

**THE SURFACE RIGHTS BOARD OF MANITOBA  
BOARD ORDER  
Under *The Surface Rights Act*, C.C.S.M. c. S235**

**Hearing:**

(no hearing held)  
(written submissions only)

**Order No: 06-2014**

**File No. 04 -2013**

**Page 1**

**Date issued:** September 26, 2014

**BEFORE:** Clare Moster, Acting Presiding Member  
Claude Tolton, Board Member  
Russell Newton, Board Member

Barbara Miskimmin, Board Administrator

**BETWEEN:**

**Applicant**  
(Owner)

**Carlyle Glenn Jorgensen**

- AND -

**Respondent**  
(Operator)

**Tundra Oil and Gas Partnership**

**Occupant**

(None)

**CONCERNING:**

The awarding of costs under Sec. 26 of *The Surface Rights Act* of Manitoba ("*the Act*") of and incidental to the participation of the Applicant in proceedings associated with the hearing held on December 10, 2013 resulting in the issuance of Board Order No. 01-2014. The Order was a "Variation of Compensation" order regarding well sites and associated access roads located on Lsds 10, 11, 12, 14, 15 and 16 in Section 19-8-29 WPM in the Province of Manitoba (*the "well sites"*).

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**COSTS FOR HEARING**

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## BACKGROUND:

At a hearing of the Board held in Virden on December 10, 2013, the Board heard six (6) applications from the Owner regarding variation of compensation for the well sites. The Board issued Order No. 01-2014 on January 7, 2014 which set new rates of compensation for each of the well sites.

Following the Hearing and the determination of the compensation to be awarded to each well site, it was determined that the Respondent's final offer of compensation on three well sites, namely Lsds 10, 12 and 15, was less than 90% of the amount determined by the Board. In accordance with Subsections 26(4) of the Act, the Board was required to increase the compensation otherwise payable for those well sites by the amount of such legal, appraisal and other expenses that were incurred by the Owner for the purposes of preparing and presenting his claim for compensation and that the Board considers just and reasonable. The Board was not required to order costs for well sites on Lsds 11, 14 and 16 under the provisions of Subsection 26(5) of the Act.

Regarding the determination of the amount of costs to be paid by the Operator, the Board's Order stated:

*"The Board requests that the Applicant prepare a request for costs in consultation with the Respondent. Should the parties agree on an amount, it will be that amount which shall be deemed to be the amount ordered by the Board. If agreement cannot be reached, each party may submit a proposal to the Board, and the Board shall determine the final amount."*

Counsel for the Operator advised the Board by letter dated May 5, 2014 that the Parties had been unable to agree on costs and asked the Board settle the matter as per the Order.

By letter dated May 21, 2014 to both Parties, the Board requested the Owner to submit his cost proposal before June 9, 2014 and provided the Operator until June 23, 2014 to submit its response to the proposal.

The Owner's cost "proposal" was received by the Board on June 3, 2014.

Counsel for the Operator submitted a response titled "Respondent's Submission on Costs" which was received by the Board on June 20, 2014.

Counsel for the Owner requested the opportunity to submit a rebuttal and by letter dated July 4, 2014 the Board granted him until July 21, 2014 to submit a rebuttal and copy it to counsel for the Operator.

On July 18, 2014 Counsel for the Owner submitted a rebuttal entitled "Applicant's Submission on Costs".

On July 18, 2014 Counsel for the Operator submitted a letter and additional information.

## ISSUES:

1. What information should the Board consider in determining the amount of costs to be awarded?
2. The amount of costs to be awarded.

## PARTIES TO THE PROCEEDINGS:

**APPLICANT:** Carlyle Glenn Jorgensen  
Counsel: Glen Harasymchuk (*written Submission 3*)

**RESPONDENT:** Glenn Ross (Surface Land Manager)  
Counsel: David E. Swayze

## Submissions:

1. **Owner's proposal for costs:** (forwarded via June 3, 2014 email) a 2-page letter from the Owner to the Board with nine (9) Attachments (primarily copies of emails and letters)
2. **Respondent's Submission on Costs:** (forwarded via June 20, 2014 email) an 11-page submission from counsel for the Operator, with attachments:
  - Tab A - excerpts from Board Orders (01-2013, 02-2013 and 03-2013)
  - Tab B - excerpt from "The Law of Evidence in Canada, 2nd edition)
  - Excerpts from Queen's Bench Regulation 553/88 related to Tariffs
3. **Applicant's Submission on Costs:** (forwarded via July 18, 2014 email) a 13-page submission from counsel for the Owner, with attachments:
  - Tab A - letter from counsel for Operator to Owner dated February 11, 2014
  - Tab B - copy of "Full and Final Release" provided by Operator (with letter dated March 11, 2014)
  - Tab C - copy of "Costs Agreement and Full and Final Release" provided by counsel for Owner and sent to Operator on March 28, 2014
  - Tab D - excerpt from Canadian Encyclopedic Digest of Law (contract)
  - Tab E - excerpt from Canadian Encyclopedic Digest of Law (waiver of privilege)
  - Tab F - excerpt from Canadian Encyclopedic Digest of Law (case: Nykoliation v Nykoliation)
4. **Counsel for Operator's letter dated July 18, 2014** (with copies of referenced correspondence between Parties)

## **DECISION:**

Upon reviewing the submissions of the Parties:

**It is the Order of This Board That:**

The Operator shall pay the Owner costs in the amount of \$3,500. Payment shall be made within thirty (30) days from the issuance date of this order. Following the thirty (30) day period, any unpaid balance shall include interest at a 3% annual rate.

## **REASONS FOR DECISION:**

### **1. What information the Board considered in determining the amount of costs to be awarded?**

There are a number of possible approaches or methods the Board considered using to determine a just and reasonable amount for costs. These include:

- (1) Costs awarded by the Board in previous orders having similar circumstances.
- (2) Costs determined by using the "Cost Guidelines - Subject to Board Discretion" outlined in the Board's "Policy and Procedure Manual".
- (3) The amount of costs that Parties to a particular issue may propose to the Board, along with their rationale for their proposal.
- (4) Amounts that may have been offered or agreed to between the Parties which are not considered to be "without prejudice" negotiations.
- (5) Cost amounts determined by the Board which take into account such factors as:
  - the complexity of the issue being addressed,
  - the amount and value (usefulness) of the evidence prepared for and submitted (presented) at the hearing,
  - invoices for actual legal and appraisal expenses incurred,
  - disbursements for necessary materials (paper, ink, binders, maps, etc.) and services (record searches, photocopying, printing, binding, etc),
  - travel related expenses (mileage),
  - the value the Board estimates for the time the Applicant spent preparing, presenting and defending his position; and including time spent reviewing and cross-examining the position of the other Party, and
  - any other expenses the Board considers just and reasonable.

The first matter the Board had to determine was whether an agreement as to costs had been entered into by the Parties.

The Owner submits (alleges) that agreement had been reached between the Parties as to the amount of costs he was proposing, and for which he had provided an itemized breakdown to the Operator on January 24, 2014. His submission included copies of correspondence between the Parties which included a specific dollar amount. He submits that this is evidence enough to show that an agreement or contract between the Parties had been agreed to and that the Board should order that the Operator honor its agreement and be ordered to pay the amount stated in the correspondence.

The Operator submits that an agreement had never been concluded with the Owner. The Operator's position is that the dollar amount that was offered was a conditional offer, subject to the Owner accepting the following three (3) conditions which were stated in a letter dated February 11, 2014 from counsel for the Operator to the Owner:

- "1. The execution of a Release confirming that upon payment of your claim for costs there will be no further claim for costs arising out of the hearing before the Surface Rights Board;*
- 2. A waiver of appeal confirming that you are accepting and will abide by the decision of the Surface Rights Board;*
- 3. A receipt confirming that you have received the payment in full."*

On February 17, 2014 the Owner provided the Operator with a form of release document which he considered could be the release the two Parties could agree to and sign. No correspondence was provided to indicate the Operator's acceptance or rejection of this document.

The Operator contends that the Owner never accepted the three (3) conditions as he never agreed to sign a Release.

The Board notes from the documents submitted, that although the Operator made reference to a Release, it was not until Counsel for the Operator in a letter to the Owner dated March 11, 2014 that a copy of the Release was provided to the Owner. The letter stated:

*"I understand your concerns in relation to what you would be agreeing to should you accept the payment from Tundra. In one final effort to conclude this matter I am enclosing the Release that we would need you to sign. I would encourage you to obtain independent legal advice."*

When the Owner took the advice of the Operator, and had his independent counsel review the "Full and Final Release" document provided by the Operator, counsel for the Owner made some amendments to the proposed document which provided the Owner with similar protection as for the Operator. This amended "Full and Final Release" document was sent to the Operator on March 28, 2014.

There is no documentation to indicate what transpired between March 28, 2014 and when the Operator submitted a letter to the Board dated May 5, 2014 advising that the Parties had been unable to agree on costs and requested the Board to settle the matter.

Having reviewed the submissions of both Parties, the Board concludes that the cost amount agreed to was conditional on the Owner agreeing to sign a Release provided by the Operator. However, the Owner did not agree to sign the Release provided. Therefore, this condition was not met and no agreement as to costs had been finalized.

The Board reviewed the legal excerpts provided by both parties in their submissions. The Board agrees with the Operator that much of the correspondence submitted by the Owner was part of negotiations and therefore deemed to be "without prejudice" and normally should not have been provided to the Board. However, the Board also accepts that the Owner was of the opinion that the Parties had agreed on the amount of costs, and submitted his documentation to support his position.

Having determined the amount offered as claimed by the Owner was "without prejudice" and normally would not be admissible evidence, the Board has not considered that amount in determining the costs being ordered.

This decision regarding use of "without prejudice" negotiating information is consistent with recent precedents established by the Board (Board Order Nos. 01, 02 and 03-2013).

An option the Operator recommended for the Board's consideration was the development and use of a "tariff of costs" similar to the approach used by the Court of Queen's Bench. Using this tariff methodology, the Operator concluded that the applicable tariff amount would be \$3,000 which it then reduced by 50% as being applicable for three of the six wells. In addition to the tariff proposal, the Operator did not take issue with the Owner's claim of \$509.83 for total disbursements, reduced by 50%. However the claim for \$250 total fuel (mileage) costs was refuted by the Operator. Using the tariff methodology plus agreed to disbursements, both reduced by 50%, the Operator arrived at a recommended cost figure of \$1,754.92.

Counsel for the Owner in the "Applicant's Submission on Costs" states that it is the position of the Owner that the development of a Tariff of Costs as proposed by the Operator is beyond the Board's jurisdiction.

The Board notes that its standard practice is to include a copy of the Board's "Policy and Procedure Manual" with the Notice of Hearing sent to all parties to the hearing. This practice was followed when the Notice of Hearing for the subject December 10, 2013 Hearing was sent out. The manual includes a section on "Costs" which sets out "Cost Guidelines - Subject to Board Discretion".

Neither Party made any reference to these Cost Guidelines in their respective submissions. The authority for the Board to make rules governing the practice and procedure of the Board is provided in Subsection 7(1) of the Act which states:

***"Rules of the Board***

***7(1) Subject to the provisions of this Act, the board may make rules governing the practice and procedure and the business of the board."***

The Board recognizes there is a wide range of possible situations where the complexity of the issue being addressed will require the Board to utilize the discretion provided to it under Section 26 of the Act to ensure amounts awarded are just and reasonable:

***"Costs in discretion of Board***

***26(3) Subject to subsections (4) and (5), the costs of and incidental to any proceedings of the board shall be in the discretion of the board.***

***Costs where offer less than 90%***

***26(4) Where the compensation payable to an owner or occupant, as the case may be, is determined by the board and the amount of the compensation that was offered by the operator before commencement of the hearing is less than 90% of the amount determined by the board, the board shall increase the compensation otherwise payable by the amount of such legal, appraisal and other expenses that are incurred by the owner or occupant, as the case may be, for the purposes of preparing and presenting a claim for compensation and that the board considers just and reasonable.***

***Costs where offer more than award***

***26(5) Where the compensation payable to an owner or occupant, as the case may be, is determined by the board and the amount of the compensation that was offered by the operator before commencement of the hearing is greater than the amount determined by the board, the board shall not award costs of any kind to the owner or occupant, as the case may be."***

The Board has not ordered specific amounts for costs in the recent past. Previously ordered amounts are no longer relevant.

The Board has considered the proposals submitted by both Parties. Recognizing that the amount proposed by the Owner was part of "without prejudice" negotiations, that amount has not been considered.

The Board has arrived at its cost amount taking into account all of the applicable factors listed above, other than "without prejudice" negotiated amounts.

The Board recognizes that the Owner had \$600 for legal advice and no appraisal costs incidental to the proceedings of the December 10, 2013 Hearing.

The Operator's submits that the costs related to the Owner's time be based on an hourly rate of \$25 and a total time of 40 hours, both reduced by 50% resulting in an amount of \$500. The Board considers this to be both unreasonable and unjust.

It should be noted that the restrictions in Subsection 26(5) of the Act only required the Board to order costs on the Lsds 10, 12 and 15. However, as the final amount (\$3,000) offered by the Operator on Lsds 11, 14 and 16 was not greater than the amounts determined by the Board (\$3,200 and \$3,000) for these Lsds, the Board was not precluded from ordering costs on all six (6) Lsds.

The Board, recognizing that the "Cost Guidelines" had not been updated for many years, has drafted new guidelines to better suit a standard one application proceeding (hearing). The Board then applied these revised Cost Guidelines to this proceeding. As the proceeding included six (6) well sites, three (3) of which the Board was required to increase compensation otherwise payable, the Board used its discretion to determine costs for this multi-application proceeding. The Board does not simply multiply the cost guidelines that would be used in a standard one site proceeding. It recognizes that much of the work and associated expenses would be similar to a single site proceeding.

The Board has taken into account the complexity, amount and value (usefulness/applicability) of the evidence prepared and presented by the Owner at the Hearing. As mentioned in Board Order No. 01-2014:

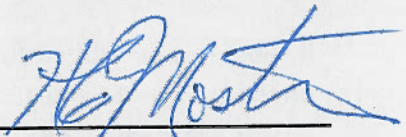
*"Much of his evidence also related to the increase in costs associated with the many components in a farming operation. Although informative, cost information by itself is not one of the matters under subsection 26 of the Act that is to be used to determine compensation."*

**3. The amount of costs to be awarded.**

The Board, using its drafted "Cost Guidelines", and discretion, has concluded that costs in the amount of \$3,500 are just and reasonable, determined as follows:

\$500	Preparation, filing and serving of applications and notices
\$1,200	Preparation for hearing ( <i>includes legal advice</i> )
\$1,000	Participation at hearing ( <i>presentation and defense of position, cross-examination of other party</i> )
<u>\$800</u>	<u>Disbursements (\$760 plus taxes)</u>
<b>\$3,500</b>	<b>TOTAL COSTS</b>

Decision delivered this 26th day of September, 2014.

  
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**H. Clare Moster,**  
Acting Presiding Member