

ALBERTA SURFACE RIGHTS BOARD
(the “Board”)

Citation: TAQA North Ltd. v. SL Developments Inc. 2013 ABSRB 989

Date: 2013-12-13

File Nos. SL2011.0324

Decision No. 2013/0989

In the matter of the *Surface Rights Act*, RSA 2000, c S-24 (the “Act”)

And in the matter of land in the Province of Alberta within the:
SE ¼-29-38-1-W5M as described in Certificate of Title No. 112 332 001 +20
(the “Lands”)

BETWEEN:

TAQA NORTH LTD.,

Operator.

and

SL DEVELOPMENTS INC.,

Lessor,

BEFORE: D. A. Sibbald, Q. C.
(the “Panel”)

DECISION

APPEARANCES:

For the Lessor: Counsel: Janet L. McCready

For the Operator: Counsel: Daron K. Naffin

1.0 BACKGROUND

This decision is limited to the costs payable under Section 39 of the *Act* for proceedings to review the compensation payable under a surface lease. A hearing under Section 27 of the *Act* to determine the annual rate of compensation payable under the surface lease was held on April 10 and 11, 2013, in Red Deer, Alberta.

In the Board’s decision on compensation¹, the parties were directed to provide written submissions on costs. The last of those submissions were received by the Board on October 1, 2013.

¹ Decision No. 2013/0580

2.0 RELEVANT LEGISLATION AND BOARD RULES

The Board's authority to award costs is set out in Section 39 of the Act which reads as follows:

Costs

39(1) *The costs of and incidental to proceedings under this Act are in the discretion of the Board.*

(2) and (3) *Repealed 2009 c31 s16.*

(4) *The costs may include all preliminary costs of the respondent necessarily incurred in reaching a decision whether to accept the compensation offered by the operator.*

(5) *When*

(a) the Board makes a right of entry order, and

(b) the owner or occupant refuses to allow the operator to enter on and use the land to which the operator is entitled as described in the order,

the operator may apply to the Board to deduct from the compensation payable under the compensation order the costs incurred by the operator in and incidental to obtaining entry on and use of the land pursuant to the right of entry order.

(6) *The amount of costs, if any, to be deducted under subsection (5) is in the discretion of the Board.*

RSA 2000 cS-24 s39; 2009 c31 s16

Rule 31 of the *Surface Rights Board Rules (Rules)* states:

31. Costs Award

(1) *The Board may award costs to a party if the Board is of the opinion that the costs are directly and necessarily related to the proceedings. A request for costs must include:*

(a) reasons to support the request;

(b) a detailed description of the costs sought; and

(c) copies of any invoices or receipts for disbursements or expenses.

(2) *In making an order for the payment of a party's costs, the Board may consider:*

(a) the reasons for incurring the costs;

(b) the complexity of the proceedings;

(c) the contribution of the representatives and experts retained;

(d) the conduct of a party in the proceeding;

(e) whether a party has unreasonably delayed or lengthened a proceeding;

(f) the degree of success in the outcome of the proceeding;

(g) the reasonableness of any costs incurred;

(h) any other factor the Board considers relevant.

3.0 ISSUES

1. What costs are payable pursuant to Section 39 of the Act?

- for the Lessor's internal costs;
- for costs for services of Berrien Associates Ltd.; and
- for costs for services of Peacock Linder & Halt LLP

4.0 KEY SUBMISSIONS AND POSITIONS OF THE PARTIES

4.1 Overview

The Lessor submits that the situation at issue was unique and therefore resulted in greater complexity being a factor to be considered under Rule 31(2)(b)

The Operator argues that the Board has dealt with a number of similar cases involving the question of compensation arising from potential development.

In the Lessor's submission the fact that the annual compensation was almost doubled by the Board's decision, justifies the costs claimed on the basis that the degree of success is a factor to be considered under Rule 32(2)(g).

The Operator argues that it made an offer in 2010 for slightly less than the annual amount awarded which, taken over the five year review period, totals \$25,000.00 in comparison to the \$814,863.00 claimed by the Lessor at the hearing.

4.2 The Lessor

It is submitted that the costs claimed, set out in the table below, were all reasonably incurred and should be payable by the Operator.

Table – Costs Claimed

Item	Amount
The Lessors' Internal Costs	\$12,500.00
Expert Witness – Services of Berrien Associates Ltd.	\$30,380.51*
Legal Costs – Services of Peacock Linder & Halt LLP	\$31,751.41
TOTAL	\$74,631.92

* exclusive of GST

4.3 The Operator

The Operator does not provide specific monetary amounts but rather takes the position, for reasons discussed below, that the costs claimed are excessive and should be reduced.

5.0 DECISION

The Panels finds that costs are payable as set out in the following table:

Table – Costs Awarded

Item	Amount
The Lessors' Internal Costs	\$2,500.00
Expert Witness – Services of Berrien Associates Ltd.	\$24,546.91
Legal Costs – Services of Peacock Linder & Halt LLP	\$20,141.50
TOTAL	\$47,064.51

5.0 FINDINGS AND ANALYSIS

5.1 Overview

The Panel considers the test of reasonableness, both as to the need to incur and the amount of the item claimed, to be the overriding principle when determining what costs are payable. Reasonableness must be measured in the context that portions of the Lessor's land have been taken for use by the Operator by a proceeding which is akin to an expropriation.

In assessing the reasonableness of the costs claimed, the Panel considered the various factors set out in Rule 31 of the Rules.

5.2 The Lessor's Internal Costs

This item was initially presented as being for the "Personal Costs of Mr. Bontje" who testified as an employee of the Lessor at the hearing and was responsible for the overall conduct of the matter for the Lessor.

The Operator took the position that Mr. Bontje was not out of pocket since, as an employee, he would already have been compensated for his time spent attending to the matters at issue.

In its Reply Costs Submission, the Lessor took the position that the claim was intended to compensate the Lessor for the time spent by its employee as opposed to compensating the employee directly.

The Panel is satisfied that a corporate Lessor may be entitled to reasonable compensation for the time incurred by an employee for reasonable steps in the proceedings.

The Lessor acknowledges that both the time claimed of 50 hours and the claimed rate of \$250.00 per hour, are estimates. In support of the estimate of the time spent, the Lessor points out that the hearing lasted two days, and a total of 50 hours would be expected to be spent in preparation and at the hearing. It is noted that Mr. Bontje has a degree in urban planning and holds a management position with the Lessor such that the \$50.00 per hour rate proposed by the Operator would not result in fair compensation to the Lessor for the time spent.

The Panel was provided with little, if any, corroborative information to support either the time spent or the rate claimed. It is correct that Mr. Bontje was present at both days of the hearing, although his

evidence was relatively brief. It is reasonable to accept that he would have spent some time consulting with and instructing counsel before the hearing. The Lessor did not assert that Mr. Bontje's duties were such that the time he spent caused the corporation to incur additional costs in the sense that other employees had to take on extra duties.

The Operator referred to the Board "typically" awarding personal costs for parties based on a rate of \$50.00 per hour. There is no Board Rule or even a Guideline to that effect.

In the absence of supporting information, the Panel finds that the amount claimed of \$12,500.00 is excessive. Mr. Bontje's role was time consuming, even just attending the hearing, and would not have allowed him to attend to his regular duties. The Panel accepts the estimate of 50 hours but finds that a rate of \$50.00 per hour in the absence of other information to be reasonable.

In summary compensation is awarded to the Lessor of \$2,500.00 for the time spent by its employee.

5. Costs for the Services of Berrien Associates Ltd.

As noted by the Lessor, Mr. Berrien is an appraiser with many years of experience, including numerous appearances before the Board.

The Panel made the following finding at page 9 of the compensation decision:

In summary, the Panel finds that the evidence does not establish, on a balance of probabilities, that the Lease has resulted in the Lands not being developed or at least that such development would be imminent. The factual basis for compensation to be payable based on a market value rate of return approach has not been established. As such, it is unnecessary to determine the appropriateness of the proposed quantification of such a claim.

It was Mr. Berrien who, as a witness, advanced the market value rate of return analysis. Simply put, his evidence was not accepted by the Panel and was of little, if any, assistance in determining the annual rate of compensation payable. His evidence no doubt led the Operator to adduce evidence from a planner to rebut the position being presented. In the absence of the market value rate of return theory being advanced, the hearing would have been simplified. Mr. Berrien's unsuccessful presentation was a contributing factor to the length of the hearing.

In *Kelly v. Alberta (Energy Resources Conservation Board)*² the court stated:

While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying "winners and losers"; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived "success" of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are "successful" when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

Although that decision is an appeal from a different tribunal, it is persuasive authority that success should not be a primary factor in determining the costs payable.

² *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 at para 31 (*Kelly*)

The account presented only provides a total of the time spent, as opposed to allocating time to specific tasks. The time totals 105.4 hours at \$250.00 per hour (\$26,350.00) and 20.7 at \$75.00 per hour (\$1,552.50). Disbursements of \$2,478.01 are also included in the invoice.

Mr. Berrien was only present at the first day of the hearing. As a result, it is claimed that almost 100 hours was spent in gathering information, preparing a report, reviewing the opposing report and consulting with counsel. That is the equivalent to over two 40-hour weeks. The Panel considers that to be an unreasonable amount of time to spend on a matter of this nature.

Considering the limited contribution to the decision-making process³, the lack of complexity of the proceeding, and the unreasonable lengthening of the proceeding⁴, as well as the lack of success⁵, the amount claimed is excessive. The Panel finds that the claim for time expended should be reduced by approximately 25 per cent to \$20,900.00 (rounded).

An award for the costs for the services of Berrien Associates Ltd of \$24,546.91, inclusive of GST and disbursements, being a reduction of approximately one quarter, is found to be reasonable. The total is based on the following:

• Fees for time spent.....	\$20,900.00
• GST on fees	\$ 1,045.00
• Disbursements, exclusive of GST	\$ 2,478.01
• GST on Disbursements	\$ 123.90
	<u>\$24,546.91</u>

5.4 Costs for Services of Peacock Linder & Halt LLP

a. Disbursements and Other Charges

The Operator did not make any specific objection to the amount of the disbursements or other charges claimed. A review of the submitted invoices indicates a total of \$931.78 for those categories which the Panel finds to be reasonable. To account for GST, a rounded amount of \$1,000.00 is awarded.

b. Legal Fees

A total of \$29,310.50, exclusive of GST, is claimed for legal fees.

In addition to the issues referenced above concerning the lack of success and lack of complexity, the Operator also takes issue with the Lessor having claimed for the services of both a senior and junior lawyer, particularly during the hearing.

It is always difficult to review accounts to determine if there has been any duplication arising from more than one lawyer being involved. It is also noteworthy that a savings may arise if work is delegated to a junior lawyer whose services are charged out a lower rate.

The Panel does not consider a two-day hearing involving six witnesses to be sufficiently complex that two counsels are reasonably needed at the hearing. Based on the invoices provided, the charges for the

³ Rule 32(2) (c)

⁴ Rule 32(2)(b) and (e)

⁵ Rule 32(2)(f)

attendance of junior counsel in preparation for the hearing the day before and at the hearing total approximately \$5,000.00 and that amount will be deducted. No other deduction will be made for any possible duplication in light of the benefit of a lower rate being used for some tasks.

The remaining claim for legal fees is approximately \$24,310.00. The Panel recognizes and accepts that "...the parties retain the right to resort to resolution of their dispute through hearing and that the cost of doing so should not be an impediment to this course of action."⁶

It is also accepted by the Panel that: "Nor should costs be incurred predicated solely on the assumption that the opposing party will have to pay."⁷

The Panel did not accept the evidence adduced by the Lessor for a market value rate of return. The determination of the annual rate of compensation was based on the amount paid under comparables in the area. In the absence of the position advanced by the Lessor, the hearing would have been shorter and more straight-forward.

In making its determination, the Panel has been influenced by the same factors referenced above in footnotes 3 through 5. As discussed above, the success of a position is not to be a primary factor in determining the costs payable.⁸

The Panel is also influenced by the information that an offer to pay annual compensation of \$4,680.00 was made in November 2010. This is less than the \$5,000.00 awarded. It is clearly, however, much closer to that amount than the annual payments well in excess of \$100,000.00 sought by the Lessor.

A reduction by 25 per cent as was applied above for the services of Berrien Associates Ltd. is considered appropriate which, after the deduction for the duplicative services, results in an award for legal fees of \$18,230.00 (rounded) plus the applicable GST of \$911.50 for a total of \$19,141.50.

c. Summary of Costs for Legal Services

Costs for legal services of \$20,141.50, inclusive of GST, are awarded being \$1,000.00 for disbursements and other charges plus \$19,141.50 for legal fees.

7.0 ORDERS

An order will issue determining the costs payable by the Operator as noted above.

Dated at the City of Edmonton in the Province of Alberta on December 13, 2013.

SURFACE RIGHTS BOARD

MEMBER

⁶ City of Medicine Hat v. Majestic Ranches Ltd. 2013 ABSRB 97 at page 6

⁷ Anderson Energy Ltd. v. Hehr at page 6

⁸ Kelly, see footnote 2 above