Canadian Natural Resources Limited

Applications for 15 Well and 8 Facility Licences
Sugden Field

Cost Awards

September 6, 2011

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Energy Cost Order 2011-007: Canadian Natural Resources Limited, Applications for 15 Well and 8 Facility Licences, Sugden Field

September 6, 2011

Published by

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

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INTRODUCTION

[1] Canadian Natural Resources Limited (CNRL) applied to the Energy Resources Conservation Board (ERCB/Board) under Section 2.020 of the *Oil and Gas Conservation Regulations* (*OGCR*) for licences to drill 15 slant wells from 8 surface locations in various legal subdivisions. CNRL also applied under Section 7.001 of the *OGCR* for approval to construct and operate 8 crude bitumen batteries in various legal subdivisions.

[2] The ERCB held the oral portion of a public hearing on the applications in Glendon, Alberta, commencing March 8, 2011, and concluding March 10, 2011. After receiving final submissions from all parties, the panel formally closed the hearing by a letter dated April 20, 2011. The panel issued *Decision 2011 ABERCB 019: Canadian Natural Resources Limited, Applications for 15 Well and 8 Facility Licences, Sugden Field*, on June 28, 2011, approving CNRL's applications with conditions.

[3] On May 2, 2011, the Minnie Lake Conservation Society (MLCS) filed a cost claim in the amount of $69 138.76. On May 30, 2011, CNRL submitted comments to the costs claim of MLCS. On June 13, 2011, MLCS submitted its response to the comments of CNRL. The Board considers the cost process to have closed on June 13, 2011.

VIEWS OF THE BOARD—AUTHORITY TO AWARD COSTS

[4] In determining local intervener costs, the ERCB is guided by its enabling legislation, in particular by Section 28 of the *Energy Resources Conservation Act* (*ERCA*):

> 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 that 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.

[5] 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* (Rules of

Practice) and Appendix E: Scale of Costs in ERCB *Directive 031: Guidelines for Energy Proceeding Cost Claims* (Directive 031).

[6] Section 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.

COST CLAIM OF MLCS

[7] On May 2, 2011, the MLCS filed a cost claim for expert fees, preparation and attendance honoraria, and forming a group in the amount of $57 550.00, expenses in the amount of $8775.06, and GST in the amount of $2813.70, for a total claim of $69 138.76.

[8] The MLCS asserted that its evidence shows that the MLCS and its members may be directly and adversely affected by these project approvals and, therefore, that the MLCS and its members fall within the category of local landowner and/or occupants given their concerns about the local watershed, the airshed, and related human and ecological health. The MLCS also asserted that the evidence of its witnesses confirms the direct and adverse impact on its members so that the MLCS qualifies under Section 28 for local intervener costs.

[9] The MLCS submitted that since all costs are strictly according to what is prescribed in the relevant directive and are supported with receipts or other documentation, the MLCS is confident that what has been submitted to the Board is complete and correct.

[10] The MLCS stated that it is confident it retained expert opinion of exceptional experience and knowledge and that each individual who gave evidence on behalf of MLCS more than fulfilled the expectation that they provide quality information to the hearing. The MLCS asserted the amounts claimed for their time and assistance are absolutely correct and fair in terms of the market value of the work done by these experts.

[11] The MLCS submitted that it acted correctly throughout the process, provided relevant and well-researched information that did not show flaws of redundancy, and supported its concerns about the potential risks associated with the applied developments. It also submitted that the MLCS is a legitimate (legally registered) society in Alberta, acting congruently with its registered interests and purposes to maintain the health of the airshed and watershed surrounding Minnie Lake and the health of the connected habitats and ecosystems.

[12] In its June 13, 2011, response to the submission of CNRL, MLCS stated that it would not be helpful to respond individually to each of the unsubstantiated and negative claims made by CNRL. Rather, it asserts that a summary statement of its consistent commitment in undertaking this intervention with the best intentions and high quality of input is a more effective response to the objections. The cost claim was approached in the same manner, with a result that is clear, complete, fair, and consistent with the requirements of *Directive 031*.

CNRL RESPONSE TO MLCS COST CLAIM

[13] In its May 30, 2011 submission, CNRL opposed the cost claim of the MLCS in the strongest possible terms, and noted that the test for an award of local intervener costs is set out in Section 28 of the *ERCA*.

[14] CNRL submitted that in Section 3.2 of *Energy Cost Order 2010-007: Section 39 and 40 Review of Well Licences No. 0404964 and 0404965, Pembina Field,* the Board stated the following:

> The Board's authority to award costs is derived from Section 28 of the ERCA. Pursuant to Section 28(2), a local intervener may be awarded costs. Section 28(1) identifies a local intervener as someone with an interest in or the right (exercised or not) to occupy land that will or may be directly and adversely affected by a decision of the Board. This requires the Board to determine 1) if the party seeking costs has an interest in, occupies, or has the right to occupy certain land; and 2) if that land may be directly and adversely affected by a decision of the Board.

[15] CNRL observed that on July 27, 2010, when the Board made its decision to hold an oral hearing regarding these applications and to afford participatory rights to the MLCS, the Board stated the following about MLCS on page 3.

> It does not appear to the Board that the MLCS has rights or interests, known to law, separate and apart from those of its members, that may be directly and adversely affected by a Board decision on the Applications.

[16] CNRL pointed out that on page 5 the Board stated the following about intervener costs:

> It is very important that interested parties to whom participatory rights have been provided make particular note that the exercise of this discretion of the Board to afford such rights does not mean that such parties qualify for intervener costs …. There is a separate and distinct test to qualify for intervener costs which must be met before an award of costs will be made. That test is set out in Section 28 of the *ERCA* ….
>
> It can be seen from the foregoing that a local intervener must have an interest in land, occupy land or be entitled to occupy land and it is the land which is or may be directly and adversely affected by a decision of the Board. Interested parties who participate in the hearing must be prepared to establish that these tests have been met if they are to successfully make a claim for intervener costs following the hearing.

[17] CNRL also noted that on or about November 9, 2010, MLCS applied to the ERCB for advance determination of local intervener status and advance funding. Those applications were opposed by CNRL, and on December 10, 2010, the panel denied those applications and upheld its July 27, 2010, decision. The panel stated:

> By its decision dated July 27, 2010 the Board denied standing to the objecting parties on the basis that MLCS and the individual landowners had not met that test. Nonetheless, the Board exercised its discretion and determined that a hearing into the applications of CNRL was in the public interest, and further exercised its discretion to afford objecting parties participatory rights enumerated in section 26 of the *ERCA*.

[18] And later, the Panel stated in its December 10, 2010 letter, on pages 3 and 4:

> In this particular case the Panel is of the view that the MLCS does not have the requisite interest in or right to occupy land in a manner sufficient to establish local intervener status. The Panel finds that it was not the intention of the legislature to include in the definition of local intervener members of the

> public who may use public facilities from time to time. Further, even if the definition of local intervener was meant to apply to members of the public at large using public recreational facilities, MLCS has not established to the satisfaction of the Board that the public recreational lands may be directly and adversely affected by the Board's decision on the applications in question.
>
> The Panel is prepared to accept that lakeshore owners who are members of the MLCS can satisfy the first branch of the test in section 28, namely having an interest in land, occupying land or having the right to occupy land. However, the submissions of MLCS do not satisfy the Panel that its July 27, 2010 decision was in error or that a decision on the applications may directly and adversely affect the lands in question.

[19] CNRL submitted that, in spite of the panel's caution as set out above, in the course of the oral hearing held in Glendon, Alberta, the MLCS retained and tendered Dr. Gilles Wendling, Dr. Ann-Lise Norman, and Ms. Jessica Ponto, Environmental Health Officer, as witnesses, at great expense to the MLCS. CNRL noted that Mr. and Mrs. Beaulieu and other members of the MLCS gave evidence at the hearing and now seek to recover honoraria and expenses. CNRL noted that Mrs. Beaulieu, on behalf of the MLCS, submitted a cost claim including an amount for Dr. Karen McDonald, who did not give evidence at the hearing.

[20] CNRL submitted that the MLCS does not qualify under Section 28 for an award of local intervener costs because the MLCS itself does not own any land. CNRL observed that, although certain members of the MLCS own recreational property at Minnie Lake, there is no evidence that the applied for wells and batteries will have any direct and adverse impact on those cottage lots. CNRL submitted that, even if the allegations of the MLCS could constitute a direct and adverse impact on land owned by members of the MLCS, CNRL's compliance with existing regulations and drilling practices adequately protect all interests while allowing CNRL to drill for and recover the valuable bitumen resource believed to underlie the lands. CNRL further noted that the owners of the land on which the pad sites will be located and where the wells will be drilled agreed to the locations and did not object to the applications.

[21] CNRL argued that the expert testimony of Dr. Donald Davies, a toxicologist, confirmed that there is no cause for concern regarding emissions from heated storage tanks. CNRL stated that while it prefers actual field testing over the theoretical work of Dr. Ian Johnson, Dr. Davies' report confirmed that even the theoretical extrapolations of Dr. Johnson give no cause for concern.

[22] CNRL noted that there is 150 to 200 metres of shale between the bottom of Minnie Lake and the targeted Sparky formation. CNRL also claimed there is also no credible evidence that cold heavy oil production with sand (CHOPS) will induce fracturing, cause fluids to migrate through natural fractures, or cause subsidence. CNRL stated that it must comply with existing regulations and that it employs drilling practices that meet or exceed industry standards. CNRL stated that its evidence and the evidence of James Freeman confirmed that groundwater and surface water would be adequately protected.

[23] CNRL respectfully submitted that the claim for Dr. Wendling should be denied regardless of standing, as his evidence was of no assistance regarding the applications. Dr. Wendling admitted that: he had not reviewed the geological and other material available in the area; he agreed that the parts of his report that dealt with allegations of subsidence should be removed from his report; he was unfamiliar with the regulatory regime in place in Alberta and had taken no steps to familiarize himself with it; he agreed the alleged natural fractures were based entirely

on speculation and were depicted in his report by lines that had no correlation to the actual situation; he was unaware of the cementing and casing regulations and of the drilling practices of CNRL; and he could not distinguish between thermal recovery methods and CHOPs, and erroneously confused the two. Accordingly, CNRL submitted that it should not be required to fund Dr. Wendling's report.

[24] CNRL submitted that the report of Dr. Ann-Lise Norman was unnecessary and of no assistance to the Board, and that CNRL should not be required to pay costs for the report. It noted that Dr. Norman was tendered as a witness by the MLCS for the sole purpose of commenting on the work of Dr. Ian Johnson. Dr. Norman did not do the work or participate in the work commented on in Dr. Johnson's report. CNRL stated that it did not attempt to refute the work of Dr. Johnson; on the contrary, Dr. Davies was asked to provide a toxicological report on the assumption that Dr. Johnson's theoretical extrapolations were correct. Dr Norman also confirmed that she was not a toxicologist and that all work and conclusions regarding toxicology should be left to those properly qualified to draw such conclusions. Accordingly, CNRL submitted that it should not be required to fund Dr. Norman's report.

[25] CNRL was of the view that the report of Ms. Jessica Ponto was unnecessary and of no assistance to the Board in determining the applications. CNRL submitted that Ms. Ponto was tendered as a witness for the purpose of commenting on the contents of the *Directive 056: Energy Development Applications and Schedules* (Directive 056) applications made by CNRL, and noted that the Board had previously determined that the applications complied with *Directive 056* and contained the requisite information. Ms. Ponto confirmed that she is not an expert on *Directive 056*, and CNRL submitted that she is clearly not qualified to provide an opinion on its requirements or dictate to the Board what should or should not be included in a *Directive 056* application. CNRL submitted that it should not be required to fund Ms. Ponto's report.

[26] CNRL pointed out that Dr. Karen MacDonald provided no report and gave no evidence at the hearing. Therefore, it submitted that there is no basis for the claim and that CNRL should not be required to fund an unwarranted claim.

[27] With respect to the claims for honoraria and disbursements for the individuals listed in the MLCS' submission, CNRL submitted that, regardless of the decision on standing, the costs should be disallowed or drastically reduced given that apart from Mrs. Beaulieu, who was clearly involved, the contribution of the others is unknown and unsubstantiated.

[28] CNRL submitted that the positions taken by the MLCS at the hearing and throughout show reluctance on the part of the MLCS to accept the credible and legitimate evidence tendered by the applicant. CNRL reiterated that the MLCS does not have standing, and it requested that the cost claim of the MLCS be dismissed in its entirety.

ANALYSIS AND FINDINGS

[29] Submissions up to July 27, 2010, did not convince the Board that the rights of MLCS and its members may be directly and adversely affected by approval of the applications and, therefore, did not meet the test for standing under Section 26(2) of the *ERCA*. Nonetheless, the Board decided to conduct a hearing into the applications of CNRL on its own initiative. In its

July 27, 2010, letter, the Board advised interested parties that were going to participate in the hearing that they would have to establish that the tests under Section 28 of the *ERCA* have been met if they were to succeed in advancing a claim for intervener costs. Having received the evidence at the hearing and made findings of fact as set forth in its decision on the applications, the panel finds no reason to change the original July 27, 2010 decision to deny standing to the objecting parties. Similarly, the panel also finds no reason to alter its advance costs ruling of December 10, 2010.

[30] The panel notes that MLCS was alerted in the July 27, 2010 letter from the Board that there was a risk that costs for participation in the hearing might not be recovered.

[31] The evidence provided at the hearing indicated that members of the MLCS have interests in and occupy certain lands. However, the evidence and findings of fact thereon did not establish that, as a result of the panel's decision, there may or will be a direct and adverse effect upon MLCS, its members, or the rights and interests of those hearing participants. Accordingly, MLCS is not entitled to an award of costs associated with its participation in the hearing.

ORDER

The ERCB hereby denies the cost claim of MLCS in its entirety.

Dated in Calgary, Alberta, on September 6, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

G. Eynon, P.Geol.
Presiding Board Member

<original signed by>

J. G. Gilmour, LL.B.
Acting Board Member

<original signed by>

R. C. McManus, M.E.Des, B.A.
Board Member

APPENDIX A SUMMARY OF COSTS CLAIMED AND AWARDED

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