



Grizzly Resources Ltd.

*Court Ordered Reconsideration of
Energy Cost Order 2010-007: Grizzly
Resources Ltd., Section 39 and 40
Review of Well Licences 0404964
and 0404965*

Cost Awards

March 26, 2012

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2012-003: Grizzly Resources Ltd., Court Ordered Reconsideration of *Energy Cost Order 2010-007: Grizzly Resources Ltd., Section 39 and 40 Review of Well Licences No. 0404964 and 0404965*

March 26, 2012

Published by

Energy Resources Conservation Board
Suite 1000, 250 – 5 Street SW
Calgary, Alberta
T2P 0R4

Telephone: 403-297-8311
Fax: 403-297-7040
E-mail: infoservices@ercb.ca
Website: www.ercb.ca

CONTENTS

Introduction.....	1
Background.....	1
Cost Claim	1
Authority to Award Costs	2
Analysis and Findings.....	3
Order/Decision.....	3
Appendix A Summary of Costs Claimed and Awarded.....	6

ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

GRIZZLY RESOURCES LTD. COURT ORDERED RECONSIDERATION OF ENERGY COST ORDER 2010-007

Energy Cost Order 2012-003
Review Application No. 1718880

INTRODUCTION

Background

[1] The following is the decision of the Energy Resources Conservation Board (Board/ERCB) in matter of the reconsideration of *Energy Cost Order (ECO) 2010-007: Grizzly Resources Ltd., Section 39 and 40 Review of Well Licences No. 0404964 and 0404965*, dated October 22, 2010.

[2] On June 27, 2008, Grizzly Resources Ltd. (Grizzly) applied to the ERCB for approval to drill two oil wells from a surface location at Legal Subdivision (LSD) 7, Section 5, Township 50, Range 6, West of the 5th Meridian, to bottomhole locations at LSD 9-5-50-6W5M and LSD 14-5-50-6W5M. The wells targeted production from the Nisku Formation and would contain hydrogen sulphide (H₂S).

[3] Susan Kelly, Linda McGinn, and Lillian Duperron (Kelly Interveners) each objected to Grizzly's applications. The Board determined that the Kelly Interveners did not meet the test to trigger a hearing of the applications under Section 26 of the *Energy Resources Conservation Act (ERCA)*, and therefore dismissed their objections and issued Well Licences No. 0404964 and 0404965 to Grizzly on November 28, 2008.

[4] The Board subsequently denied the Kelly Interveners' application to review its decision to dismiss their objections. Grizzly drilled the wells in January and February of 2009.

[5] The Kelly Interveners appealed the Board's decision to dismiss their objections and deny their review application to the Court of Appeal of Alberta (Court of Appeal). By decision dated October 28, 2009,¹ the Court of Appeal directed that the Board's decision to deny a hearing be vacated, and remitted the matter back to the Board for reconsideration with certain directions, which included that the Kelly Interveners "be accorded standing on the merits."

[6] In accordance with the Court of Appeal's direction, the Board convened a review hearing, which was held in Drayton Valley, Alberta, on April 13 and 14, 2010. Following the hearing, the hearing panel issued *Decision 2010-028: Section 39 and 40 Review of Well Licences No. 0404964 and 0404965*, dated July 13, 2010. In *Decision 2010-028*, the hearing panel found that Well Licences No. 0404964 and 0404965 remained in good standing and upheld them.

Cost Claim

[7] On May 14, 2010, following the hearing, the Kelly Interveners filed a cost claim for legal fees in the amount of \$30 270.00, attendance honoraria in the amount of \$6000.00, expenses in

¹ *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349.

the amount of \$1710.46, and GST in the amount of \$1596.08. The cost claim filed by the Kelly Interveners totalled \$39 576.54.

[8] In *ECO 2010-007*, the hearing panel denied the cost claim of the Kelly Interveners.

[9] The Kelly Interveners appealed *ECO 2010-007* to the Court of Appeal. By decision dated January 23, 2012,² the Court of Appeal allowed the appeal and remitted *ECO 2010-007* back to the Board for reconsideration in a manner consistent with its decision.

[10] In response to the Court of Appeal's decision to remit *ECO 2010-007* back to the Board, the Board assigned a panel to reconsider *ECO 2010-007*. This is the panel's decision.

[11] In conducting the reconsideration of the Kelly Interveners' cost application and *ECO 2010-007*, the panel reviewed the submissions from both the Kelly Interveners and Grizzly that had been filed in support of and in response to the original cost application. As those submissions were comprehensive and complete in canvassing the views of both parties, the panel did not find it necessary to obtain further submissions in connection with its reconsideration of the cost application and/or *ECO 2010-007* and has based its decision in this matter on the previous submissions of the parties and the hearing record.

AUTHORITY TO AWARD COSTS

[12] In deciding cost claims, the Board must comply with its enabling legislation, in particular with Section 28 of the *ERCA*. When assessing costs, the Board also refers to Part 5 of the *Energy Resources Conservation Board Rules of Practice* and Appendix E: Scale of Costs in *ERCB Directive 031: Guidelines for Energy Proceeding Cost Claims*.

[13] In this particular case, the panel also takes direction from the Court of Appeal in its decision dated October 28, 2009. Specifically, the panel notes the Court of Appeal's finding that the location of the Kelly Interveners' residences in the protective action zone (PAZ)—as it was then known—was, by virtue of the definition found in *ERCB Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry*, sufficient evidence that their rights could be directly and adversely affected as a result of a hazardous release and that “no further evidence was needed” to demonstrate their entitlement to a hearing. In fact, the Court of Appeal specifically found that the Kelly Interveners were “to be accorded standing to be heard on the merits....” In doing so, the Court of Appeal found the Kelly Interveners met the test to trigger the hearing that resulted in *Decision 2010-028*.

[14] In this particular case and specifically in respect of the Kelly Interveners, the panel also takes direction from the Court of Appeal in its decision dated January 23, 2012. In particular, the panel notes that the Court of Appeal found that the Board was interpreting Section 28 of the *ERCA* too narrowly, and that it was unreasonable for the Board to limit Section 28 to physical damages to lands as a prerequisite to eligibility for costs. In that regard, the panel takes direction from the following statement in the Court of Appeal's decision:

² *Kelly v. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19.

In the circumstances, the appropriate remedy is to allow the appeal and remit the application for costs back to the Board for reconsideration, in a manner consistent with these reasons. For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger an entitlement to costs. Further, while the amount of costs to be awarded lies within the discretion of the Board, the actual outcome of the hearing, and the absence, in hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.³

ANALYSIS AND FINDINGS

[15] Having found that the Kelly Interveners met the test to initiate the hearing to which *ECO 2010-007* relates, according to the Court of Appeal's decisions as referenced above, it follows that they were eligible for consideration for an award of costs under Section 28 of the *ERCA*.

[16] Further, having taken direction from the Court of Appeal and its finding that the Kelly Interveners are eligible for an award of costs under Section 28 of the *ERCA*, the panel must decide the amount of the costs to be awarded to them.

ORDER/DECISION

[17] The panel has examined the cost application by the Kelly Interveners and finds that the majority of costs claimed should be allowed because they were reasonably incurred to present the positions of the Kelly Interveners at the hearing.

[18] However, the panel notes that some of the legal fees claimed do not qualify for reimbursement under *Directive 031*.

[19] The Kelly Interveners' cost claim includes counsel's travel time to and from Drayton Valley on January 19, 2010, February 26, 2010, and April 1, 2010, totalling 4.5 hours. Appendix E of *Directive 031* permits travel costs for the hearing phase of the proceeding only. Therefore, the panel disallows these costs.

[20] In addition, counsel for the Kelly Interveners' cost claim included a claim for her paralegal's time spent in preparing submissions: three hours at \$45.00 per hour plus GST. As per Appendix E of *Directive 031*, legal fees are deemed to include all overhead charges implicit in the normal operation of a law firm and the Board will not consider claims for secretarial work. The Board will, however, consider claims for work performed by a paralegal on the application or intervention if the claimant demonstrates that the work performed required the expertise of a paralegal and could not have been performed by a legal assistant. As the cost application provided no submissions in support of the claims for paralegal time spent preparing submissions, the panel disallows that portion of the claim.

[21] Accordingly, the panel reduces the claim for legal fees incurred by the Kelly Interveners by 4.5 hours at \$350 per hour plus GST, for a total of \$1653.75, and three hours at \$45 per hour, for a total of \$141.75.

³ Ibid, paragraph 37.

[22] Counsel for the Kelly Interveners also charged mileage for two trips to and from Drayton Valley. As she claimed for accommodation for April 12 and 13, the second trip must have occurred outside the hearing phase of the proceeding. Given this, she was only entitled to claim mileage for one trip. The panel therefore disallows the sum of \$122.21.

[23] In addition, counsel for the Kelly Interveners charged a total of 58 hours in hearing preparation time, 23.1 hours for hearing attendance time, and 5 hours for argument. Given that the hearing only lasted two days and that sitting time on each of the two hearing days was about 8 hours each day, the panel finds that the claim for 23.1 hours of hearing attendance time is unreasonable under the circumstances. The panel therefore reduces the hearing attendance time from 23.1 hours plus GST to 16 hours plus GST, which results in a further reduction of \$2609.25. Coupled with the reduction of legal fees noted above, the panel reduces the Kelly Interveners' claim for legal fees by \$4404.75.

[24] In respect of disbursements, the panel notes that counsel for the Kelly Interveners claimed courier expenses totalling \$427.46 incurred during the period of March 4 to September 3, 2009. As the Notice of Hearing was not issued until January 13, 2010, the panel disallows all of these claims.

[25] The panel also notes that the Kelly Interveners each claimed both preparation and hearing attendance honoraria, totalling \$2000.00 each. Section 5.1.2 of *Directive 031* provides that the Board will not normally award preparation honoraria to interveners where a lawyer is primarily responsible for preparing their intervention.⁴ However, the panel notes that the hearing was held at the direction of the Court of Appeal, and that the Kelly Interveners appear to have been actively involved in assisting their counsel in preparing their intervention. Accordingly, given the unique circumstances of this case, the panel is prepared to allow both preparation honoraria of \$600.00 and attendance honoraria of \$400.00 to each of the Kelly Interveners.

[26] In addition, some of the mileage claimed by the Kelly Interveners is not eligible for reimbursement under *Directive 031*. Appendix E of *Directive 031* permits cost claimants to claim mileage for intercity travel distances of 50 kilometres or more. Consistent with the principle of permitting reasonable mileage claims relating to travel to and from the hearing venue, the panel accepts the Kelly Interveners' claims for mileage to and from the hearing venue on April 13 and 14, 2010. However, the additional mileage claims of Ms. Kelly (\$14.84 and \$35.57) and Ms. Duperron (\$35.57 and \$15.37) for trips to the well site and to town to assist their counsel are not eligible for reimbursement under *Directive 031* and are disallowed.

[27] Finally, Ms. McGinn claimed costs of \$50 for her daughter's fees to type submissions on behalf of the Kelly Interveners. Further, both Ms. Duperron and Ms. Kelly claimed costs for laser printer toner cartridges of \$100.78 and \$29.36, respectively. Normally these types of costs are not eligible for recovery under the category of office disbursements in the Scale of Costs. However, as the panel has awarded preparation honoraria in recognition of the Kelly Interveners' active involvement in preparation of their intervention, the panel is prepared to allow their claim for toner cartridges in this instance. However, the claim for time spent typing the submissions is not eligible for recovery under *Directive 031*, and is therefore disallowed.

⁴ *Directive 031*, Section 5.1.2.

[28] Based on the above, the panel disallows a total of \$8133.23 in costs claimed by the Kelly Interveners.

[29] Having reconsidered submissions from the parties filed in connection with the application for cost awards that resulted in *ECO 2010-007*, the panel hereby orders that Grizzly pay costs totalling \$31 443.31, including GST, to the current counsel for the Kelly Interveners at the following address:

Klimek Law
240, 4808 – 87 Street
Edmonton, Alberta T6E 5W3
Attention: Ms. K. E. Buss

Dated in Calgary, Alberta, on March 26, 2012.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

B. T. McManus, Q.C.
Presiding Member

<original signed by>

G. Eynon, P.Geol.
Board Member

<original signed by>

T. L. Watson, P.Eng.
Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

This appendix is unavailable on the ERCB website. To order a copy of this appendix, contact ERCB Information Services toll-free at 1-855-297-8311.