ERCB

Grizzly Resources Ltd.

Application by Timothy Losey and Cheryl Kerpan under Section 28 of the *Energy Resources Conservation Act*
Review of Energy Cost Order 2010-007

Cost Awards

May 28, 2012

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2012-004: Grizzly Resources Ltd., Application by Timothy Losey and Cheryl Kerpan under Section 28 of the *Energy Resources Conservation Act*, Review of Energy Cost Order 2010-007

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ENERGY RESOURCES CONSERVATION BOARD

Calgary, Alberta

APPLICATION UNDER SECTION 28 OF THE *ENERGY RESOURCES CONSERVATION ACT*
BY TIMOTHY LOSEY AND CHERYL KERPAN **Energy Cost Order 2012-004**
REVIEW OF ENERGY COST ORDER 2010-007 **Review Application No. 1667433**

INTRODUCTION

Background

[1] The following is the decision of the Energy Resources Conservation Board (Board/ERCB) in the matter of Review Application No. 1667433 filed by Timothy Losey and Cheryl Kerpan (Review Applicants) under section 28 of the *Energy Resources Conservation Act* (*ERCA*) seeking a review of *Energy Cost Order 2010-007* dated October 22, 2010 (*ECO 2010-007*).

[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 (H_2S).

[3] The Board considered and dismissed the objections filed in connection with the application and issued Well Licence Nos. 0404964 and 0404965 to Grizzly on November 28, 2008. Grizzly drilled the wells in January and February of 2009.

[4] The Review Applicants did not object to the original applications filed by Grizzly. Parties who originally objected to the applications appealed to the Court of Appeal of Alberta (Court of Appeal) the Board's decision to dismiss their objections and deny their review application. 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 appellants were to "be accorded standing on the merits."

[5] 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.

[6] The Review Applicants participated in the review hearing.

Cost Claim

[7] On April 22, 2010, following the review hearing, the Review Applicants filed a cost claim for preparation costs, attendance honoraria, and for "forming a group" in the amount of

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

$2000.00; expenses in the amount of $186.28; and GST in the amount of $9.32. The cost claim filed by the Review Applicants totalled $2195.60.

[8] In *ECO 2010-007* the hearing panel denied the cost claim of the Review Applicants.

[9] Other parties 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] On November 15, 2010, the Review Applicants filed an application under section 28 of the *ERCA* seeking a review of *ECO 2010-007* (review application).

[11] On January 24, 2011, the Review Applicants requested the Board to hold the review application in abeyance pending the results of the appeal of *ECO 2010-007*.

[12] 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*. Given the connection between the review application filed by the Review Applicants and *ECO 2010-007*, the Board determined it appropriate for the panel to also decide the review application.

[13] In considering the review application, the panel reviewed the submissions from both the Review Applicants and Grizzly. The panel also considered the submissions filed by the parties in connection with the original costs application filed by the Review Applicants.

AUTHORITY TO AWARD COSTS

[14] In deciding costs 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 Costs Claims*.

[15] In this particular case, the panel also takes specific 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 appellants' 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 the appellants were "to be accorded standing to be heard on the merits…." In doing so, the Court of Appeal found the appellants met the test to trigger the hearing that resulted in *Decision 2010-028*.

[16] In this particular case, and specifically with respect to the Review Applicants, the panel also takes direction from the Court of Appeal in its decision dated January 23, 2012. In particular, the panel notes 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

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

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:

> 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

[17] Having found the appellants 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 they were eligible for consideration for an award of costs under Section 28 of the *ERCA*.

[18] The basis for the Court of Appeal's finding that the appellants met the test to initiate the hearing to which *ECO 2010-007* relates was the fact that they resided in the PAZ as it was then known. This fact, according to the Court of Appeal, was sufficient to meet the test to initiate a hearing of the applications under section 26 of the *ERCA* in the specific circumstances of that case.

[19] The Review Applicants also reside in the PAZ as it was then known. Had they objected to the applications that formed the subject of the review hearing, based on the findings of the Court of Appeal, the Review Applicants would also have met the test to initiate a hearing of the application.

[20] Further, having taken direction from the Court of Appeal, specifically its finding that the appellants were eligible for an award of costs under Section 28 of the *ERCA*, the panel also finds the Review Applicants are eligible for an award of costs in relation to their participation in the review hearing. The panel must therefore now decide the amount of the costs to be awarded to the Review Applicants.

ORDER/DECISION

[21] The panel has examined the costs application by the Review Applicants and finds that the majority of costs claimed should be allowed because they were reasonably incurred to present their positions at the review hearing.

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

[23] The Review Applicants claim costs of $300.00 each for "forming a group." The panel acknowledges that Section 5.11 of *Directive 031* encourages local interveners with similar issues to participate in Board hearings as a group rather than as individuals and contemplates awards for honorarium to parties who do so. However, the panel notes that the Review Applicants reside

[3] Ibid., paragraph 37.

in the same household. The panel finds that Section 5.11 is not intended to apply to situations where interveners reside at the same residence. Awarding an honorarium to the Review Applicants in these circumstances would offend the spirit and intent of *Directive 031* and represent an abuse of the Board's costs award regime. As such, the Board disallows the Review Applicants' claim for honorarium for forming a group in the amount of $600.00.

[24] The Review Applicants each claim mileage in the amount of $74.74. They do not provide any further detail or information to substantiate the claim, including the amount of mileage that amount represents. At the Board's reimbursement rate of $.505 per kilometre (km), this claim amounts to an assertion by the Review Applicants of mileage for a total of 296 km of travel. Generally the Board allows mileage to and from the hearing venue in Drayton Valley. The Review Applicants reside approximately 34 km from Drayton Valley. As the Review Applicants reside at the same residence and were therefore able to travel to and from the hearing venue together, the panel disallows one of the two mileage claims in its entirety. Turning to the second mileage claim, the panel is prepared to grant costs representing the mileage to and from the hearing venue for each of two hearing days. The panel estimates the total mileage travelled by the Review Applicants to be approximately 144 km and therefore awards one of the mileage claims in its entirety, for a total award of $74.74.

[25] Based on the above, the panel disallows a total of $678.48 in costs claimed by the Review Applicants.

[26] Having reconsidered submissions from the parties filed in connection with the application for costs awards that resulted in *ECO 2010-007*, the panel hereby orders that Grizzly pay costs totalling $1517.12, which includes GST, to the Review Applicants.

Dated in Calgary, Alberta, on May 28, 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

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