



Trilogy Blue Mountain Ltd.

Applications for a Well and a Pipeline Licence
Pembina Field

Cost Awards

February 10, 2010

ENERGY RESOURCES CONSERVATION BOARD

Energy Cost Order 2010-003: Trilogy Blue Mountain Ltd., Applications for a Well and a Pipeline Licence, Pembina Field

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ENERGY RESOURCES CONSERVATION BOARD

Calgary Alberta

**TRILOGY BLUE MOUNTAIN LTD.
APPLICATIONS FOR A WELL AND
A PIPELINE LICENCE
PEMBINA FIELD**

**Energy Cost Order 2010-003
Applications No. 1613367 and 1574425
Cost Application No. 1625937**

1 INTRODUCTION

1.1 Background

Trilogy Blue Mountain Ltd. (Trilogy) applied to the Energy Resources Conservation Board (ERCB/Board) under Section 2.020 of the *Oil and Gas Conservation Regulations* for a licence to drill a well from a surface location at Legal Subdivision (LSD) 14, Section 23, Township 46, Range 2, West of the 5th Meridian, to a projected bottomhole location at LSD 16-22-43-2W5M.

The purpose of the proposed well would be to produce gas from the Banff Formation.

Trilogy currently has three applications before the Board for this proposed well. They were filed on November 28, 2007 (Application No. 1548356), January 27, 2009 (Application No. 1604040), and May 6, 2009 (Application No. 1613367). Each successive application was filed to update the calculated maximum hydrogen sulphide (H₂S) concentration and H₂S release rate. These changes in H₂S calculations also affected the emergency planning zone for the proposed well.

Trilogy also submitted an application under Part 4 of the *Pipeline Act* for approval to construct and operate a pipeline for the purpose of transporting gas to a tie-in point at LSD 14-23-46-2W5M (Application No. 1574425).

The proposed pipeline would be about 140 metres (m) in length, have a maximum outside diameter of 114.3 millimetres, and transport gas with a maximum H₂S concentration of 3.5 moles per kilomole or 0.35 per cent.

The proposed well surface location is about 1.6 kilometres (km) north of Battle Lake and about 10 km northwest of Westeros, Alberta.

Several area landowners filed objections to the proposed project, and the Board received submissions from

- Bob Whiteside
- Lily Whiteside
- Brent Norris
- Tim Belec
- Michael Black
- Mike Todorow
- Charlene Steinke

The interveners raised issues concerning location, environment, emergency response planning, and public consultation. Some landowners objected to alternative locations proposed by other landowners, which resulted in two landowner groups with separate legal representation in the hearing.

The Board also provided an opportunity for parties who reside outside the immediate area of the proposed sour gas well to provide brief comments.

The Board opened and adjourned a public hearing of the applications in Westeros on October 29, 2008, before Board Members, J. D. Dilay, P.Eng. (Presiding Member), and M. J. Bruni, Q.C., and Acting Board Member R. J. Willard, P.Eng.

On September 1, 2009, the panel and ERCB staff and counsel conducted a site visit to view the area of the proposed well and pipeline, alternative sites, and the locations of interveners' residences.

The Board reopened the hearing on September 2, 2009, before Board Members M. J. Bruni, Q.C. (Presiding Member), and G. Eynon, P.Geol., and Acting Board Member R. J. Willard, P.Eng. The oral portion of the hearing was completed on September 3, 2009, and the hearing was closed following written submissions of final arguments on September 18, 2009. The Board's decisions regarding the applications were communicated in *Decision 2009-072: Trilogy Blue Mountain Ltd., Applications for a Well and a Pipeline Licence, Pembina Field*, dated December 15, 2009, and *Decision 2009-072 Errata*, dated December 16, 2009.

1.2 Cost Claim

On October 5, 2009, Mr. Whiteside, Ms. Whiteside, Mr. Norris, Mr. Black, and Mr. Belec (collectively the "Whitesides") filed a cost claim in the amount of \$61 162.11. On October 16, 2009, Trilogy submitted comments with respect to the Whitesides' cost claim. On October 30, 2009, the Whitesides submitted a response to the comments of Trilogy.

On October 14, 2009, Mr. Todorow and Ms. Steinke (together "Todorow-Steinke") filed a cost claim in the amount of \$31 019.84. On October 29, 2009, Trilogy submitted comments with respect to the Todorow-Steinke cost claim. On November 6, 2009, Todorow-Steinke submitted a response to the comments of Trilogy.

2 VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

In determining local intervener costs, the Board is guided by Section 28 of the *Energy Resources Conservation Act*, which reads:

28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board,

(a) has an interest in, or

(b) is in actual occupation of or is entitled to occupy

land is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or

group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.

It is the Board's position that a person claiming local intervener costs must establish the requisite interest in land and provide reasonable grounds for believing that such an interest may be directly and adversely affected by the Board's decision on the application in question.

When assessing costs, the Board 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*.

Subsection 57(1) of the *Rules of Practice* states:

57(1) The Board may award costs, in accordance with the scale of costs, to a participant if the Board is of the opinion that

- (a) the costs are reasonable and directly and necessarily related to the proceeding, and
- (b) the participant acted responsibly in the proceeding and contributed to a better understanding of the issues before the Board.

3 WHITESIDES' COST CLAIM

The Whitesides were represented by Richard Secord and Eva Chipiuk of Ackroyd LLP. On October 5, 2009, the Whitesides filed a cost claim for legal fees in the amount of \$50 436.00, attendance honoraria in the amount of \$3250.00, expenses in the amount of \$4812.73, and GST in the amount of \$2663.38, for a total claim of \$61 162.11.

3.1 Views of Trilogy

On October 16, 2009, Trilogy provided submissions in response to the Whitesides' cost claim.

Trilogy referred to Section 5.1.3 of *Directive 031*, which provides that interveners may claim \$100.00 per half day for attendance honoraria. Each of the five Whitesides made a claim of \$650.00 for the two-day hearing, which exceeds the amounts outlined in *Directive 031*. Trilogy therefore submitted that the claim for attendance honoraria be reduced by \$200.00 per intervener to reflect the guidelines set out in *Directive 031* that each of the five Whitesides should be permitted a total attendance honorarium of \$400.00.

The Whitesides claimed legal fees and disbursements totaling \$55 930.95. With respect to the Whitesides' claim for legal fees, Trilogy cited Section 6.3 of *Directive 031*, wherein it states that "as there is no certainty that a hearing will be held until a notice of hearing is issued, the ERCB normally does not award costs incurred before notice is issued." Trilogy submitted that since the notice of hearing in this matter was not issued until August 5, 2008, none of Mr. Secord's time prior to that date should be allowed, thereby reducing the claim for legal fees by \$5350.00.

Trilogy noted that some of the time entries claimed prior to August 5, 2008, appeared to relate to the appropriate dispute resolution (ADR) discussions. Trilogy submitted that, in addition to the fact that those costs were incurred by the Whitesides prior to issuance of the notice of hearing, it has already paid intervener costs associated with the ADR discussion.

Furthermore, Trilogy noted that the account for Mr. Secord included costs related to legal services provided to Verna Phippen. Ms. Phippen was not an intervener and was not granted standing to participate in the hearing. Trilogy submitted that since there were approximately 50 references to Ms. Phippen in Mr. Secord's account, claim for legal fees should be reduced by an additional 5 per cent.

Regarding the expenses claimed for meals and accommodations for Mr. Secord and Ms. Chipiuk for the hearings on October 29, 2008, and September 2 and 3, 2009, Trilogy submitted that the Whitesides provided no justification as to why both lawyers should be paid. Trilogy submitted that only the expenses of Mr. Secord should be allowed.

Also, regarding the expense claims by Mr. Whiteside and Ackroyd LLP for printer copies, Trilogy submitted that the charges appear to be charges for printing documents from a printer and should be disallowed.

Trilogy submitted that even with the suggested reductions outlined above, the Whitesides' cost claim remains excessive given that it was only a two-and-a-half day hearing and no expert evidence was presented. Trilogy suggested that the Board consider a further reduction and grant a cost award to the Whitesides in the range of \$30 000.00 to \$35 000.00.

3.2 Views of the Whitesides

On October 30, 2009, the Whitesides submitted a response to Trilogy's comments on their cost claim.

The Whitesides noted that Section 5.1.3 of *Directive 031* also states that the noon break separates the two halves of the hearing day. The Whitesides submitted that when a hearing has a morning and afternoon session followed by a supper break, the supper break would constitute a further half hearing day. The Whitesides noted that on September 2, 2009, the hearing began at 8:30 a.m. and continued until 8:30 p.m., and on September 3, 2009, the hearing began at 8:30 a.m. and ended at 10:30 p.m. Given those extended hours, the Whitesides submitted that an attendance honorarium claim of \$300.00 per day per person was warranted.

In response to the issue of denying costs that were incurred prior to the issuance of the notice of hearing on August 5, 2008, the Whitesides noted that Section 6.3 of *Directive 031* states that "...However, the ERCB recognizes that local interveners may sometimes incur costs prior to the notice that are reasonable and directly and necessarily related to their intervention. Accordingly, the ERCB considers all claims for costs incurred prior to the notice of hearing on a case-by-case basis." The Whitesides submitted that since Trilogy applied for five applications, the first being in August of 2007, it was reasonable for them to incur legal costs prior to the issuance of the notice of hearing and their legal counsel should not be penalized for that.

With respect to the 21.4 hours claimed by Mr. Secord prior to the notice of hearing being issued, the Whitesides submitted that they retained counsel in August 2007 to assist them in understanding Trilogy's applications. The Whitesides submitted that none of the fees related to compensation matters and they were all reasonable and directly and necessarily related to Trilogy's various applications. As a result, the Whitesides submitted that they should be awarded in full.

The Whitesides noted that Trilogy failed to calculate time entries of approximately 0.8 hours at \$250.00 per hour in relation to communications between their counsel and ERCB ADR employee Jeff Strem. The Whitesides did not agree that the cost claim should be reduced by \$200.00 for the time entries related to contact with Mr. Strem given that he is an employee of the ERCB.

Regarding the time entries relating to Ms. Phippen, the Whitesides noted that Trilogy provided Ms. Phippen with a notice of application for its sour gas well and pipeline applications. The Whitesides submitted that it was reasonable for Ms. Phippen to contact legal counsel to assist her in understanding the applications at issue and that the costs incurred relating to that contact should be awarded in full.

Regarding the legal costs of Ms. Chipiuk, the Whitesides submitted that using two legal counsel greatly reduced the overall costs. They also submitted that the Board has previously recognized that it is often more effective to use two legal counsel and have the junior lawyer complete tasks at a lower hourly rate, such as was done in this case. The Whitesides submitted that having two counsel attending the hearing helped to complete the hearing in two days rather than three days as originally scheduled. The Whitesides noted that a reduction had already been made to the claim for Ms. Chipiuk. Since the Board normally does not award legal fees for the second counsel's attendance at the hearing, the Whitesides did not submit that portion of Ms. Chipiuk's claim, which would have totalled \$6310.00; therefore, the Whitesides submitted that Ms. Chipiuk's claim should not face further reduction.

The Whitesides further submitted that given the reduction already made to Ms. Chipiuk's fees, the nominal disbursements she incurred should be awarded in full.

In response to the issue regarding the copying charges, the Whitesides referred to page 26 of Schedule C of the *Court of Queen's Bench Costs Manual* and submitted that charges claimed for printer copies were equivalent to photocopy charges and should be awarded in full. The Whitesides noted that the claim of \$175.00 for printer copies made by Mr. Whiteside was included in error and should be deducted from the cost claim.

3.3 Views of the Board

With regard to attendance honoraria, the Board notes that \$50.00 per person was claimed for the hearing in October 2008, and that \$300.00 per person per day was claimed for the two-day hearing in September. The Board notes that *Directive 031* provides for \$100.00 per person per half day for attendance at a hearing. The Board took into consideration the very long days of the hearing and has exercised its discretion in this case to award the attendance honoraria claimed by the Whitesides in full.

Regarding the time entries relating to Ms. Phippen, the Board finds that those costs relate to legal services provided to a person who was not given standing to participate in the hearing and is not otherwise eligible for costs under Section 28 of the *Energy Resources Conservation Act* or *Directive 031*. For that reason, the Board hereby disallows the sum of \$1475.00. Regarding the time incurred when Ms. Phippen was part of a larger group, no reduction will be made as the group work would have been completed in any event.

While the Board appreciates and encourages parties to attempt to resolve concerns among themselves whenever possible, the Board is of the view that claims for cost recovery for negotiations between parties should be handled in the context of the negotiations themselves and not through the Board's cost recovery process. The Board finds that the Whitesides did not substantiate the legal costs incurred by Mr. Secord prior to the issuance of the notice of hearing and therefore reduces Mr. Secord's legal fees by a further \$200.00.

Regarding the costs claimed by Ms. Chipiuk, the Board believes that using a more junior lawyer for hearing preparation in this case was an efficient use of resources and likely reduced the total legal fees. Therefore, the Board hereby allows Ms. Chipiuk's fees in full. However, in doing so the Board notes that its decision to allow Ms. Chipiuk's fees is confined to the specific circumstances of the present case and that it is rare that a hearing of this length and complexity would warrant the use of two counsel for a party.

The Board finds the claims for meal and accommodation expenses reasonable and appropriate in the context of a two-day hearing that went on as long as 14 hours a day. The Board awards those claims in full.

The Board agrees that the costs in this matter are high for a hearing of this length and complexity, especially given that no expert evidence was presented. The Board has looked at all of the materials filed in this instance and has noted that Trilogy filed four different applications, all of which needed to be reviewed by the Whitesides. The volume of materials relating to the applications was significant. It was necessary for the Whitesides to fully prepare for the hearings, and there were effectively two separate hearings due to significant changes in the applications. While no technical experts were called, the applications and hearing involved significant environmental and planning issues. Further, the Board found the evidence presented by Mr. Secord's witness panel to be very valuable. Notwithstanding all of this, the legal costs claimed by the Whiteside are quite excessive in the circumstances. Therefore, the Board has decided to reduce the Whitesides' claim for legal fees by a further \$5000.00.

Lastly, the Board finds the claim for printer copies made by Ackroyd LLP to be reasonable and allows it in full. The Board notes and accepts the Whitesides' advice that the claim for printer copies made by Mr. Whiteside should be disregarded.

4 TODOROW-STEINKE COST CLAIM

Todorow-Steinke were represented by Jennifer Klimek of Klimek Law. On October 14, 2009, Todorow-Steinke filed a cost claim for legal fees in the amount of \$25 065.00, preparation and attendance honoraria in the amount of \$3887.50, expenses in the amount of \$808.70, and GST in the amount of \$1258.64, for a total claim of \$31 019.84.

4.1 Views of Trilogy

On October 29, 2009, Trilogy provided submissions in response to the Todorow-Steinke cost claim.

Trilogy referred to Section 5.1.2 of *Directive 031*, which states that "the Board will not normally provide a preparation honorarium to a local intervener if a lawyer is primarily responsible for the preparation of an intervention." Trilogy submitted that it was apparent that counsel for Todorow-

Steinke, Ms. Klimek, was primarily responsible for preparation of their intervention and represented them throughout the application process. Trilogy also noted that prior to retaining Ms. Klimek on November 24, 2008, Mr. Todorow had claimed nine hours for preparation time for his attendance at the Battle Lake Synergy meetings. Trilogy submitted that this claim should be denied as attending those meetings was voluntary and was not related to this ERCB application process. In addition, none of the other time entries for Todorow-Steinke prior to November 24, 2008, related to the preparation of submissions. Trilogy submitted that the claim for preparation honoraria should be denied entirely.

Regarding the claim for an attendance honorarium for Mr. Todorow in the amount of \$1325.00, Trilogy noted that Mr. Todorow attended the two and a half days of hearing in October 2008 and September 2009, and in accordance with *Directive 031* would only be entitled to \$100.00 per half day of attendance at the hearing. Therefore, Trilogy submitted that the attendance honorarium claim should be reduced to \$500.00 to reflect the guidelines set out in *Directive 031*.

Todorow-Steinke claimed \$407.50 for mileage, as well as \$602.50 for a taxi. Trilogy requested that Todorow-Steinke clarify both of these claimed expenses. Trilogy noted that there was no evidence to support the claim for taxi charges and submitted that this claim should be disallowed.

Trilogy went on to state that under the assumption that the \$602.50 was actually for mileage and not for a taxi, that would mean that the mileage claimed would be based on travelling 1205 km at \$0.50 per km. Some of the trips claimed by Todorow-Steinke (three trips at 130 km each) were for attendance at meetings of the Battle Lake Synergy, which as previously stated were voluntary and not related to this ERCB application process. Trilogy therefore submitted that the mileage incurred for the trips to the Battle Lake Synergy meetings totalling \$195.00 were inappropriate and should be denied.

With respect to the legal fees submitted on behalf of Ms. Klimek, Trilogy submitted that the amount of \$26 529.84 was excessive, considering the duration of the hearing (two days) and the fact that her clients did not present any expert evidence.

Trilogy noted Ms. Klimek's comments that the hearing was very long and should not be viewed as a simple two-day hearing because ultimately there were three applications to review. Trilogy submitted that three applications were required because of changes in H₂S content only and therefore the legal fees claimed were not comparable to legal fees that would be awarded for three separate, unrelated applications. Trilogy submitted that the legal fees claimed by Klimek Law should be reduced by 30 per cent to \$17 545.50, which, including GST and disbursements, would total \$18 639.29.

4.2 Views of Todorow-Steinke

On November 6, 2009, Todorow-Steinke submitted a response to Trilogy's comments.

Todorow-Steinke submitted that their legal fees were reasonable and that they were lower than Mr. Secord's legal fees and even lower than the range set out by Trilogy to be 'reasonable' for a two-day hearing with no expert evidence.

Todorow-Steinke clarified that they were not expecting to be awarded costs for three separate and unrelated applications. However, it was not one application that proceeded in a straight

forward manner, but three different applications for one well, which made for more work than just one application.

Todorow-Steinke submitted that Ms. Klimek could not have effectively prepared them for a hearing if the time and charges were reduced as suggested by Trilogy.

4.3 Views of the Board

The Board notes that Todorow-Steinke have claimed preparation honoraria at an hourly rate. The Board recognizes that *Directive 031* does not provide compensation for interveners by way of an hourly rate, but rather provides for a range of preparation honoraria based on the specific circumstances of the application in question.

The evidence suggests that the majority of Todorow-Steinke's submissions were prepared by Ms. Klimek. Accordingly, the Board is not prepared to approve preparation honoraria in this case. Therefore the Board hereby disallows their claim for preparation honoraria in its entirety.

The Board notes that *Directive 031* provides for \$100.00 per person per half day for attendance at a hearing. The Board took into consideration the very long days of the hearing and has exercised its discretion in this case to award \$300.00 per day for attendance by Mr. Todorow at the hearing on September 2 and 3, 2009, and \$50.00 for his attendance at the hearing on October 29, 2008. This results in an attendance honorarium award totalling \$650.00.

As Todorow-Steinke did not substantiate the costs claimed for taxi charges, the Board disallows the claim for taxi charges in the amount of \$602.50 in its entirety. The Board allows the claim for mileage in the amount of \$407.50.

The Board notes that Mr. Todorow provided a very short submission at the hearing and that his oral evidence regarding the well location differed from his written submissions. As a consequence, the evidence provided by Ms. Klimek on behalf of Todorow-Steinke was not particularly helpful to the Board. The Board therefore reduces Todorow-Steinke's claim for legal fees to \$20 000.00 including GST.

5 ORDER

The Board hereby orders that Trilogy pay intervener costs totalling \$75 252.37 as follows:

- i) payment in the amount of \$53 978.36 to Ackroyd LLP at 1500, 10665 Jasper Avenue, Edmonton, Alberta, T5J 3S9, and
- ii) payment in the amount of \$21 274.01 to Klimek Law at #240, 4808 – 87 Street, Edmonton, Alberta, T6E 5W3.

Dated in Calgary, Alberta, on February 10, 2010.

ENERGY RESOURCES CONSERVATION BOARD

“Original Signed by M. J. Bruni, Q.C.”

M. J. Bruni, Q.C.
Presiding Board Member

“Original Signed by G. Eynon, P.Geol.”

G. Eynon, P.Geol.
Board Member

“Original Signed by R. J. Willard, P.Eng.”

R. J. Willard, P.Eng.
Acting Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED



Appendix A