil & Gas v. Nobbs***; ***Star Oil and Gas Ltd. v. MacLean***; ***Nurnburger v. Oryfyn Energy Advisors Corp***. The vehicle charge is not a reasonable estimate of actual charges and includes an element of profit. There is no evidence of actual costs for clerical staff costs and the 40 hour estimate is unreasonable.

Rhyason Ranch replies that the Board has discretion to determine right of entry and takes issue with the suggestion that there was no evidence in support of its positions. It denies devoting the bulk of the time on irrelevant issues of no merit, and says that the hearing would not have taken more than one day in any case. Terra made no reasonable proposals prior to the arbitration and costs should be awarded to discourage such conduct. Moreover, success is not determinative because of the involuntary nature of the process from the landowner's perspective. There was no basis for the majority of Terra's proposals other than arbitrary "industry norms."

With respect to the lack of particulars on the account for legal services, Rhyason Ranch argues that client confidentiality is a fundamental right and should only be disclosed in rare circumstances. In any event, the dates in the account make it clear that the charges are related to the arbitration.

Terra specifically waived Mr. Hadland's expert qualifications and did not object to him acting in the dual capacity of representative and expert. His role was little different from that of witnesses for Terra. As well, Rhyason Ranch says it does

not matter whether the accounts for legal and consulting services have been paid, they are due and owing.

Concerning Mr. Rhyason's charges, he was compelled to give up substantial time and incur costs for legal counsel and a consultant. It is reasonable to assume that Mr. Rhyason would have been occupied and busy elsewhere but for having to attend the hearing and deal with Terra's application. The hours claimed are not unreasonable, including those of the clerical staff who produced multi-tabbed voluminous materials outside of office hours.

IV. ANALYSIS AND DECISION

Administrative tribunals, such as the MAB, do not have the power to award costs unless provided for expressly or by necessary implication in the board's enabling statute (***Re National Energy Board Act*** [1986] 3 FC 275 (FCA).

It is common ground between the parties that Section 47 of the ***Administrative Tribunals Act "ATA")***, S.B.C. 2004, c. 45, provides the Board with the authority to award costs.

Section 47 of the ***ATA*** reads:

> 47 (1) Subject to the regulations, the tribunal may make orders for payment as follows:
>
> (a) requiring a party to pay part of the costs of another party or an intervener in connection with the application;
>
> (b) requiring an intervener to pay part of the costs of a party or another intervener in connection with the application;
>
> (c) if the tribunal considers the conduct of a party has been improper, vexatious, frivolous or abusive, requiring the party to pay part of the actual costs and expenses of the tribunal in connection with the application.
>
> (2) An order under subsection (1), after filing in the court registry, has the same effect as an order of the court for the recovery of a debt in the amount stated in the order against the person named in it, and all proceedings may be taken on it as if it were an order of the court.

This is the first opportunity for the Board to deal with costs in the context of Section 47. Prior to the ***ATA***, the Board awarded legal costs or compensation on the basis of Section 27 of the ***Act*** :

> 27. (1) The board may award costs of or incidental to any proceeding before the board, the chair or board member, and may fix the amount of costs and determine who must pay those costs.

As indicated by the cases cited by the parties, the Board's cost awards — including compensation for the landowner's time and expenses — to landowners can only be described as modest, ranging between $200.00 to $3,000.00 (***Thomson*** ($200), ***Nurnburger*** ($800), ***AEC Oil*** ($600), ***Star Oil*** ($2,000), ***Rose Prairie Wolfe Ranch*** ($500), ***Talisman Energy*** ($400.00. In ***Iten***, which arose out of an application for damages for an oil spill from a flow line, the landowners kept track of their time, spent on re-mediation of the oil spill and preparation for mediation and arbitration, and submitted annotated invoices for 49 hours spent at $125.00 per hour, for a total of $6,338.90. The Board carefully considered the matter and awarded the $3,000.00 all inclusive. In ***Baxter***, the applicant landowners sought $5,000.00 in costs for preparing and attending the arbitration (and another arbitration heard at the same time) and the Board decided that the appropriate amount was $750.00. In the companion case, the Board awarded $500.00.

In ***Penn West***, the Board rejected a claim for costs on a client and solicitor basis and awarded the landowner costs on a party and party basis at scale 3 under the Supreme Court tariff. In ***Nurnburger***, the landowner submitted a bill of costs in the amount of $3,828.98 based on scale 3 of the Supreme Court tariff. The Board found that he was entitled to some contribution to his legal expenses and awarded $800.00. In yet another case, ***AEC Oil***, the MAB rejected the tariff and the principles for awarding costs in the courts. Costs or compensation have been awarded on an *ad hoc* and not always consistent basis.

It is clear from Section 47, that the Board has a broad discretion to award costs, and may order one party to pay part of the costs of another party or intervener. However, that discretion must be exercised judicially and based on the facts of each case (***Henderson v. Laframboise***, [1930] OJ No. 149 (CA), para. 13). The statutory language does not provide much guidance, although one express limitation is that the Board can only order part payment of costs.

Given the earlier decisions of the Board, it may be useful to reflect briefly on the meaning of "costs" under the ***ATA*** and, therefore, the ***Act***. In ***Bell Canada Communications v. Consumers Association of Canada***, [1986] SCJ No. 8, the Supreme Court of Canada interpreted the word "costs" in the context of Section 73 of the ***National Transportation Act*** -- "the costs of and incidental to a proceeding ..." to mean "legal costs." In other words, "costs" are legal costs (see also ***BC Vegetable Greenhouse I, LP v. BC Vegetable Marketing Commission***, BC Farm Industry Review Board, May 20, 2005, para. 23). In the courts, self-represented litigants may also receive legal costs (***Skidmore v.***

Blackmore, above). In ***Roberts v. College of Dental Surgeons of BC***, 1999 BBCA 103 Mr. Justice Goldie explained:

> Para. 30 Generally, "costs", when used in this province in the context of legal proceedings, comprehends two classifications: one, a lawyer's recovery of his or her account from the client. ...:
>
> > The term "costs" also denotes the expenses which a person is entitled to recover from the other side by reason of his being a party to legal proceedings. They include court fees, stamps, etc., and also, where the party is represented by a solicitor, the reasonable and proper charges and fees of the solicitor and counsel. *The amount of these costs is ascertained by the process of taxation, which is regulated by certain principles of general application*. [Emphasis by Goldie JA]
>
> Para. 31 It is evident that when a party is paid costs under the second classification the amount so paid will operate as an indemnity in respect of the recipient's own costs. Only in exceptional circumstances will this amount to a full indemnity.

The costs at issue here are legal costs in the second sense; costs a party is entitled to recover from another by reason of being party of a legal proceeding. The purpose of these costs is to provide part indemnity for the party's own costs (Section 47). In other words, the legislation seems to have contemplated less than full indemnity, something that, in any event, is rare in the courts.

As an administrative tribunal, the Board's processes are intended to be less formal that those provided by the courts. In some cases, professionals other than lawyers may represent parties. In other cases, parties may represent themselves. Different professionals may also represent parties at different stages of the process. In the absence of a tariff, there may be difficulties assessing time spent and the value of the time of a self-represented party. All the same, given the nature of the Board's processes, I am of the view that parties before the MAB may be entitled to the equivalent of legal costs whether they are represented by legal counsel or not. However, in my opinion Section 47 does not provide the authority to award compensation, for example, for time spent by a landowner in dealing with the subsurface rights holder or for opportunity costs, i.e. that the landowner could profitably have spent his or her time engaged in some other enterprise.

Unless qualified by statute or by agreement of the parties, costs in BC have a traditional meaning, governed by the provisions of Rule 57 of the Supreme Court Rules (***Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd.*** [1990] BCJ No. 865 (CA)). In ***Shpak v. Institute of Chartered Accountant of BC***, [2003] BCJ 514 (BCCA), the Court noted that "...where the provisions for costs in the

constituent statute, or Rules properly passed pursuant to the statute, do not indicate otherwise, the provisions of Rule 57 will govern the tribunal's award of costs " (para. 56). Section 47(1) authorizes the Board to award costs of a proceeding. The specification of those costs, particularly, paragraph (c), and the power of the Lieutenant Governor in Council to create a tariff suggests that the intent of the legislature was to exclude the application of Rule 57 of the Rules of Court. Section 47 stand on its own subject to any regulations made under Section 60 (J.L.A. Sprague, ***The Annotated Administrative Tribunals Act***, Toronto, Ont.: Carswell, 2005). In my view, the Supreme Court tariff is not applicable.

Terra argues that success must be an important consideration. In the courts, outcome of a dispute, or success, is a primary consideration. In the "absence of special circumstances, the successful party is entitled to a reasonable expectation of obtaining an order for the payment of his costs by the unsuccessful party" (***Henderson v. Laframboise***, para. 13). Where success is divided, costs are not awarded (see also ***CCH Canadian Ltd. V. law Society of Upper Canada***, [2000] FCJ No. 92 (TD)). In some regulatory proceedings, on the other hand, there may not be clear winners and losers and it may be considered a quite proper exercise of discretion that a successful applicant pay the costs of other participants (***Re National Energy Board Act, above***).

While I agree that success, or outcome, cannot be ignored, there are significant differences between court proceedings and those before the Board. As an administrative tribunal, the Board's processes are intended to be less formal that those provided by the courts. Specifically, the Board has recognized that the need to balance the interests of the surface rights holders and the subsurface rights holders, recognizing the compulsory and compensatory aspects of the process (***AEC Oil***).

Landowners in B.C. generally hold title to the surface of their land, but they do not usually hold title to the sub-surface minerals, including petroleum and natural gas. The Crown usually retains these rights, and has the power to dispose of them to companies that may subsequently wish to remove the resources. The legislative scheme under the ***Act*** allows subsurface rights holders, such as oil and gas companies, access to those rights; for example, oil and gas rights leased form the Crown. As the Crown is the dominant tenant, the surface rights holders ultimately have little choice but to allow access to those subsurface rights, either by agreement or through the MAB's processes. Either way, the process results in a loss of rights for the surface rights holder. The purposes of Part Three of the ***Act*** are, on the one hand, to provide entry to private lands for purposes connected with exploration, development and production or storage of oil and gas; and, on the other, to provide compensation to surface rights holders, such as landowners, and set terms for the entry occupation and use (***Terra Energy Corp. v. Meek***, MAB No. 409AR, May 16, 2007). Rhyason Ranch

should not be denied costs simply because Terra was successful in obtaining a right of entry. Indeed, only in rare and exceptional circumstances would the Board deny entry. A right of entry order is not, in my view, a proper measure of success. The compulsory aspect of the Board's proceedings reflect the fact that surface rights holders may become parties simply by virtue of that status.

While the Board may set terms of entry, compensation is the most significant quid pro quo established by the ***Act*** for entry, occupation and use. Section 21 details the heads of compensation, including the compulsory aspect of the entry, occupation and use, the value of the land and the loss of profit or right, temporary and permanent damage, and compensation for severance, and "other factors the Board considers applicable." Exercising its role under the ***Act***, the Board attempts to balance interests of surface rights holders and subsurface rights holders, and must give consideration to other factors than quantum or success. Under some right of entry orders, some compensation payments are payable in the first year, only while others are payable annually. Given the cost of legal services, it is likely that they could consume a substantial portion of any amount of compensation. From that standpoint, in my view, the compensatory aspects of legal costs of the surface rights holder must be a significant factor in the Board's cost awards.

However, any legal cost award must be reasonable and necessary in all of the circumstances. In this case, both parties point to the costs as deterring frivolous actions and defences, encouraging parties to make reasonable efforts to settle, and discouraging improper or unnecessary steps in the litigation. The arbitrator may consider a number of factors, including the nature of the costs incurred, the reasons for incurring them, the contributions of counsel or advisors, fairness in the Board's process, and whether parties have taken a "realistic approach" in dealing with the issues before the Board (***Nurnberger*** and ***Thompson***). This list is not exhaustive. In my view, the onus rests on the party submitting costs for assessment to establish affirmatively the necessity and reasonableness of the charges claimed as disbursements (***Holzapfel v. Matheusik*** [1987] BCJ No. 1227 (BCCA), p. 3).

The degree of success in outcome may provide some measure or indication of whether parties adopted a "realistic approach." Under the ***Expropriation Act***, RSBC 1996, c. 125, a landowner may be entitled to "actual reasonable legal costs" if the amount awarded exceeds the amount paid by 115% or some or all of the costs in the court's discretion even if amount awarded is less. In ***Kodila v, BC (Ministry of Transportation)*** [2007] BCJ No. 2450 (BCSC), the plaintiff was entitled to have costs determined under the ***Tariff of Cost Regulation***, BC Reg 189/99. The court noted that it "was reasonable for the plaintiff to pursue compensation ... and that ... did not take a broad approach to the issues but rather confined his claim to the narrow issues before me" (para. 31). In my view,

given the compulsory and compensatory aspects of the Board proceedings a surface rights holder must generally have an expectation of part indemnity for reasonable and necessary representational costs and disbursements.

The statutory language found in Section 47(1)(a), (b) and (c) provides the power to make an order for payment of costs "in connection with an application," emphasizing that costs may encompass the entirety of the progress of the matter before the Board, whatever its ultimate outcome (***BC Vegetable Greenhouse***, para. 25). In my view, therefore, the legal costs awarded must be "in connection with the application."

The process before the Board may be broken down into a series of steps. The Board has the discretion to award costs for the necessary steps in its process, including, for example, initial investigations and instructions, preparation for and attending to pre-mediation conferences and mediation, instructions regarding mediators' orders, preparation for and attending to pre-arbitration conferences and arbitration, and "orders ... in relation to any matter that the tribunal considers necessary for the purpose of controlling its own process" (Section 14(c), ***ATA***). As a general principle, given the emphasis in ***Act*** and by the Board on mediation and voluntary dispute resolution, a surface rights holder may well expect a greater proportion of reasonable and necessary costs associated with the mediation stage in the MAB process. In my opinion, this will encourage both parties to adopt reasonable positions early on in the process and discourage unnecessary litigation.

On a related note, it ought not to be necessary for subsurface rights holders to come before the Board to obtain an order for right of entry to conduct a survey. Parties do not require the Board's authorization or order to enter lands for the purposes of conducting a survey (see Section 59.1, ***Land Surveyors Act***, RSBC 1996, c. 248).

Like the courts, legal costs awarded will also include reasonable and necessary disbursements and expenses related to the proceeding such as mail, courier expenses, photocopying, travelling and subsistence expenses, the cost of necessary experts, and experts' reports. Any claim for disbursements must be properly documented. As well, the onus rests on the party submitting costs for assessment to establish affirmatively the necessity and reasonableness of the charges claimed as disbursements (***Holzapfel v. Matheusik***).

I am of the view that the Board's costs awards must be guided by principles that include the following:

1. Generally, costs must provide partial indemnity to the surface rights holder for reasonable and necessary representational costs, including legal fees and disbursements, in connection with the application;
2. However, those costs must also encourage parties before the MAB to make reasonable offers to settle their disputes, encourage them to narrow the issues in dispute, and discourage improper or unnecessary steps in the litigation.

I now turn to the application of these principles to the case at hand.

V. APPLICATION OF PRINCIPLES

Rhyason Ranch claims to be entitled to $44,081.61 in costs in the circumstances. Given the costs awarded by the MAB in the past, this is a substantial claim.

1. Arbitration Costs and Disbursements

I am of view that Rhyason ranch is entitled to legal costs "in connection" with this application. As the surface rights holder, Rhyason Ranch is entitled to some indemnity for part of its reasonable legal costs and disbursements. Rhyason Ranch's counsel's account is for a total of 67 hours, $14,060.00 at $200.00 per hour, presumably including applicable taxes as the account does not indicate otherwise, plus $517.00 in costs and disbursements. These costs are said to relate to the arbitration. The account appears to cover the period from January 9 to March 23, 2007. In my view, the hourly rate claimed is reasonable.

Briefly, there were three main issues before me at the arbitration:

1. Whether right of entry should be denied because of Terra's alleged failure to negotiate in good faith prior to applying to the Board;
2. Whether right of entry should also be denied because Terra failed to show that its proposal, in particular the proposed access road, was the most appropriate for the Lands; and
3. Determining compensation and terms for the right of entry.

With respect to the first issue, in my view, Rhyason Ranch's position was without merit. As well, with respect to both the first and second issue, Rhyason Ranch emphasized the regulatory failings of Terra's application seeking to have the application dismissed, rather than the compensatory aspects. The regulatory aspects are outside the jurisdiction of the MAB and within the jurisdiction of the Oil and Gas Commission. In its evidence and argument, Rhyason Ranch focussed on the failings of Terra's proposal based on considerations that

included financial, construction conditions, environmental and geotechnical grounds.

That is not to say that Rhyason Ranch ignored compensation and terms. In terms of the outcome, while critical of the "industry standards" proposed by Terra, Rhyason Ranch provided little evidence and argument to support a departure from those standards, other than noting that these standards have been in place for many years. There was little dispute that the amounts proposed were, in fact, the standards. As noted by the Alberta Court of Appeal in ***Nova, An Alberta Corporation v. Bain et al***. (1984), 33 LCR 91, p. 93, "if the board ... finds a pattern established it not only should apply the results of that pattern, it should not depart from it without good reason for doing so." For example, Rhyason sought $5,000 in compensation for the compulsory aspect of the right of entry for each single well site and for each parcel of land crossed, paid annually as long as there is entry, occupation and use, rather than as a one-time payment as is standard. Overall, I find that Rhyason Ranch's approach was "unrealistic," not just in terms of departure from industry standards but also in terms of the rationale put forward. While I accept that Mr. Dunn's evidence regarding the bases for, and the origin of the standards left a lot to be desired, Mr. Hadland's evidence in that regard offered little but bald assertions about "reaching for new ground." Despite these misgivings, I am prepared to award costs to Rhyason Ranch. On the issue of compensation, I note that Terra substantially increased its offer at the commencement of the arbitration, from $500/acre to $600/acre. In my view, one day would have been sufficient to deal with the issues of terms and compensation in this application.

Terra objects to the lack of particulars on counsel's statement of account. I share that concern. While client solicitor confidentiality is important, the Board does not, like the courts, have a tariff and it is, therefore, necessary for the parties to be able to subject an amount claimed, on account of fees and disbursements, to some measure of scrutiny to ensure that it is reasonable and appropriate in all of the circumstances. Ultimately the choice for a party may well be between seeking the financial benefit of having costs assessed or retaining client solicitor privilege. There must be sufficient information and material to enable me to determine what would be a reasonable fee (see, for example, ***Denovan v. Lee*** (1991), 62 BCLR (2d) 213).

Regardless of the lack of particulars, which is troubling, Rhyason Ranch obviously and demonstrably did incur legal costs. Counsel became involved in the application from early January 2007. Counsel would have had to attend to obtaining initial instructions, reviewing the file, drafting or assisting in the drafting of statement of points, preparing for a hearing of ordinary complexity or importance, attending to the hearing, and, finally, providing written submissions on the merits and on the issues relating to costs. In all of the circumstances, I find that $3,000 is a reasonable amount on account of legal fees.

Terra objects to costs for two adjournment applications. I agree. In my view, the adjournment applications were unnecessary and without proper foundation, particularly, the "information provided [was] fairly general and little persuasive value" (***Terra Energy Corp. v. Rhyason Ranch Ltd***., Board Order No. __, January 2007).

In the ***Penn West*** case, the MAB disallowed "any disbursements relating to the fact that counsel for the [landowner] does not ordinarily reside in the Peace River area of British Columbia." I do not agree. In my view it is important for landowners to be able to engage counsel of their choice. Indeed, they may not be able to find local counsel willing to represent them and they ought not to be restricted to the Peace River area. In my view, the amount claimed for counsel's disbursements is reasonable. I award $517.00 in disbursements.

2. Mediation Costs and Disbursements

I am of view that Rhyason ranch is also entitled to some of its costs with respect to Mr. Hadland's representative (and other) efforts "in connection" with this application.

Mr. Hadland invoiced 84 hours at the rate of $125.00, for a total of $10,500.00 plus GST, for the period from March 29, 2006 until the last day of the arbitration, January 29, 2007. A substantial portion of his time, 37 hours, was charged to preparation for the arbitration between January 12 and 17, after, it would appear, Rhyason had engaged counsel.

I do not take issue with the hourly rate claimed by Mr. Hadland. In my view, that is not unreasonable in the circumstances. I do not award any fees for the period prior to the application or for the period after Rhyason Ranch engaged counsel to deal with the application. The first entry in counsel's account is dated January 9, 2007. While there may be rare and exceptional instances where it would be reasonable to engage more than one representative, this is not one of those.

Mr. Hadland's account is not particularly detailed or informative. It is, therefore, difficult to ascertain what services Mr. Hadland performed in "in connection with the application." However, as Rhyason Ranch's representative or asistant, Mr. Hadland would have been attending to Mr. Rhyason's initial instructions and information gathering, preparing and attending to the pre-mediation conference, preparing and attending to the mediation, preparing and attending to the pre-arbitration conference, reviewing Terra's statement of points, and assisting with the preparation of Rhyason Ranch's statement of points. In all of the circumstances, I am prepared to allow $2,000 for Mr. Hadland's representative efforts. In my view, this provides substantial indemnity for reasonable representational costs associated with Mr. Hadland.

In addition, I am reluctantly prepared to allow $250 for Mr. Hadland's attendance at the arbitration to give evidence as an expert and related preparation. Terra accepted his expert status at the arbitration and cannot now challenge that. I did not find Mr. Hadland's expert evidence necessary other than on the issue of overall land value. His assessment of land value ($600/acre) was accepted by Terra at the commencement of the hearing.

As well, Mr. Hadland invoiced for unspecified registry services (Northern Registry Services, January 3, 2007, $155.29), office expenses, telephone mail etc. ($214.71), and 10 days of vehicle use at $50.00 per day ($500). While some of these expenses may be legitimate disbursements, there is no supporting documentation provided in support, nor are they sufficiently particularized. There is not sufficient evidence to support this claim for disbursements and I dismiss it.

3. The Landowner's Time and Expenses

In past cases of the Board, landowners have been awarded reasonable compensation for the time spent preparing for and attending mediation and arbitration plus out of pocket expenses. In one case, ***Iten***, for example, the all inclusive cost award included even the time spent re-mediating an oil-spill. These cases were based on the previous legislation. In my view, Section 47(1) of the ***ATA*** allows the Board to award part payment of legal costs, i.e. reasonable legal fees and disbursements in connection with the application. It does not provide for payment for "opportunity costs" or lost profits from his involvement in this matter. In my view, Mr. Rhyason is not entitled to payment for the 84 hours he claims, as "a conservative *estimate*" (emphasis added), he spent dealing with Terra from the initial contacts in March 2007 through to the conclusion of the arbitration. His time "estimate" appears identical to Mr. Hadland's invoice, including an identical "typo." In short, I deny his claim for the time he claims to have spent on this matter.

Mr. Rhyason also charged office expenses, telephone, mail etc. ($1,214.71) and clerical staff expenses – "2 girls @ 2 days (10 hours/day) @ 36.00" – for $1,440.00. He charged for his use of his vehicle, also for 10 days, at $150.00 per day, $1,500. The rate claimed for his vehicle is his business rate for vehicle use. I also deny the claim for these expenses.

While I appreciate that Rhyason Ranch did incur costs, for example, for the preparation of maps and document binders for the arbitration, these expenses are not supported by any supporting documentation. I appreciate Mr. Rhyason's statement in his affidavit that he can produce invoices etc. upon request. However, the time to document the claim was at the time of the submission.

V. DECISION ORDERS

In summary, Rhyason Ranch is entitled to $3,000 on account of legal fees and $517 on account of disbursements. I also award a total of $2,250 on account of Mr Hadland representational role and his expert evidence. I deny Mr. Rhyason's claim for time and expenses.

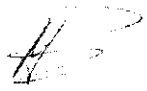
VI. DECISION

THEREFORE THE BOARD MAKES THE FOLLOWING ORDERS:

1. Terra must pay legal costs and disbursements to Rhyason Ranch in the amount of $ 5,767. The amount is payable no later than 30 days from the date of this order unless the parties agree otherwise.

MEDIATION AND ARBITRATION BOARD

DATED THIS 14th DAY OF JANUARY, 2008



IB S. PETERSEN,
VICE-CHAIR