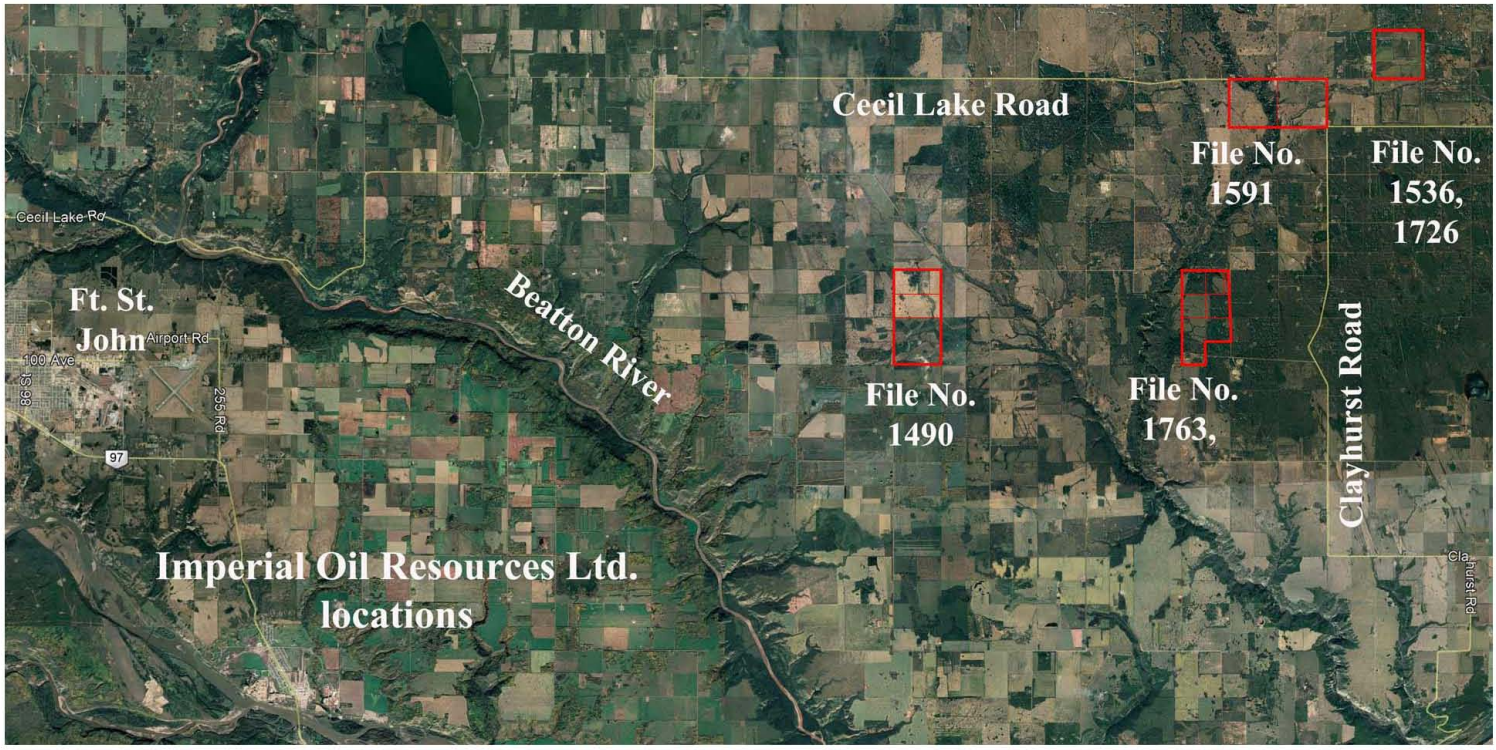
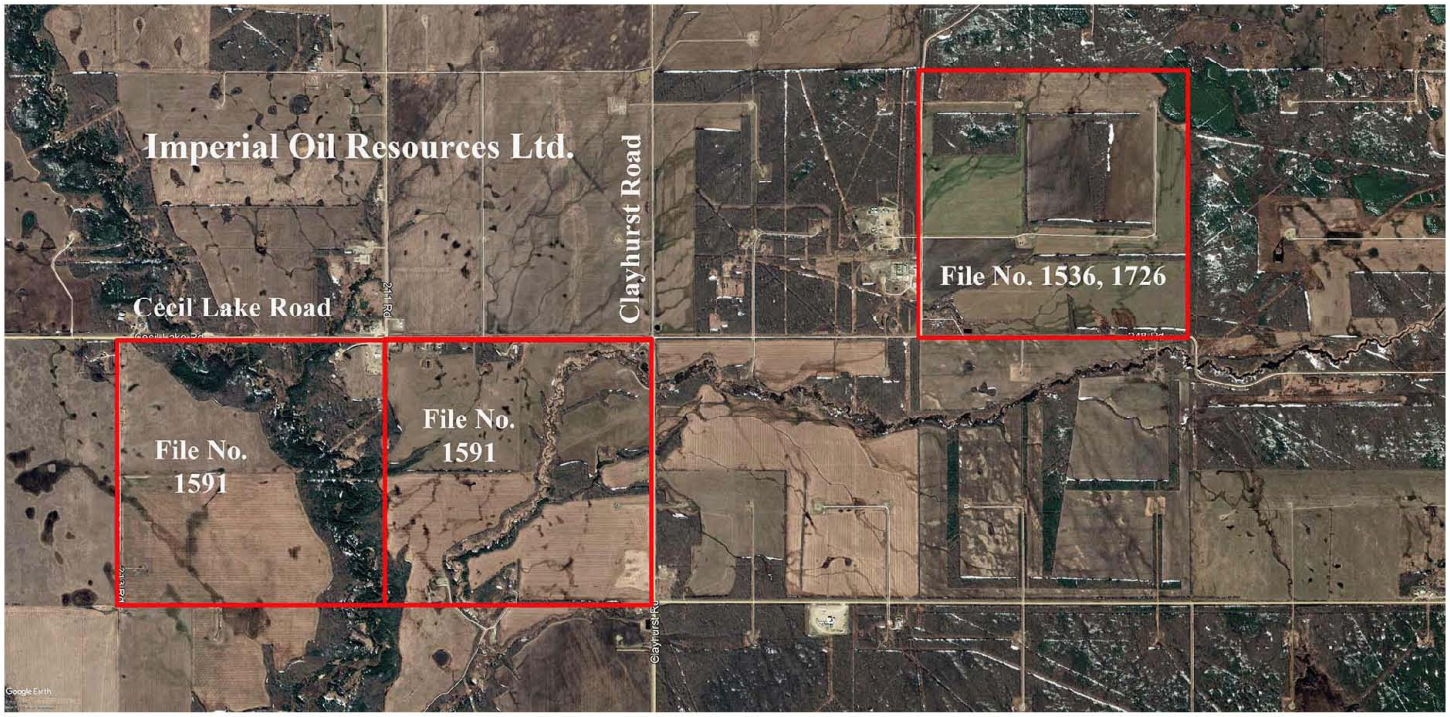

Cecil Lake Road
File No. 1591
File No. 1536, 1726
Cecil Lake Rd
Ft. St. John
Airport Rd
100 Ave
Beatton River
File No. 1490
File No. 1763,
Clayhurst Road
Imperial Oil Resources Ltd. locations


Imperial Oil Resources Ltd.
Clayhurst Road
Cecil Lake Road
File No. 1536, 1726
File No. 1591
File No. 1591

BRITISH COLUMBIA

File: 1490

ARBITRATION ORDER 373A

Parties to the Arbitration:

Imperial Oil Resources Ltd.
237 4th Avenue, S.W.
Calgary, Alberta
T2P 3M9

Applicant

Dennis Raymond Nelson
Mavis Eileen Nelson
Box 14
Goodlow, British Columbia
V0C 1S0

Respondent

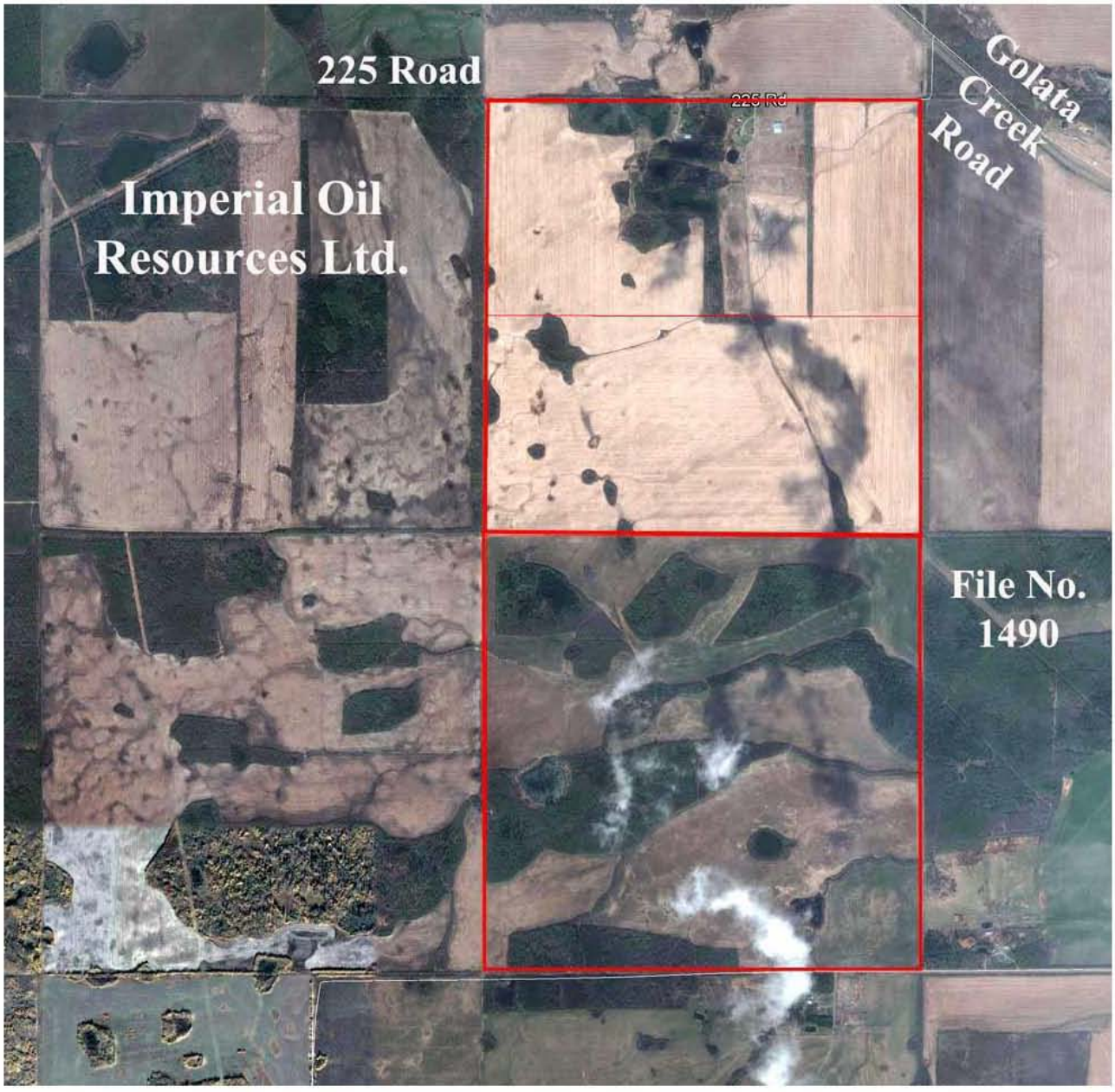
Arbitration hearing date: 15 October 2003

The Applicant, Imperial Oil Resources Ltd., (Imperial) filed an application 17 April 2003 with the Mediation and Arbitration Board under the *Petroleum and Natural Gas Act* for the right to enter land owned by the Respondents Dennis Raymond Nelson and Mavis Eileen Nelson, (Nelsons), for the stated purposes of "continued operation of a well to produce oil," and to fix compensation payable for the entry, occupation and use of the land.

Imperial requests the right to enter from the Board under section 9 (1) (b) of the *Petroleum and Natural Gas Act*, which states:

> 9 (1) A person may not enter, occupy or use land, other than Crown land to explore, for, develop or produce petroleum or natural gas, or explore for, develop or use a storage reservoir unless
>
> (a) the person makes, with each owner of the land, a surface lease in the form and content prescribed authorizing the entry, occupation or use,
>
> (b) the board authorized the entry, occupation or use, or
>
> (c) as a result of a hearing under section 20, the board makes an order specifying terms of entry, occupation and use, including payment of rent and compensation.

Imperial had made application previously in this matter, and had withdrawn its application in February 2003. Imperial's application contained the additional statement that the application was "made solely in response to a directive from the Oil and Gas Commission;" as the Oil and Gas Commission was of the opinion that Imperial did not have tenure over the well site. Relief was urgently sought by Imperial as the Oil and Gas


225 Road
225 Rd
Golata Creek Road
Imperial Oil Resources Ltd.
File No. 1490

Commission was prepared to issue an order requiring the well be "shut in". Imperial's application states "this enforcement action forces Imperial oil Resources into the untenable position of arguing against the need for the Right of Entry its application seeks."

Background

In 1988, the Respondents applied for and were granted an Agricultural Lease from the Crown under lease #802950, dated 20 July 1988, for lands known as NE ¼ Section 5 and the SE ¼ Section 8, Township 84, Range 14, West of the 6th Meridian.

Situated on the lands was a well producing oil known as "EAGLE ET AL BOUNDARY 8 - 8 - 84 - 14 W6M". Eagle Resources Ltd. had acquired permission to construct the well on what was then Crown land in August 1984, and made application for surface tenure, pursuant to the *Lands Act*, and received conditional approval in March 1985. The conditions required to obtain a "long term tenure" disposition under the *Lands Act* was not met.

On 1 September 1985, Imperial became the operator of the well, and duly gave notice to the appropriate agencies. Imperial acknowledges Imperial did not pursue the *Lands Act* disposition from the Crown.

Eagle Resources had been granted "long term tenure" as documented in the Land and Water British Columbia Inc. file # 8001399 and well authority # 6101. A subsequent Crown file # 8002367, and a temporary permit was issued. When the well was assigned from Eagle Resources to Imperial Oil Resources Ltd., the Client Services Coordinator of the BC Land and Water Branch made numerous requests to Imperial for document submission. Despite the requests, Imperial did not submit the requested information. According to a note to file dated 27 September 2002, file # 8001399 was cancelled because Imperial did not submit the transfer agreement despite the numerous requests (from 1987 to 1994) by Land and Water British Columbia Inc. The cancellation was prior to the Agricultural lease being issued to the Respondents.

Since 1988, the Respondents made the required improvements and payments such that they obtained a Crown grant of the lands #7476/1345 on 19 August 2002, and title was registered in their names. This title included the area covered by Imperial's well site. Had Imperial pursued the *Lands Act* disposition, that area would have been exempted from the grant and so noted on title, and Imperial would have its tenure, and would not require acquisition of the rights to enter, occupy and use the lands.

Position of the Parties

Imperial seeks to rely on a combination of sources to perpetuate the rights it could have obtained, had it pursued the *Lands Act* disposition. Imperials asks the Board to interpret the *Lands Act*, the reservations in the Agricultural Lease and in the Crown Grant issued to the Nelsons under the *Lands Act*, and section 7 of the *Petroleum and Natural Gas Act* to mean that its rights, acquired from the predecessor operator are of a quality or kind which obviated the need to register, and thereby give notice of its interest, under the *Land Title Act*. Imperial also asks the Board to find Imperial has pre-existing rights and therefore no compensation is owed to the Nelsons. Imperial is unable to produce any documents which give them undeniable tenure rights to the Lands which are the subject of their application.

In effect, that the rights Imperial acquired from Eagle Resources Ltd. are of the same nature of kind as the Crown's reservation of mineral rights. Imperial asserts that this Board lacks the jurisdiction to determine this question of law.

Imperial correctly states that both parties operated under mistaken beliefs. The Nelsons knew there was a well and assumed that Imperial had acquired a Crown disposition in respect to the area covered by the well site, and therefore they were not entitled to compensation. After title was issued to the Nelsons, Imperial negotiated with them for a surface lease, and then resiled from that position, asserting it did not need a surface lease or Right of Entry.

Nelsons assert that they are the owners of the land, the title stands, and that Imperial does not have the right to enter on their lands. They ask the Board to find that as Imperial is claiming ownership of the well site, they are owed compensation since the effective date of the Agricultural Lease, and they have complied with all requirements of the Agricultural Lease prior to the purchase of the lands and issuance of title on which the well site is located. They have paid taxes on the whole of the land, including the area covered by the well site, though not on the improvements on the well site, since 1988.

They are willing to grant a surface lease on terms, or to have the Board issue an order granting Imperial the right to enter, occupy and use their land, with conditions including but not limited to the appropriate compensation for the entry, occupation and use.

Issues

The parties did not agree on the following:

1. Unhindered access to, occupation and use of the well site by the Applicant to produce oil;

2. If compensation is owed to the Respondents, the effective date - that is from when the Agricultural lease was granted or when title was granted;

3. Amount of annual and/or initial compensation owed to the Respondents; and

4. Costs to the parties.

Discussion

What is before this Board is an application for a Right of Entry by Imperial, to allow it to operate its well situated on land owned by the Nelsons.

The evidence is clear that the Nelsons own the land on which Imperial's well is located.

Can or should this Board look beyond the evidence of title to determine whether Imperial's pre-existing right to operate its well, this right granted by the Crown, survived the issuance of title to the Nelsons?

Imperial was given ample notice of the Crown's intention to grant title. Imperial was familiar with the requirements of the *Petroleum and Natural Gas Act* and received some notification in addition to prompt it to complete requirements. Imperial also received notice that it must take steps to preserve its rights.

The Board finds that in choosing not to do so, Imperial let its inchoate rights lapse. That lapse occurred before title was issued to the Nelsons; there was nothing to carry forward. To adopt Imperial's position would involve ignoring the effect of s 23 of the *Land Title* Act. Imperial could have had the well site excepted, but it did not. Thus the Nelsons are indefeasibly entitled to an estate in fee simple to the land. The right to drill the well on Crown land was acquired through section 7 of the *Petroleum and Natural Gas Act,* and once title was issued, the relevant section is section 9.

Compensation needs to be determined; the questions are as to whether there should be an initial payment, and for how many years, i.e. from the date of the Agricultural lease or the issuance of title?

The Board finds that as Nelsons have paid taxes on the whole of the land since 1988, the appropriate effective date is the granting of the Agricultural lease - that is 1988. The Board awards the Respondents for the taking of the lands since 1988 to present, the amount of forty three thousand, four hundred and ninety four dollars ($ 43,494.00) plus interest calculated in accordance with the Court Order Interest Act R. S. B. C. 1996 and amendments thereon. The Board finds that the appropriate compensation for the five years from the date of this order is $ 3,500.00 per annum, which is due and payable on the anniversary date of this order.

As to whether there should be an "initial taking" payment, there was in fact no initial taking as the well was in production before the Nelsons applied for and were granted the Agricultural Lease, and there was no compulsory aspect to the taking. The Board declines to award compensation for "initial taking".

The Board awards to the Respondents costs for travel and inconvenience in the amount of five thousand dollars ($ 5,000.00).

The Board finds that Imperial should have the right to enter upon the land to operate the well and produce oil, and therefore grants to the Applicant that right.

ORDER

The Board orders:

(a) the Applicant to pay to the Respondent forty eight thousand, four hundred and ninety eight dollars ($ 48,494.00) plus interest calculated in accordance with the Court Order Interest Act R. S. B. C. 1996 and amendments thereon, by 4:00 p.m. on 16 April 2004.

(b) execute a standard surface lease incorporating the annual compensation in the amount of $3,500.00 and incorporating the Surface Lease Regulation (B. C. Reg. 497/74), for the well site as outlined in the Individual Ownership Plan drawn by McElhanney Associates, dated 18 September 2002;

(c) pursuant to section 25 (3) of the *Petroleum and Natural Gas Act,* Imperial Oil Resources Ltd. will file a copy of the surface lease with the Land Title Office for registration; and

(d) comply forthwith as expeditious as is reasonable.

Dated at the City of Fort St. John, British Columbia, this 18th day of March 2004.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

_____
Thor Skafte, Member

_____
Jim Sodergren, Member

MEDIATION AND ARBITRATION BOARD

10142 – 101 Avenue
Fort St John, BC. V1J 2B3

The Petroleum and Natural Gas Act, RSBC 1996, Chapter 361

File No: 1536.

Board Order: 382M

07 October, 2004.
Ft St John, BC.

Between:

Richard Velander (Applicant)

And

Imperial Oil Resources (Respondent)

A mediation session to discuss evidentiary matters relating to damages on Imperial Wellsite 06-01-85-14-W6M, and to determine off lease contamination to private surrounding lands, filed in an application for mediation under Section 16 (1) (b) of the Petroleum and Natural Gas Act (Damages), by the Applicant, and corrective measures to be taken by the Respondent, was held at the Ft St John Mediation and Arbitration office at 1500 hours, on 07 October, 2004. In attendance were Mr. Richard Velander, the Applicant, and Mrs. Donna Velander. Representing the Respondents were Messer's Ralph Parks – Imperial Oil Land Agent, David Slade – Imperial Oil Opportunities Manager, and Reg Wisener, Imperial Oil Goodlow Field area foreman.

Agreement was reached to the concerns of both the Applicant and Respondent that:

1. The Applicant, Mr. Richard Velander will, in consultation with the Respondent, Imperial Oil Resources Ltd., allow the Respondent to do sampling of the soil and ground water to the South and West of the surface lease. The Applicant will have a choice as to where some of the samples are collected.

2. The samples collected will be forwarded to a reputable independent laboratory for analysis, and the generated laboratory report reviewed by the Applicant and Respondent together.

3. Depending on the results of the sampling, Imperial Oil Resources may install 3 or 4 ground water monitor wells, the locations chosen in consultation with the Applicant and Imperial Oil Resources environmental group.

4. If contaminate levels from the Respondent's lease exceed Government Agricultural standards, confirmed by the independent laboratory generated analysis reports on the collected samples, are infiltrating the Applicants

private land, the Respondent will enact remedial activates within regulatory guidelines to correct the source of the problem.

5. Compensation for EACH ground water monitoring well to the Applicant, if installed by the Respondent, will be FOUR HUNDRED ($400.00) dollars the year of installation and TWO HUNDRED ($200.00) dollars each year there after. The annual rate of compensation is reviewable after 5 years.

6. The Applicant is to be compensated for surface damages encountered with the installation of the monitoring wells at a rate to be agreed to at the time of the installation.

7. For weed control the Applicant will be compensated at an annual rate of FOUR HUNDRED FIFTY (($450.00) dollars, plus chemical costs, for EACH lease to spray and control weeds on Imperial Oil Resources locations 14-1-85, 16-1-85, 8-1-85, and SIX HUNDRED ($600.00) dollars, plus chemical costs, on location 6-1-85.

We the undersigned agree to the terms of this mediation. Accordingly we affix our signatures as evidence of our consent to this agreement.

Signed this Seventh day of October, 2004 at the Fort St John Mediation and Arbitration Office, in the province of British Columbia.

APPLICANT: Richard Velander (Richard Velander) RESPONDENTS: Ralph Parks (Ralph Parks) IOR Land Agent

Certified a true copy this 14th day of Oct 2004 The original being in the custody of the Mediation and Arbitration Board under the "Petroleum and Natural Gas Act, 1996"

Dave Slade (Dave Slade) IOR Opportunities Mgr

Reg Wisener (Reg Wisener) IOR Area Foreman

MEDIATOR: (Thor Skafte)

Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

Date: July 17, 2007

FILE No. 1591
Board Order No. 421M

BEFORE THE MEDIATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361
(THE ACT)

SE ¼ Sec 34 Twp. 84 Range 14 W6M
(THE LANDS)

BETWEEN:

IMPERIAL OIL RESOURCES
("APPLICANTS")

AND:

EDWARD BEVERLY & NEORA NOREEN FORRESTER
("RESPONDENT")

MEDIATION ORDER

Applicant: **Imperial Oil Resources**

Respondent: Edward Beverly & Neora Noreen Forrester

Hearing: July 17, 2007

Decision: **July 17, 2007**

Mediator: Jim Sodergren

Board Order

Background:

A Pre Hearing Conference was held on June 29, 2007. At this time it was explained that we could only deal with what was on the application. All parties agreed they understood and Mediation was set for July 17, 2007.

Mediation took place on July 17, 2007 at the Mediation and Arbitration Board office. In attendance were Jim Sodergren (Board Mediator), representing the Applicant was Bill Trefiak, Kelsey McLeod and Brian Dunn, representing the Respondent were Edward and Neora Forrester. Also in attendance on behalf of the Respondents were Gwen Johansson and Karen Goodings.There was a lengthy discussion about the different flow lines. Edward and Neora Forrester wanted Imperial Oil Resources to use the existing line or abandon the line if they were not going to use it.

Entry, occupation or use order

19 (1) A mediator may make an order permitting, subject to the terms the mediator may specify in the order, an applicant under Section 16 to enter, occupy or use the land for a purpose stated in that section.

19 (2) Before making an order, a mediator must

(a) require the applicant to deposit with the board security in the amount, form and manner that the mediator considers necessary for the purpose of ensuring

that the owner of the land will be paid any amount ordered subsequently to be paid to them.

(b) require the applicant to pay to the owners, as partial payment of the amount subsequently ordered by the board to be paid to them, an amount of money not less than ½ the amount of the security required to be deposited, and

(c) require the applicant to serve a copy of the order on each owner of the land, and direct the manner of service.

Therefore the Board orders:

1. Pursuant to Section 19 (1) of the Petroleum and Natural Gas Act, the Applicant is granted the right to enter onto the lands, for the purpose of surveying, soil sampling, doing an archaeological assessment, construction which includes the boring of said flow line and the operation of the flow line as per the application filed May 30, 2007.
2. Pursuant to Section 19 (2) of the *Petroleum and Natural Gas Act*, the Applicant must deposit with the board, security in the amount of $ 0.00.
3. Pursuant to Section 19 (2) of the *Petroleum and Natural Gas Act*, the Applicant must pay to the landowners a partial payment in the amount of $ 0.00.
4. Pursuant to Section 19 (2) of the *Petroleum and Natural Gas Act*, the Applicant must serve a copy of this order to the Respondent prior to entry onto the land.
5. Upon the completion of survey, the applicant shall address the monetary value of the flow line right-of-way with the respondent. If the parties cannot reach a mutually satisfactory agreement, it will be sent to Arbitration to decide the monies to be paid to the respondent.
6. Under Section 20 of the *Petroleum and Natural Gas Act,* this matter shall proceed to Arbitration unless both parties report in writing that they consent to the terms of this order within 30 days of the date of this order.

MEDIATION AND ARBITRATION BOARD
UNDER THE PETROLEUM AND NATURAL GAS ACT

DATED JULY 18, 2007

James L Sodergren

James Sodergren Board Member

File No. 1591
Board Order No. 1591-1

April 11, 2008

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF SE ¼ Section 34 TWP 84 Range 14 W6M

(The "Lands")

BETWEEN:

Imperial Oil Resources Limited

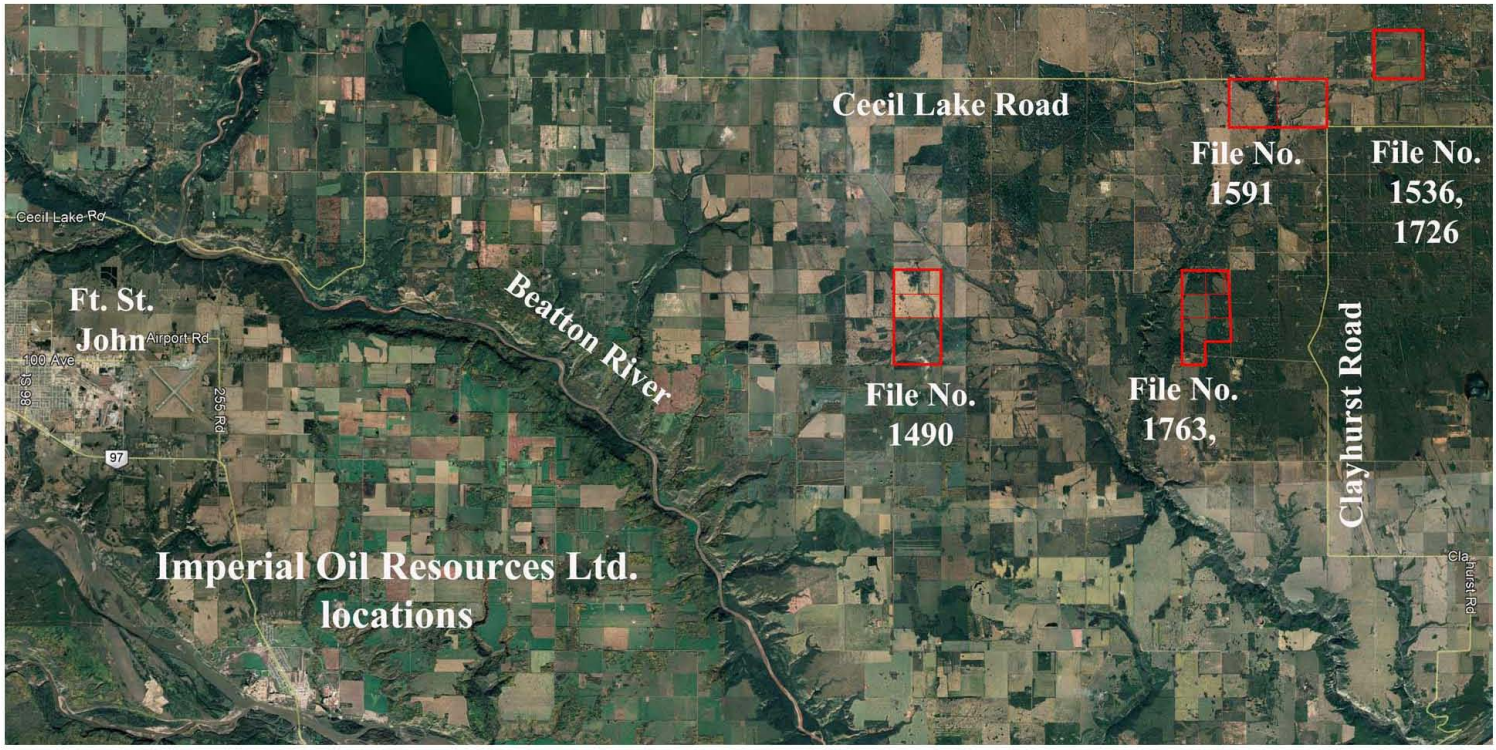
(APPLICANT)

AND:

Edward Beverly and Nedra Noreen Forrester

(RESPONDENTS)

BOARD ORDER


Cecil Lake Road
File No. 1591
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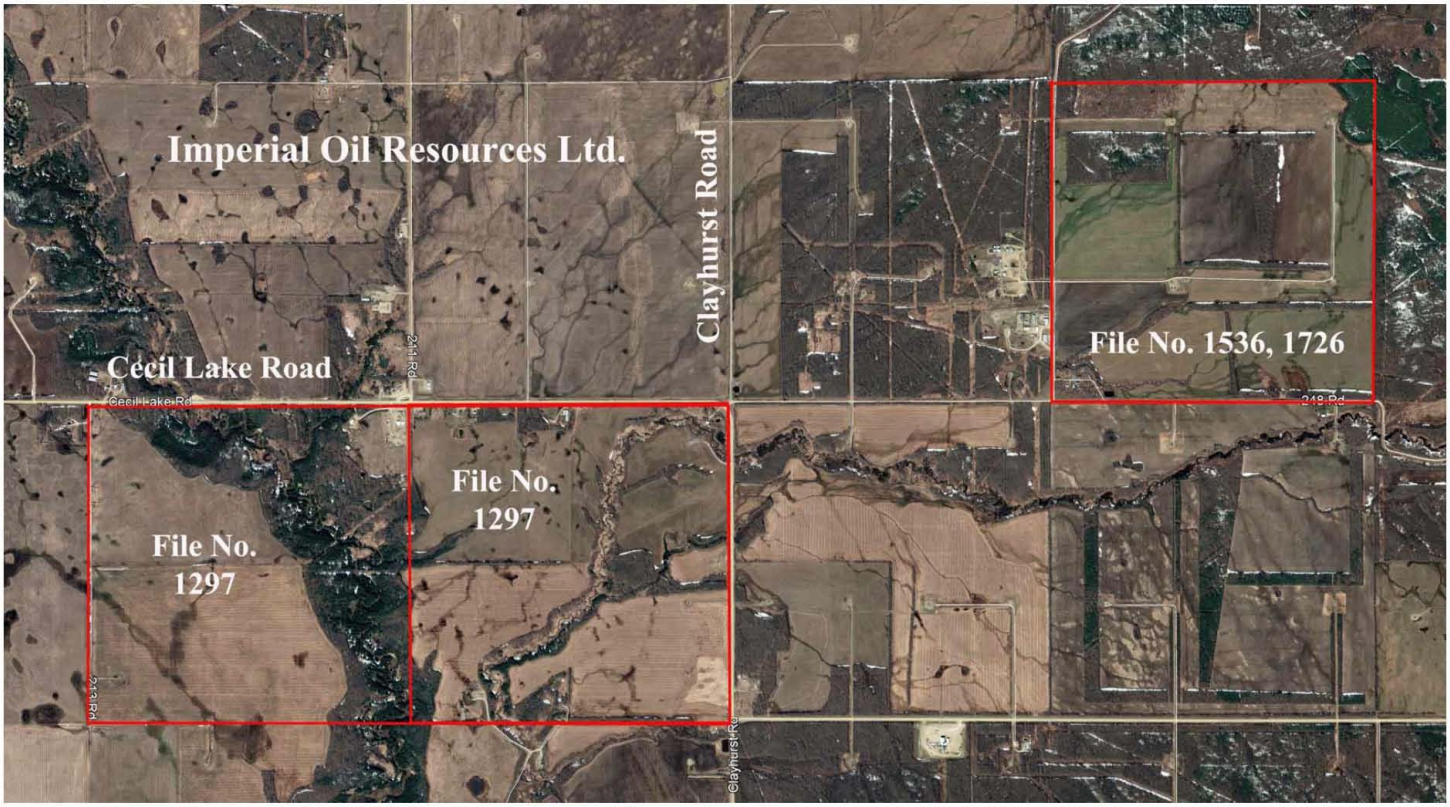
File No. 1763,
Clayhurst Road
Imperial Oil Resources Ltd. locations


Imperial Oil Resources Ltd.
Clayhurst Road
Cecil Lake Road
File No. 1536, 1726
File No. 1297
File No. 1297

On July 18, 2007 the Board made an order granting the applicant, Imperial Oil Resources Limited (Imperial) the right to enter onto the Lands for the purpose of surveying, soil sampling, doing an archaeological assessment, and construction and operation of a flow line in accordance with an application filed May 30, 2007. The Board made an error in the name of the applicant in its order. The Board ordered a security payment of $0 and partial payment of $0.

The Board ordered that upon completion of the survey, the applicant shall address the monetary value of the flowline right of way with the respondents, and if the parties cannot agree, it will be sent to arbitration. The mediator ordered that the application shall proceed to arbitration unless the parties agreed to the terms of the order. The respondents, Nedra and Kenneth Forrester (Forresters) advised that they did not agree to the terms of the order.

The Board convened a pre-hearing conference to discuss the issues. The Forrester's objected to the right of entry having been granted on the grounds that Imperial had not established need for the right of way. The Forresters were concerned with the possible future use of an existing ROW across their lands. Following a couple of telephone conferences, the parties agreed that the only purpose for the existing ROW was to manage any contingent liability. The Forresters had no objection to the proper abandonment of the existing pipeline in place.

The Oil and Gas Commission (OGC) has subsequently approved Imperial's application for the new pipeline, made an order requiring the proper abandonment in place of the existing pipeline, and approved the abandonment plan. A survey has been completed. As the Forresters have not received a copy of the survey (although Imperial thought one had been provided), Imperial will forthwith provide the Forresters, their counsel and the Board with a copy of the survey. As a result of the various orders of the OGC, there is no further dispute with respect to the Imperial's right to enter the Lands, other than to determine appropriate compensation.

The mediation order, nevertheless, requires amendment to correct the corporate name of the applicant. Given that a survey is available it seems sensible to also amend the order to refer to the survey. Section 19(2) of the *Petroleum and Natural Gas Act* requires the board to make an order for security deposit and partial payment to the landowner before making a right of entry order. Pursuant to section 26(2) of the *Act*. The Board may review, amend, rescind or vary a direction or order made by it.

The Board hereby amends and varies its order of July 18, 2007 in these proceedings as follows:

1. Upon payment of the amounts set out in paragraphs 2 and 3, the Applicant shall have the right of entry to and access across the

portion of the Lands shown in Schedule A for the purpose of constructing and operating a flow line.

2. The Applicant shall deposit with the Mediation and Arbitration Board security in the amount of $4,000.00. All or part of the security deposit may be returned to the Applicant or paid to the Respondents upon the agreement of the parties or as ordered by the Board.

3. The Applicant shall pay to the Respondents the amount of $2,225.00 as partial payment for compensation payable for entry to and use of the Lands.

4. The Applicant shall serve the Respondents with a copy of this Order prior to entry onto the Lands.

5. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated April 11, 2008

FOR THE BOARD

Cheryl Vickers

IMPERIAL OIL RESOURCES LIMITED

INDIVIDUAL OWNERSHIP PLAN

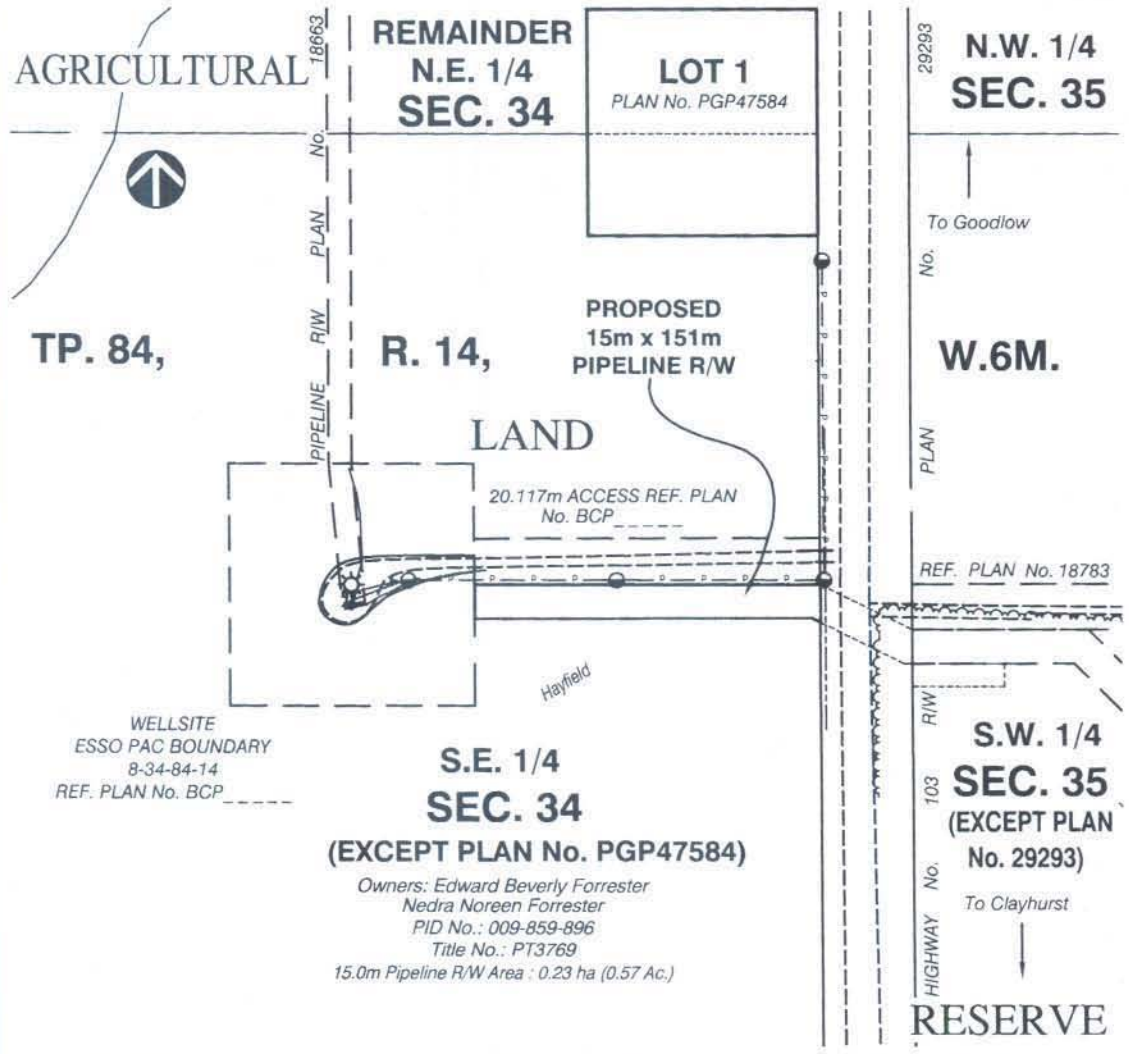
SHOWING 15.0m PIPELINE RIGHT OF WAY

SCHEDULE A CW

IN

SOUTH EAST 1/4 SECTION 34, TOWNSHIP. 84, RANGE 14, W.6M.
(EXCEPT PLAN No. PGP47584)

PEACE RIVER DISTRICT



OWNER: Edward Beverly Forrester
Nedra Noreen Forrester

TITLE No. PT3769

PID No. 009-859-896

15.0m PIPELINE R/W 0.23 ha 0.57 Ac.

THIS IS THE SKETCH/PLAN ATTACHED TO THE RIGHT OF WAY AGREEMENT BETWEEN

Certified correct this 10th day of October 2007.

AND IMPERIAL OIL RESOURCES LIMITED
DATE THIS ___ DAY OF _____, 2007.

K.H. LAWSON B.C.L.S.

DATED (INITIALS)

McELHANNEY GEOMATICS
Professional Land Surveying Ltd.
8808 - 72nd Street
Fort St. John, British Columbia
Phone:(250)787-0356, Fax:(250)787-0310

DISTANCES ARE IN METRES.
PORTIONS REFERRED TO ARE OUTLINED IN RED & GREEN.

REVISION: 3	DRAWN BY: TZB
SCALE: 1:2,500	JOB No. : 3111-17068/P1

File No. 1591
Board Order # 1591-2

January 13, 2009

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF SE ¼ Section 34 TWP 84 Range 14 W6M

(The "Lands")

BETWEEN:

Imperial Oil Resources Limited

(APPLICANT)

AND:

Edward Beverly and Nedra Noreen Forrester

(RESPONDENTS)

BOARD ORDER

Heard by written submissions:	From the Applicant dated November 6, 2008 and December 3, 2008 From the Respondent dated November 21, 2008
Panel:	Cheryl Vickers

INTRODUCTION

The Applicant, Imperial Oil Resources Limited (Imperial Oil), applied to the Mediation and Arbitration Board seeking the right to enter land owned by the Respondents, Mr. and Mrs. Forrester, for the purposes of surveying, soil sampling, archaeological study, and construction and operation of a flowline to remove hydrocarbons from a well also located on the Lands. The Board conducted a pre-hearing conference on June 29, 2007 and a mediation on July 17, 2007. The Board issued an Order on July 18, 2008 granting Imperial Oil the right to enter the Lands owned by the Forresters for the stated purposes. The Respondents objected to the granting of the entry order and requested that the application proceed to arbitration.

The Board conducted several pre-hearing telephone conferences in order to determine the issues and assist with the resolution of some of the issues. Initially, the Forresters objected to the entry on the grounds that Imperial Oil had not established need for the right of way. They took the view that an existing but not currently used pipeline in another right of way on the Lands could be used, or alternatively, that if the existing right of way was no longer required, that it should be removed from title before a new right of way was given.

The Oil and Gas Commission (OGC) determined that the existing pipeline could not be used and authorized the construction of the proposed flowline in the new proposed right of way. The Forresters conceded that need for the proposed right of way was established by the OGC's approval of Imperial Oil's application. The parties remained unable to resolve the amount of compensation payable for the entry.

The Board amended its original order to correct an error in the corporate name of Imperial Oil, define the area of the Lands over which right of entry was granted in accordance with an attached plan, and require the payment of a security deposit and partial payment (Order 1591-1).

FACTS

The right of way occupies .57 acres of the Lands. Installation of the flowline within the right of way was accomplished by boring from adjacent land without

disturbance or damage to the Lands. No crop loss was incurred as a result of the installation of the flowline. The Forresters continue to use of the right of way area for agricultural purposes. The previously existing pipeline has been abandoned in place and its right of way remains registered on the Title to the Lands.

ISSUE

The issue is the determination of the compensation payable by Imperial Oil to the Forresters under the *Petroleum and Natural Gas Act* (*PNGA*) as a result of Imperial Oil's entry, occupation and use of the Lands. The claim advanced by the Forresters includes a claim more properly characterized as a claim for costs. The amount payable as compensation under the *PNGA* is to be distinguished from an amount payable as costs.

The Forresters sought a number of orders not related to the issue of compensation. Most of these orders are for matters relating to terms of the entry. They are matters that could be negotiated by the parties in a right of way agreement or potentially incorporated by the Board in an entry order. Terms of entry, however, once the need for the entry order was conceded, were never identified as issues in this matter and were not the subject of this arbitration.

The other order sought by the Forresters is for the removal of the encumbrances associated with the old right of way now containing the abandoned pipeline. The Board does not have the authority or jurisdiction to order either the registration or the removal of an encumbrance to a Title. The *PNGA* provides for the filing of Board orders with the Registrar of Land Titles, but otherwise gives no authority to the Board to order a party to a right of way agreement or the Registrar of Land Titles to register or discharge a right of way or other encumbrance from a title.

This decision will deal solely with the determination of compensation payable for the entry under the *PNGA*.

ANALYSIS

I. LAW

Principles of Compensation

Section 9(2) of the *PNGA* provides that a person who enters, occupies or uses land to explore for, develop or produce petroleum or natural gas is liable to pay compensation to the landowner for loss or damage caused by the entry, occupation or use. Section 21(1) of the *PNGA* lists various factors the Board may consider in determining an amount to be paid to a landowner. They are:

a) the compulsory aspect of the entry, occupation or use,
b) the value of the land and the owner's loss of a right or profit with respect to the land,
c) temporary and permanent damage from the entry, occupation or use,
d) compensation for severance,
e) compensation for nuisance and disturbance from the entry, occupation or use,
f) money previously paid to the owner for entry, occupation or use,
g) other factors the board considers applicable, and
h) other factors or criteria established by regulation.

There are no other factors or criteria established by regulation.

In addition, the following principles of compensation are relevant:

- compensation is for actual or reasonably probable and foreseeable loss sustained (*Western Industrial Clay Products Ltd v. Mediation and Arbitration Board*, 2001 BCSC 1458)
- the Board exceeds its jurisdiction if it orders an amount to be paid that exceeds the loss sustained (*Western Clay, supra*)
- the Board should consider the landowner's residual and reversionary interest in the land (*Dome Petroleum Ltd v. Juell* [1982] B.C.J No. 1510 (BCSC); *Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC).

The Board may consider the various factors set out in section 21 of the *PNGA* and evaluate each, then step back and consider whether the totality gives proper compensation in any particular case (*Scurry Rainbow, supra*).

Compensation vs costs

A company's liability under the *PNGA* is for compensation for loss arising from the entry. This liability exists whether or not the Board is asked to assist with determining the amount payable or is asked to make an entry order. Time spent by a landowner in responding to a request for entry is time that is lost to them in the pursuit of other activities, is a loss that arises from the entry, and is a compensable loss under the *PNGA*. A certain amount of compensation will, in most cases, be due to the landowner to compensate for their time and any inconvenience associated with responding to a request for entry, negotiating terms and dealing with the company regardless of whether proceedings are commenced before the Mediation and Arbitration Board. To the extent a landowner experiences aggravation, anxiety, nuisance, or disturbance as a result of the entry, whether it is nuisance to the interruption of their daily activity and

incursions on their time, or nuisance in the form of noise or other disturbance, these are compensable losses.

The loss from inconvenience or nuisance associated with responding to a request for entry and negotiating terms and compensation is to be distinguished, however, from costs associated with the Board's processes. Once proceedings are commenced, the parties' costs associated with engaging in Board processes may be payable at the Board's discretion in accordance with the Board's Rules. The Board's Rules provide a presumption in favour of the landowner recovering his or her reasonable costs incurred in the mediation process. The same presumption does not exist for costs associated with the arbitration process.

Expenses incurred by a landowner for agent or counsel fees to participate in a Board process may be payable as costs but are not necessarily payable as compensation for loss arising from the entry. While a claim for costs would not, in every case necessarily have be made as a separate application, particularly in the mediation context where a presumption in favour of payment of the landowners costs applies, in the context of this case where the issue was defined as determining the amount of compensation (as distinct form costs), and where the Board's Rules contemplate consideration of a number of factors in determining whether costs are payable, any claim for costs of the arbitration process should form the subject of a separate application and dealt with after the completion of the arbitration process.

II. FINDINGS

Entitlement under *PNGA*

Imperial Oil submits that, on a strict application of section 9(2) of the *PNGA*, no compensation is due to the Forresters as no loss or damage has been suffered. Alternatively, Imperial Oil, submits $950/acre is an appropriate compensation rate for this entry. Additionally, Imperial Oil indicates it has agreed to pay $1,000 to cover the Forrester's legal costs for the mediation and drafting of documents.

The Forresters seek compensation for the right of way at $1,425/acre and crop loss of $300/acre for 2.5 years. Additionally, they claim amounts to cover negotiation time, disbursements, agent time and legal counsel. The totality of their claim is $14,869.42.

While there has been no actual tangible damage to the land or actual loss of profits as a result of the entry, the Forresters have nevertheless lost rights with respect to their land that is compensable under the *PNGA*. They have lost the right to determine for themselves whether their land should be used for the production of natural gas or petroleum resources, and have lost rights with respect to the future use of the right of way area for other than agricultural purposes. Other than this loss of intangible rights, there is no evidence of actual

or reasonably probable damage to the land or of actual or reasonably probable loss of profits from the land. The Forresters are entitled to be compensated for their intangible loss, but they are not entitled to compensation for crop loss as none was sustained, or for damage to the Lands as none was incurred.

The Forresters have experienced a certain amount of nuisance and disturbance in having to deal with Imperial Oil's request for entry. Time spent by the Forresters in responding to the request for entry is time that is lost to them in the pursuit of other activities. This is a compensable loss under the *PNGA*.

The Forresters are entitled, therefore, to receive compensation for their loss of rights and for the nuisance and disturbance associated with having to deal with the request for entry. This proceeding relates solely to the amount payable for compensation, as distinct from costs.

Value of the Land/Loss of Rights

The evidence is that the Lands are adjacent to Highway #103 that connects to Alberta Highway #64 and links three communities. The lands are serviced with natural gas, three-phase electrical power, and telephone. They are cleared and under cultivation. I have no evidence, however, of the property's market value or relative market value in relation to other lands.

The Forresters advise that plans had been prepared for subdivision of the lands but provide no details as to the nature or timing of the proposed subdivision, or quantifying the economic loss, if any, resulting from putting the subdivision plans on hold.

Imperial has provided evidence of compensation rates for entry to three comparable properties all at $950/acre. Two of these entries relate to the same project as the flowline on the Forrester's property making them relevant comparables in terms of timing. The third relates to property three miles to the east of the Forrester's property that is similar in topography, soil type and land use. There is no evidence as to when this compensation agreement was reached. The evidence is that few comparables are available in this area as activity has not supported new development.

The Forresters argue that $1,425 is reasonable based on the Board's 2007 decision in *Spectra Energy Midstream Corporation v. Vause*, MAB Order 420A. In that case the evidence was that $950/acre had been the going rate since the 1980's. The Board referenced the 50% increase to the Consumer Price Index between 1985 and 2006, indicating a change in the purchasing power or value of money over that time, and concluded that a corresponding increase to the compensation rate to $1,425/acre was appropriate. The disturbance to the land was greater in the *Vause* case than in this case. The Forresters indicate that they understand the $1,425/acre rate has been accepted by other oil and gas

operators in the region but provide no evidence to support that understanding. The Board has no independent knowledge that this rate has been accepted by other parties.

Considering the compulsory aspect of the entry, the relatively minimal impact of this right of way to the Forrester's use and enjoyment of the Lands, the evidence of compensation for access for the same project and over comparable land at $950/acre, the lack of evidence of any special value in these lands to these owners and that the Forresters have residual rights and can continue to use the surface of the lands for agricultural purposes, I find $950/acre (.57 x $950 = $541.50) compensates the Forresters for their loss of rights.

Loss of Time/Nuisance and Disturbance

In their business, the Forresters charge out their time at $50/hour. They claim to have spent 81.5 hours in dealing with Imperial Oil personnel and the mediation and arbitration process. Some of this time is relation to the Board's proceedings, and properly characterized as costs; some is in relation to dealing with the request for entry regardless of the Board's proceedings, and is compensable under the *PNGA*. In the absence of evidence detailing the amount of time spent on particular activities, but recognizing that they have spent some time dealing with the company and have experienced stress and anxiety, at the risk of being arbitrary but in an effort at determining what might be a reasonable amount of compensation for this loss in the circumstances, I find $2,000 compensates for this loss.

Global Lump Sum

I have found compensation for loss of rights is $541.50 and for loss of time/nuisance and disturbance is $2,000. These amounts add up to $2,541.50. Stepping back and considering the totality of the award, I am satisfied that rounding this figure to $2,600 provides fair and reasonable compensation in the circumstances of this case.

CONCLUSION

I conclude the Forresters are entitled to lump sum compensation for the right of entry in the amount of $2,600. As they has already been paid $2,225, they are entitled to receive the balance of $375.00. The lump sum represents compensation payable under the *PNGA* for loss as a result of the entry and does not speak to the issue of costs for either the mediation or arbitration processes. My understanding is that Imperial has agreed to pay the Forresters $1,000 as costs of the mediation process. The parties are at liberty to provide further submissions with respect to costs if they cannot agree on entitlement beyond the offer made.

ORDER

The Board orders Imperial Oil Resources Limited to pay Edward and Nedra Forrester the sum of $375.00. Upon payment of this amount, Imperial Oil may apply for return of the security deposit held by the Board in this matter, and the security deposit shall be returned.

Dated: January 13, 2009

FOR THE BOARD

Cheryl Vickers
Panel Chair

File No. 1726
Board Order # 1726-1

March 30, 2012

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

SECTION 1 TOWNSHIP 85 RANGE 14 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Vafirid Richard Velander

(APPLICANT)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing February 20, 2012.

Thor Skafte and Richard Velander for the Applicant
Peter Miller for the Respondent

INTRODUCTION

[1] This is Mr. Velander's application for costs of these proceedings to date and advance costs for the arbitration process.

[2] Mr. Velander applied to the Board pursuant to section 166 of the *Petroleum and Natural Gas Act* for mediation and arbitration to review the annual rent payable under a surface lease with Imperial Oil for the purpose of constructing and operating a wellsite on the Lands owned by Mr. Velander. The Board appointed a mediator, but the parties were unable to resolve the dispute. The mediator referred the application to arbitration. Mr. Velander seeks his costs of the mediation process and advance costs for the arbitration. Imperial opposes the application.

[3] The Board's power to award costs is found in Division 7 of the *Petroleum and Natural Gas Act.* The Board may order a party to an application to pay all or part of the actual costs incurred by another party in connection with the application (section 170). "Actual costs" is a defined term that includes actual reasonable fees and disbursements of legal counsel, a professional agent or expert witness, actual reasonable expenses incurred by a party in connection with a board proceeding, and an amount to account for the reasonable time spent by a party in preparing for and attending a board proceeding (section 168). The Board may also order an operator to pay to a landowner as advance costs, all or part of the amount the Board anticipates will be the landowner's actual costs awarded by the Board (section 169). An award of either costs or advance costs is discretionary.

ISSUES

[4] There are two issues before me. The first is whether the Board should exercise its discretion at this point of the proceedings to require Imperial to pay Mr. Velander all or part of his costs incurred in the mediation process. The second is whether the Board should exercise its discretion to require Imperial to pay advance costs to Mr. Velander for the upcoming arbitration.

ANALYSIS

[5] Rule 18 of the Board's Rules set out a process respecting applications for costs and the factors the Board will consider in making an order for payment of a party's costs. An application for costs must be in writing and include reasons to support the application, a detailed description of the costs sought and copies of invoices or receipts for disbursements. The factors the Board will consider in making an order for costs include: the reasons for incurring costs, the contribution of counsel and experts retained, the conduct of a party in the proceeding, whether a party has unreasonably delayed or lengthened a proceeding, the degree of success in the outcome of the proceeding, and the reasonableness of any costs incurred.

[6] As to advance costs, an application must be in writing and must summarize the nature of the actual costs and the amount the landowner anticipates will be incurred in connection with an application.

Costs of Mediation

[7] The Board's Rules contemplate that in an application for a right of entry order and mediation and arbitration of associated compensation (an application under section 158 of the *Petroleum and Natural Gas Act*), the landowner will usually be entitled to recover their costs incurred in relation to the mediation process. This presumption in favour of the landowner does not apply to the arbitration process, nor does it apply to applications other than for right of entry, such as this one for mediation and arbitration of a rent review under section 166 of the *Act*.

[8] In applications other than under section 158 where a company requiring the right of entry will generally be required to pay the landowner's costs of mediation regardless of the outcome of the mediation, the Board cannot properly consider the factors set out in Rule 18 prior to the conclusion of its proceedings. The Board's usual practice, in the absence of any agreement by the parties with respect to costs, is to determine entitlement to costs and the amount of any costs payable after the proceedings have concluded.

[9] Both parties question the sincerity of the other in trying to reach a negotiated settlement and the merit of each other's case, and Imperial questions the reasonableness of the costs claimed. I cannot properly consider the factors set out in Rule 18 with the information before me or in advance of hearing the evidence and arguments in this case. In the absence of any presumption that the landowner will necessarily be entitled to recovery of his costs, I decline to order costs of the mediation process at this time. The determination of costs, if not resolved between the parties, can be dealt with at the conclusion of the arbitration process. I see no reason in this case to depart from the Board's usual practice in that regard.

Advance Costs

[10] The *Petroleum and Natural Gas Act* gives the Board the unusual discretion to award advance costs. The Board has recently had the opportunity to consider the exercise of that discretion in *Canadian Natural Resources Limited v. Kerr*, Order 1715-2, November 29, 2011. The application for advance costs in *CNRL v. Kerr* arose in the context of an application by CNRL for right of entry and mediation and arbitration of associated compensation under section 158 of the *Petroleum and Natural Gas Act*. In that case, the factors the Board found compelling in exercising its discretion to award the landowner advance costs included the compulsory nature of the application, the landowner's personal and financial circumstances, the fact the landowner sought to advance novel arguments in his claim for compensation, the apparent need for expert evidence, and the fact that the landowner had not received any amount on account of his costs incurred in the mediation process to which he was presumptively entitled..

[11] None of the factors that the Board found compelling in *CNRL v. Kerr* exist in this case. There is no compulsory aspect to this application; it is an application for rent review, not right of entry. There is no presumption in favour of the landowner receiving his costs of the mediation process. This case does not appear to raise novel issues, nor does either party contemplate the need for expert evidence. I have no evidence with respect to Mr. Velander's personal or financial circumstances and am not satisfied that an award of advance costs is necessary to enable Mr. Velander to effectively participate in the arbitration process. I decline to exercise the Board's discretion to award advance costs in the circumstances of this case.

CONCLUSION

[12] I decline to exercise the Board's discretion to make an award of costs or advance costs at this time. The issues of entitlement to costs and the amount of any costs payable may be raised following the conclusion of the arbitration process, at which time the Board can properly consider the factors set out in Rule 18.

DATED: March 30, 2012

FOR THE BOARD

Cheryl Vickers, Chair

File No. 1726
Board Order No. 1726-2

December 11, 2012

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
SECTION 1 TOWNSHIP 85 RANGE 14 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Vaflrid Richard Velander

(APPLICANT)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

BOARD ORDER

Heard:	August 23, 2012, in Fort St. John
Appearances:	J. Darryl Carter, Q.C., Barrister and Solicitor, for the Applicant
	Peter L. Miller, Barrister and Solicitor, for the Respondent

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INTRODUCTION

[1] Mr. Velander seeks a review of the annual rent payable under a surface lease with Imperial Oil Resources Limited (Imperial). The lease of 6.3 acres for an access road and oil well site was originally executed in 1960. The annual rent was last reviewed in 2006 and revised by agreement to $6,300, or $1,000/acre. In this review, Mr. Velander seeks an increase of approximately 30% to $1,355/acre. Imperial submits no increase is warranted.

[2] Mr. Velander also seeks to recover his costs of the Board proceedings, inclusive of his time and expenses, and the accounts of his agent and counsel. His total claim for costs exceeds $25,000. Imperial submits the claim for costs is unreasonable.

ISSUES

[3] The first issue is to determine the appropriate annual rent under the surface lease.

[4] The second issue is to determine whether Imperial should pay all or part of Mr. Velander's costs, and if so, to determine the amount.

FACTS

[5] Valfrid Richard Velander owns the Lands. Mr. Velander and Imperial entered a surface lease effective February 9, 1960 granting Imperial the right to enter and use 6.30 acres of the Lands for Imperial's operations. Imperial has used the Lands for an access road and oil well. Imperial uses and occupies 2.3 acres of the leased area for the access road and 3.67 acres for the well site.

[6] The access road and oil well are located in the NW ¼ of the Lands. The Velanders' residence is located in the SW ¼ of the Lands. There are trees between the residence and the NW ¼.

[7] The parties last renegotiated the annual rent in 2006 and agreed to an annual rent of $6,300. In July 2010, Imperial advised Mr. Velander it was reviewing the annual rent payable under its surface leases with him, and offered to continue to

pay $6,300 annually effective January 15, 2011 for the ensuing five years. Mr. Velander did not accept this offer.

[8] Mr. Velander mailed a Notice to Negotiate pursuant to section 165 of the *Petroleum and Natural Gas Act* (*PNGA*) on May 11, 2011. The parties were unable to agree to a revised rent, and pursuant to section 166 of the *PNGA*, Mr. Velander filed an application for mediation and arbitration with the Board. As mediation failed to produce an agreement, the mediator referred the application to arbitration.

[9] Pursuant to section 166(4) of the *PNGA*, any order amending the rental provisions in the surface lease is effective February 9, 2011, which is the anniversary date of the surface lease immediately preceding delivery of the Notice to Negotiate.

[10] When the parties originally negotiated the lease, the land on either side of the access road and surrounding the well site was bush. Presently, the area to the north of the access road is bush and approximately one-third of the portion of the NW ¼ south of the access road is bush. Most of the southern part of the NW ¼ is cultivated with hay. The NE ¼ and SW ¼ of the Lands are also cultivated. The NE ¼ abuts up against the leased area.

[11] Mr. Velander leases the cultivated portion of the NW ¼ on a share-crop basis.

[12] The access road is not gated. Occasionally trespassers access the road and field, causing damage and requiring the field to be reseeded.

[13] An operator visits the well site every two or three days. The operator checks and does minor maintenance. The well requires very little maintenance. A service rig is brought in every five years.

EVIDENCE AND ANALYSIS

Annual Rent

[14] Section 154(1) of the *PNGA* lists the various factors the Board may consider in determining an amount to be paid periodically or otherwise. The enumerated items include:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any, of other rights of entry with respect to the land;

(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[15] Not all of the above factors will be relevant in every case or in the determination of annual compensation as opposed to initial compensation for an entry. There are no factors or criteria established by regulation.

[16] Section 154(2) of the *PNGA* further provides that, in determining an amount to be paid on a rent review application, the Board must consider any change in the value of money and of land since the date the surface lease was originally granted or last renewed.

[17] The purpose of a rental payment is to address the immediate and ongoing impact of an operator's activity on private land to the landowner and to the lands (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). The rental payment must be based on actual or reasonably probable loss or damage caused by the operator's entry on and use of the lands. In an application for rent review, any revised rent is payable for the period following the effective date, not for past losses. In determining a revised annual rent with reference to actual loss and on consideration of the relevant factors, an analysis of probable future use of the land and probable future losses must be undertaken (*Canadian Natural Resources Ltd. v. Bennett, et al*, 2008 ABQB 19).

[18] In this case, both parties' view of appropriate rent stems essentially from consideration of other leases rather than an analysis of the actual loss incurred or consideration of the various factors set out in section 154(1) other than (i) other surface leases, and (j) previous orders of the Board. As "other leases" is the factor to which the parties directed most of the evidence, I will address it first.

Other leases

[19] Both parties provided evidence of other surface lease rentals. Mr. Velander based his claim of $1,355.00 on three comparables. The first comparable (Silver Hammer Farms) is a 2006 rent renegotiation for a 4.15 acre area used for a producing gas well. The agreed per acre rent is $1,277. The land is used for the growing of pedigreed seed (fescue). Mr. Skafte's evidence was it has the same Class 3 soil as the subject. The second comparable is a surface lease negotiated in 2011 at approximately $1,394/acre for land located in Township 80. The lease is for a multi well pad, although the annual compensation agreed only reflects the drilling of one well. The lease provides for additional compensation for additional wells. Other than Mr. Skafte's evidence that the land has the same Class 3 soil as the subject, and the actual site plan showing the location of the leased area, I have no other information with which to compare this lease with

the subject. The third comparable is a 2010 consent Board Order where the parties agreed to annual compensation of $1,355/acre for the use and occupation of 3.33 acres for a well site and access road in Township 85. Again, other than Mr. Skafte's evidence that the land has the same Class 3 soil as the subject, and the actual site plan showing the location of the leased area, I have little information with which to compare this entry with the subject. The site plan shows the access road is only .22 of an acre, compared to the 2.63 acres used for roadway on the Lands, and consequently, the well site does not extend as far into the field as it does on Mr. Velander's Lands. The consent Order reflects the landowner's agreement not to object to the company's application to the Oil and Gas Commission for a pipeline permit.

[20] Imperial provided evidence of the annual per acre rent paid under 23 other leases, together with a plan of each leased area and, in some cases, photographs. The rents range from $556/acre to a high of $1,277/acre, being the Silver Hammer Farm lease also relied on by Mr. Velander. The second highest annual rent, at $1,117/acre, is for a 3.76 acre site with two producing gas wells. The comparables include one Carnaby lease at $998/acre and three Carnaby leases at $1,000/acre, and one Imperial lease at $1,002/acre and three Imperial leases at $1,000/acre. The Imperial comparables were negotiated in 2011 and 2012.

[21] Imperial argued that their leases indicate the "going rate" and that Mr. Velander is asking for a rent increase above the rent paid to his neighbours. Imperial argued their other surface leases were just being brought up to the rent level currently enjoyed by Mr. Velander. Mr. Parkes' evidence, on behalf of Imperial, was that $1,000/acre is the going rate for Imperial leases in the area. He agreed Imperial is the "biggest player" in the immediate area. Unless there is a reason to pay more than the going rate, Imperial's position during rent renegotiation is that the going rate should be acceptable. His evidence was that other landowners in the area, all similarly affected as Mr. Velander by increasing costs, have accepted $1,000/acre as an appropriate rate of compensation.

[22] Mr. Parkes' evidence was that at the time of the last rent renegotiation with Mr. Velander, Imperial was considering buying the farm because of its proximity to a gas plant. His evidence was that from Imperial's perspective, Imperial paid a premium above the going annual rent because they "just wanted to get it out of the way and get on with it". He did not indicate Imperial's view of how the $1,000/acre reflects the compensation considerations set out in section 154 of the *PNGA*. Mr. Velander's evidence was that at the time of the last rent renegotiation, he was not aware of Imperial's intent to buy the farm. From Mr. Velander's perspective, the agreed rent fairly compensated him at the time. Likewise, he did not indicate his view of how the $1,000/acre reflects the compensation considerations set out in section 154 of the *PNGA*. Subsequently, Imperial approached him with respect to buying the farm. An appraisal was done, but Mr. Velander could not accept the appraised land value and refused to sell.

[23] With reference to Alberta authorities, Imperial argued the evidence of comparable surface leases established a "pattern of dealings", that the Board should only depart from such a pattern for the most cogent reasons, and that there was no justification in this case to depart from the practice of rents indicated by other comparable leases.

[24] Mr. Velander argued that his comparables were a better reflection of an appropriate per acre rate. He argued that Imperial's "going rate" did not reflect a true negotiated settlement but was the result of a "take it or leave it" approach to negotiation.

[25] I have problems both with the "pattern of dealings" approach taken by both parties to rely almost exclusively on other leases, and with the evidence of the other leases provided.

[26] First, the "pattern of dealings" approach to compensation is an approach that has been adopted by the Courts in Alberta for determining compensation as an alternative to the method of providing compensation for specific enumerated effects. The Alberta Courts have said that evidence establishing a pattern of dealings should be given great weight by that province's Surface Rights Board (*Livingston v. Siebens Oil & Gas*, [1978] 3 W.W.R. 484). Numerous subsequent decisions have been faced with determining whether a "pattern of dealings" has been established and the evidence necessary to establish a "pattern of dealings". Where the evidence does not establish a "pattern of dealings", the Courts apply the alternative method of providing compensation for the effects enumerated in the Alberta *Surface Rights Act* by calculating the actual loss of use and adverse effect arising from an entry (See for example: *Canadian Natural Resources Ltd. v. Bennett*, *supra*).

[27] To my knowledge, the "pattern of dealings" approach has not been used by the Courts in this province to determine compensation for surface access. In *Scurry Rainbow Oil Ltd. v. Lamoureux*, [1985] B.C.J. No. 1430, the British Columbia Supreme Court considered some Alberta authorities referred to it respecting a "pattern of dealings" approach. The Court suggested that by looking to an established pattern the Board does not necessarily abandon the criteria set out in the *PNGA*. The Court indicated that if the Board were to rely on a pattern, it would be saying in effect that the factors set out in the *PNGA* historically achieved a particular pattern, which may, in an appropriate case, be the best evidence of the value of a right of entry. In so doing, however, the Board would need to be satisfied that a pattern had been established, and presumably, that the pattern reflected the various factors listed in the *PNGA*. Since *Scurry Rainbow,* and unlike the Alberta *Surface Rights Act*, the *PNGA* has been amended to specifically include the terms of other surface leases or agreements as <u>one</u> of the factors the Board <u>may</u> consider. Compensation for surface access in this province is to be based on a consideration of the various factors set out in section 154 of the *PNGA*, including consideration of the terms of other leases. I

was not provided with any authority binding on this Board, instructing the Board to give greater weight to the terms of other leases where they establish a "pattern of dealings" at the expense of consideration of the other enumerated factors in section 154 of the *PNGA* or the Board's discretion generally to consider "other factors the board considers applicable".

[28] Second, even if the "pattern of dealings" approach is to be adopted by this Board and preferred where the evidence sufficiently establishes that a "pattern of dealings" exists, I find the evidence before me falls short of establishing such a pattern. With reference to some of the factors identified by the Alberta Courts that establish a "pattern of dealings", the evidence before me falls short of identifying the area to which the pattern is said to apply and does not identify the number of sites overall that are within this area. Neither party indicated how many sites they had reviewed in selecting their comparables, nor did they provide an explanation for rejecting certain sites as comparable. Other than with respect to the Imperial leases, there was no information provided with respect to the negotiation process. There is insufficient evidence with respect to the circumstances surrounding each negotiation, the factors considered by the parties, whether the factors considered include the factors set out in section 154 of the *PNGA*, or the compensation attributed to individual factors. There is no explanation as to how leases presented at rates below the alleged pattern support the compensation pattern. There is no discussion or distinction between new leases and rent renewals. For many of the comparables, there is no evidence of the date of negotiation.

[29] It appears from the large map provided with Imperial's binder of leases, that the 25 comparables before me are a small sample of the number of surface leases in the area surrounding the Lands, and while many are in surrounding Townships, they span a fairly large area. The only conclusions I am able to draw from the evidence of comparable leases before me is that the rental payments range from a low of $556/acre to a high of $1,355/acre, with an average of approximately $925/acre. Eleven of the 25 provide a rent of $998/acre or higher; only four agreements exceed $1,002/acre. The evidence establishes that Imperial's "going rate" is $1,000/acre, but it does not establish a "pattern of dealings" generally agreed between landowners and operators for appropriate compensation for the losses arising from an entry and the effects of an entry giving consideration to the factors listed in section 154 of the *PNGA*. Neither do the three comparables provided by Mr. Velander establish a "pattern of dealings". Mr. Velander's requested rent of $1,355 reflects the second highest rent indicated by the array of leases before me. Three agreements, without any evidence to compare the circumstances of those agreements to the subject circumstances, do not give rise to a "going rate" or any presumption that the rates will appropriately compensate for losses in any other case.

Other section 154 considerations

[30] As to the value of the land, the only evidence before me is Mr. Skafte's evidence that according to "Farm Credit on line", eight properties in Townships 84, 85, and 88 sold in the last two years. His evidence was that all of these properties are comparable to the Lands except the sale in Township 85, which was swamp and sold for $671/acre. His evidence was the top price was over $2,200/acre and the average price was $1,297/acre. He did not provide any details with respect to these sales or the properties involved. I have no evidence of the change in the value of the Lands since 2006 when the annual rent was last renegotiated. Mr. Skafte is not an appraiser and is not qualified to provide an opinion on the value of land. If I accept $1,297/acre as the best evidence of the probable market value of the Lands, Mr. Velander's requested rent of $1,355/acre exceeds the value of the land.

[31] As to loss of profit, Mr. Velander's evidence was that he would expect at least two bales of hay per acre, but he provided no evidence as to the value of a bale of hay, the potential profit obtainable if the leased area was cultivated in hay, or the estimated loss of profit arising from Imperial's use and occupation of the leased area. Imperial's evidence was that in the Peace River area forage crops average about two to two and a half tons per acre at $65/ton, for crop value of $163 per acre. If I accept $163/acre as the best evidence of probable crop value from the Lands, Mr. Velander's requested rent of $1,355/acre is significantly in excess of this amount. I have no evidence as to Mr. Velander's share of the crop value in accordance with his sharecropping arrangement, or as to his actual profit from the Lands, once expenses are accounted for.

[32] Neither party provided evidence to assist with a calculation of loss arising from tangible or intangible nuisance and disturbance. Mr. Velander indicated that "a lot of turns" were required when farming the NE ¼ adjacent to the leased area. But he provided no evidence of the additional time involved in farming around the installation. An annual rent of $8,536 (6.3 acres x $1,355) represents approximately 170 hours at $50/hour.

[33] Some nuisance and disturbance is associated with Imperial's use and occupation of the Lands and Imperial's need to check and maintain the well site, but as the well site and access road are not visible from the Velanders' residence, the impact on them is not great. Some nuisance and disturbance arises from the very existence of the access road and the consequent ability of trespassers to access the Lands via the access road, occasionally causing damage. While I accept Mr. Velander's evidence that occasionally trespassers gain access to his Lands via the access road, sometimes causing damage, I have no evidence of any actual loss or expense incurred by Mr. Velander as a result.

[34] As to severance, the parties took different views of whether the leased area severed the Lands giving rise to compensation. The access road and well site

certainly sever the NW ¼. But at the time they were installed, the entire NW ¼ was bush. At some point since, most of the area south of the access road has been cultivated, but the area north of the access road has not. The area north of the access road does not appear to be too small to be cultivated, nor is it cut off from access via the NE ¼, which is cultivated. I accept Imperial's view that the surface lease does not cause a compensable severance of the Lands.

[35] Mr. Velander included two pages of medical information in his binder. The purpose of this evidence was not explained. There is certainly no evidence before me to link any of Mr. Velander's medical conditions to Imperial's use and occupation of the Lands.

[36] Neither party provided evidence of any other circumstances beyond those specifically enumerated in section 154 of the *PNGA* for the Board's consideration.

[37] Considering the evidence as a whole, the current rent of $1,000/acre may approach about 77% of the market value of the Lands and far exceeds the probable loss of profit from the leased area. The evidence does not establish significant nuisance and disturbance.

[38] As to the change in the value of money, Mr. Skafte's evidence was that according to the Bank of Canada the average inflation rate from 1915 to 2012 was 3.3%. He applied this inflation rate to the current rent of $1,000/acre to estimate renewed rent at $1,355/acre. Ms. Birchall's evidence, on behalf of Imperial was that the inflation rate between 2009 and 2012 was 5.93% or 1.94% per year. I have taken the liberty of visiting the Bank of Canada Inflation Calculator website myself (http://www.bankofcanada.ca/rates/related/inflation-calculator/). The website advises that a basket of goods costing $1,000 in 2006 would cost $1,108.26 in 2011. This increase represents an increase of 10.83% or an average inflation rate of 2.08% over five years.

[39] Mr. Velander's evidence was that his farming costs have gone up over 30%, and for some items, for example oil, his costs have increased by 80%. His evidence was not clear as to the period of time over which farming costs have increased by this amount. His evidence was that the cost of living has increased all over the north and has increased more than in the southern part of the province. It is the average 30% increase for many of the farming costs, that he submitted warrants the 30% increase to the annual rent. Imperial argued Mr. Velander's farming costs are not relevant to the landowner's loss arising from the entry, and that in any event, the increased cost of farming is borne by the tenant.

[40] Mr. Velander in turn queried why he should receive less just because he rents the land. He indicated his neighbor receives the same amount but does not live in the area, and another neighbor across the road receives the same amount but the land has not been farmed for over five years. These arguments point to some of the problems with the "pattern of dealings" approach to compensation.

In adopting a "pattern of dealings", compensation is based on "going rates" and "what every body else gets" without regard to a landowner's actual loss. The alternative to a pattern of dealings approach is to attempt to compensate for actual loss. If a landowner is going to rely on other leases to argue he should be compensated at the same level as someone else without regard to his actual loss, then he cannot complain that someone else is paid the same amount but does not experience the same loss, especially when no evidence is provided to actually substantiate his actual loss.

[41] The costs of farming incurred by Mr. Velander are similarly incurred by others in the area. Any loss of profit associated from an increase to the cost of farming is not a loss arising from Imperial's use and occupation of the Lands. I prefer the evidence from the Bank of Canada's inflation calculator as a more reliable indicator of the change in the value of money since the date of the last rent review to the effective date of this rent review.

[42] Annual rent is intended to compensate a landowner for probable actual losses arising from the use and occupation of the leased area in the rent review period going forward. It is to compensate prospectively, rather than retrospectively. There is no presumption, therefore, that the previously agreed annual rent will compensate for losses going forward. Just because a party is entitled to request a review of annual rent, does not mean annual rent must automatically be increased. It is incumbent on a landowner when requesting a rent review to establish his or her ongoing prospective losses arising from the entry and to establish that an increase is warranted to adequately compensate for ongoing losses. Mr. Velander has failed to establish that his losses exceed, or even meet, the current payment of $1,000/acre. But for Imperial's offer to continue to pay $1,000/acre, I would be hard pressed to find evidence to support the current rent, let alone increase it. I find no basis on the evidence before me to increase the annual rent, even considering the evidence respecting the change in the value of money since the last rent review.

Costs

[43] This arbitration was not so much about annual rent as it was about recovery of Mr. Velander's costs. While the substance of the arbitration disputed a requested rent increase of approximately $2,236 per year, the total costs claimed amount to $25,552.36.

[44] The claim may be broken down as follows:

- on account of Mr. Velander's time and expenses $ 4,140.00
- on account of Mr. Skafte's time and expenses $ 8,507.40
- on account of Mr. Carter's time and expenses $12,904.96

[45] Section 170 of the *PNGA* gives the Board the discretion to order a party to pay all or part of the actual costs of another party in connection with an application. As set out in section 168 of the *PNGA*, "actual costs" include

(a) actual reasonable legal fees and disbursements;
(b) actual reasonable fees and disbursements of a professional agent or expert witness;
(c) other actual reasonable expenses incurred by a party in connection with a board proceeding;
(d) an amount on account of the reasonable time spent by a party in preparing for and attending a board proceeding.

[46] Imperial does not take serious issue with providing Mr. Velander a reasonable amount for his costs. It disputes, however, that the amount claimed is reasonable.

[47] Rule 18(4) of the Board's Rules provide that in making an order for the payment of a party's costs, the Board will consider

(a) the reasons for incurring costs;
(b) the contribution of counsel and experts retained;
(c) the conduct of a party in the proceeding;
(d) whether a party has unreasonably delayed or lengthened a proceeding;
(e) the degree of success in the outcome of a proceeding;
(f) the reasonableness of any costs incurred;
(g) any other factor the Board considers relevant.

[48] Other than in an application for a right of entry, there is no presumption that a landowner will automatically be entitled to recover their costs.

[49] This was an application for rent review, not an application for right of entry. It was not complex. Mr. Velander sought an arbitrary increase to the annual rent payable of 30%, which was not supported by any evidence of actual loss arising from the right of entry, nor was it supported by sufficient evidence to establish a "pattern of dealings". While Mr. Velander accused Imperial of refusing to negotiate in good faith and adopting a "take it or leave it approach", he was not able to establish that Imperial's offer did not compensate for his actual loss arising from Imperial's continued use and occupation of the Lands.

[50] It is not clear to me how either Mr. Skafte or Mr. Carter significantly assisted Mr. Velander with his application for rent review. Of course, I am not privy to the advice either one of them may have given Mr. Velander and cannot say whether his pursuit of the rent review through to arbitration was on their advice.

[51] I am left with a dilemma. If I do not award Mr. Velander his costs, he will be left with significant accounts from Mr. Skafte and Mr. Carter. Mr. Velander felt the need to seek the advice of professionals, and not allowing him to recover those costs seems unfair to him. But laying the responsibility for that recovery at the feet of Imperial, in the circumstances, seems unfair to Imperial.

[52] I have commented in previous decisions that there is an apparent disconnect between the expectations of landowners and what the law allows as compensation for the use and occupation of private land for the purpose of oil and gas development. I note it is not unusual for the costs associated with the mediation and arbitration process to exceed the compensation payable, and further note that companies rarely take issue with paying a landowner's costs, although they do from time to time take issue with the amount payable. It may be that landowners would be more accepting of the legislative regime if the money that is apparently available for the reimbursement of costs could somehow be directed to their benefit, rather than to the benefit of agents and counsel, particularly when the participation of agents and counsel does not appear to have been of any material assistance.

[53] In limiting cost awards, I do not want to discourage landowners from seeking professional representation. The Board often benefits if both parties are able to participate on a level playing field from the perspective of being able to access the professional resources necessary to provide expert evidence and legal argument. On the other hand, through the awarding of costs, I do not want to encourage an environment that provides no incentive for the realistic assessment of a case and its prospect of success or that has the potential for abuse of process and growth of a dysfunctional dispute resolution system.

[54] Considering all of the circumstances, I am prepared to require Imperial to pay part of Mr. Velander's costs associated with the Board's proceedings.

[55] Mr. Velander submitted an accounting of his time commencing in May of 2011 through August 21, 2012 totaling 37.5 hours. To this claim, he added an additional 8 hours for attendance at the arbitration for a total claim of 45.5 hours. As the arbitration was entirely unsuccessful, I am not inclined to require Imperial to reimburse Mr. Velander for all of his time associated with the arbitration process. I find 35 hours for preparation and attendance at the mediation and arbitration proceedings is reasonable in the circumstances. Mr. Velander sought payment for his time at $100/hour. In the absence of evidence to establish that he would actually recover $100/hour for his time if it was not spent in Board proceedings, I am not prepared to depart from the rate usually applied to landowner's time of $50/hour. I award Mr. Velander $1,750 on account of his own time.

[56] As for disbursements, he provided postage receipts totaling $48.58 and claimed $170.78 as the cost of binders and supplies for his submissions. These disbursements are reasonable and may be recovered.

[57] As to Mr. Skafte's account, it charges for 60.75 hours of time inclusive of all of his time in preparation for and attending the mediation and arbitration, and disbursements of $472.89 for title search, materials and supplies, postage, and photocopying. The disbursements are not unreasonable. He divides his time into "administration hours", "intervener hours" and "mediator hours" and charges

different rates. There is no explanation as to what these different categories entail. Mr. Skafte, while assisting Mr. Velander in the mediation process, was never the mediator. Most of the time is billed as "administration hours" or "intervener hours" and billed at $125/hour. His first invoice to Mr. Velander bills both "administration hours" and "intervener hours" at $125/hour but his second invoice only bills "administration hours" at $75/hour. I find $125/hour is not reasonable for administrative services.

[58] Some of the entries do not appear unreasonable in terms of the time spent, for example time recorded for meetings and conference calls. Other entries appear excessive, for example, the claims for time spent in receipt of emails. As one example, the invoice bills .5 hour on December 20, 2012 for an e-mail from Michelle Hannigan (Board Assistant). This email simply attached a Notice of Mediation teleconference. A claim of ½ hour to review this email seems excessive. Much of Mr. Skafte's time appears to have been spent in sending and receiving email with little time spent in research or preparation that may have been of some assistance to Mr. Velander. Mr. Skafte's evidence at the arbitration was of no assistance to the advancement of Mr. Velander's case.

[59] A landowner ought not to feel compelled to embark on a rent review without assistance, however, and I accept, despite my comments above, that Mr. Skafte did provide Mr. Velander with some assistance in the initiation of the rent review, and the mediation and arbitration process. I award Mr. Velander $2,000 on account of Mr. Skafte's time plus his disbursements of $472.89 and HST of $296.75.

[60] Mr. Carter's account claims 21.9 hours of time ($12,045) spent in preparation for and attendance at the arbitration and $245.44 in disbursements, for mileage, long distance, and courier charges. The disbursements are not unreasonable. While presenting a bill for $12,904.96, he suggested $10,000 on payment of his account may be more reasonable. As with Mr. Skafte's account, while some of the time entries do not appear unreasonable, others do. For example, Mr. Carter charges .2 of an hour for each of 9 emails sent or received on July 19, 2012 several of which were from myself and contained no more than a few words or a single sentence. It is hard to imagine how close to two hours could have been spent in review and receipt of these emails. There is no time in Mr. Carter's account spent on preparation of cross-examination or submissions in preparation for the arbitration; the bulk of the account is for time spent reviewing or sending email. While Mr. Carter provided some effective cross-examination of Imperial's witnesses, his involvement did not ultimately assist Mr. Velander in providing sufficient evidence to establish his claim. I award Mr. Velander $4,000 on account of Mr. Carter's time plus his disbursements of $245.44 and GST of $212.27.

[61] Mr. Velander may recover part of his costs of these proceedings calculated as follows:

On account of his own time and expenses	$	1,969.36
On account of Mr. Skafte's time and expenses inclusive of HST	$	2,769.64
On account of Mr. Carter's time and expenses inclusive of GST	$	4,457.71
Total	$	9,196.71

ORDER

[62] The Surface Rights Board orders that the annual rent payable by Imperial Oil Resources Ltd. to Valfrid Richard Velander for its continued use and occupation of the Lands shall continue to be $6,630.00 per year for the rent review period commencing February 9, 2011.

[63] The Surface Rights Board further orders that Imperial Oil Resources Ltd. shall forthwith pay to Valfrid Richard Velander the sum of $9,196.71 for costs.

DATED: December 11, 2012

FOR THE BOARD

Cheryl Vickers, Chair

File No. 1726
Board Order No. 1726-2amd

January 8, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
SECTION 1 TOWNSHIP 85 RANGE 14 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Vaflrid Richard Velander

(APPLICANT)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

AMEND ORDER

Pursuant to section 53 of the *Administrative Tribunals Act*, the Board amends Order 1726-2 dated December 11, 2012 to correct a typographical error at paragraph [62] as follows:

[62] The Surface Rights Board orders that the annual rent payable by Imperial Oil Resources Ltd. to Valfrid Richard Velander for its continued use and occupation of the Lands shall continue to be **$6,300.00** per year for the rent review period commencing February 9, 2011.

DATED: January 8, 2013

FOR THE BOARD

Cheryl Vickers, Chair

File No. 1763
Board Order No. 1763-1

December 12, 2012

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
BLOCK A SECTIONS 5 AND 8 TOWNSHIP 84 RANGE 14 WEST OF THE SIXTH MERIDIAN PEACE RIVER DISTIRCT

(The "Lands")

BETWEEN:

Dennis Raymond Nelson and
Mavis Eileen Nelson

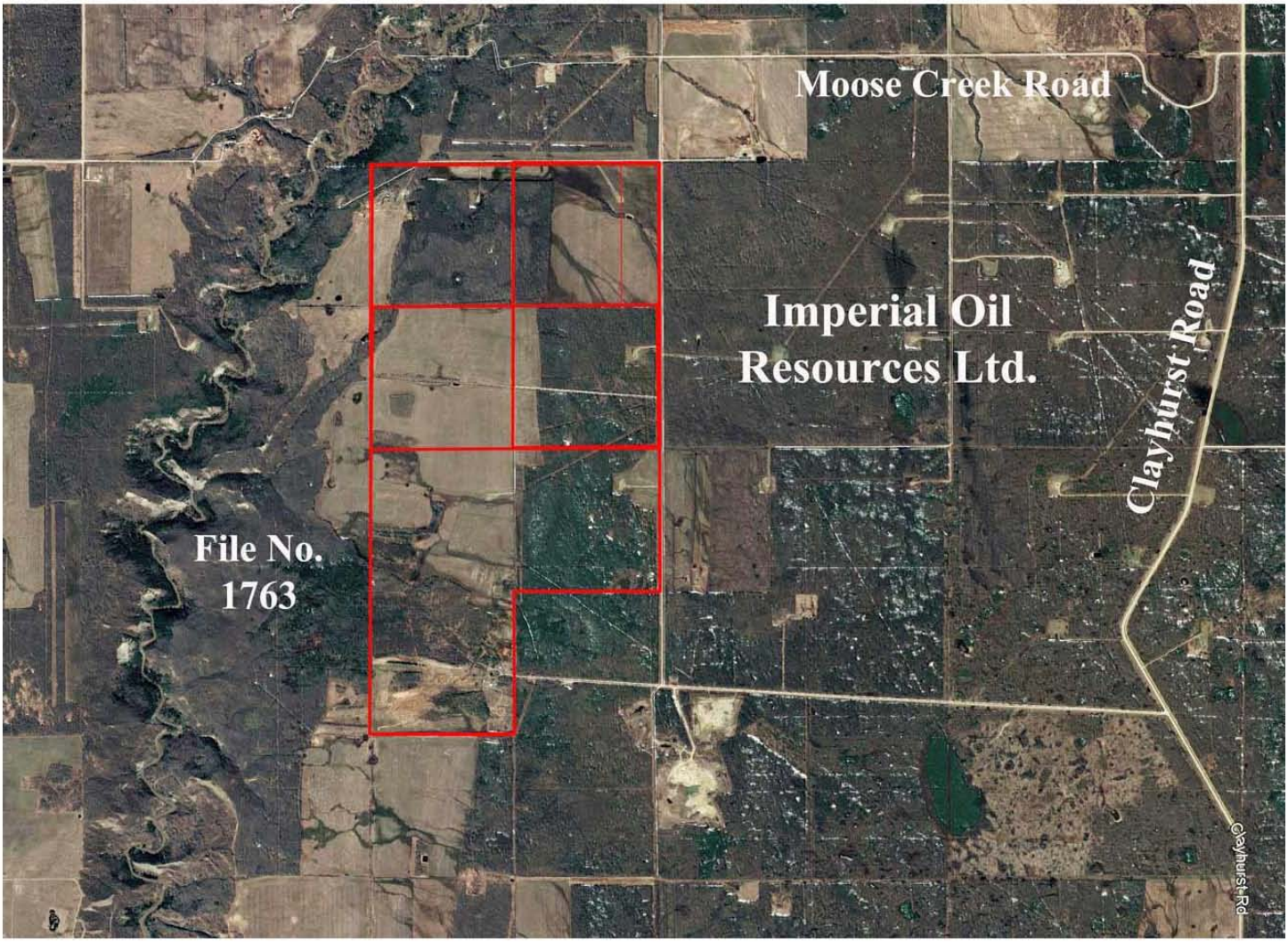
(APPLICANTS)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

BOARD ORDER


Moose Creek Road
Imperial Oil
Resources Ltd.
Clayhurst Road
File No.
1763
©Clayhurst Rd

Heard by written submissions closing September 14, 2012	
Submissions by:	Dennis Nelson and Mavis Nelson, on their own behalf
	Peter L. Miller, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] This is an application for rent review pursuant to section 166 of the *Petroleum and Natural Gas Act* (*PNGA*).

[2] The applicants, Dennis and Mavis Nelson own the Lands. The Respondent, Imperial Oil Resources Limited (Imperial), uses and occupies 3.82 acres of the Lands for an access road and oil well. Historical events have made it difficult for the parties to come to terms on the annual rent payable for Imperial's continued use and occupation of the Lands.

[3] When Imperial's predecessor Eagle Resources Ltd. (Eagle), originally acquired the right in 1984 to drill an oil well and occupy the surface of the Lands, the Crown owned the Lands. In 1988, the Nelsons acquired an Agricultural Lease of the Lands subject to Eagle's rights, by then acquired by Imperial. In 2002, the Crown granted the Nelsons the fee simple title to the Lands including the area used by Imperial for the access road and well site.

[4] Upon acquiring the Crown grant in 2002, the Nelsons sought annual compensation from Imperial retroactive to 1988. Imperial applied to the Board, then known as the Mediation and Arbitration Board, in November 2002 seeking a right of entry order allowing its continued use and occupation of the Lands for the access road and well site, and determination of the compensation payable to the Nelsons. Imperial withdrew its application in 2003, and the mediator terminated mediation. However, in April 2003, in response to advice from the Oil and Gas Commission that it was of the view Imperial did not have proper tenure for its installations on the Lands, Imperial applied again to the Board for a right of entry Order and determination of compensation.

[5] The Board issued an Order on March 23, 2004 granting Imperial right of entry to use and occupy the Lands and ordering Imperial to pay to the Nelsons compensation in the amount of $43,494.00 plus interest calculated in accordance with the *Court Order Interest Act* as compensation for Imperial's use and occupation of the Lands since 1988 to 2004. The Board ordered the parties to enter a surface lease setting compensation payable for the five year term commencing on the date of the Order at $3,500 per year. The Board further ordered Imperial to pay the Nelson's $5,000 for their costs. In compliance with

the Board's Order, Imperial sent the Nelsons a proposed surface lease together with cheques totaling $73,154.93 comprising compensation from 1988 to 2004 plus pre-judgment interest, and annual compensation for 2004 to 2005. The Nelsons cashed the cheques.

[6] On appeal from the Board's decision to the Supreme Court of British Columbia, the Court found that the Board had erred in awarding any compensation to the Nelsons for the period prior to November 28, 1996. The Court found that in accordance with the *Limitation Act*, the Nelsons' claim for compensation prior to that date was extinguished. The Court further found that the Board erred in fixing annual rent for the period commencing in 2003 at $3,500 per year, and determined that the appropriate rent commencing in 2003 was $3,050 per year. The Court ordered the Nelsons to repay Imperial the amount by which the funds they previously received exceeded the amount to which they were entitled under the Court Order. The Nelsons did so.

[7] In May 2006, the parties entered a surface lease providing for annual rent of $3,050 ($798/acre) effective March 16, 2004. In May 2009, Imperial offered to increase the annual rent to $3,850 ($1,008/acre) effective March 16, 2009. The Nelsons did not accept this offer.

[8] On August 10, 2009, the Nelsons served Imperial with a Notice to Negotiate. As the parties were unable to agree on a revised annual rent, the Nelsons filed this application to the Board in April 2012 seeking mediation and arbitration of the rent review. Mediation was unsuccessful and the mediator referred the application for arbitration.

[9] The Nelsons submit they have lost $57,230.00 over the 20 year period from 1988-2008. This figure is calculated by adding the amount the Nelsons were required to repay to Imperial to the difference between what would have been Imperial's accrued compensation from 1988-2008 based on the Board's Order, and the accrued compensation for the same period adjusted annually by 3.3% for inflation. The Nelsons seeks restoration of this amount in the form of annual rent payable over 10 years, which amounts to $5,722.99 annually. Additionally, they seek annual rent of $5,138.97, which they calculate by adjusting the 1988 rent annually by 3.3% to 2011. The claim totals $10,081.96 annually.

[10] Imperial stands by its offer to increase the annual rent to $3,850.00.

ISSUE

[11] This is an application for rent review. The first issue is to determine the appropriate annual rent under the surface lease as of March 16, 2009, being the

anniversary of the surface lease immediately prior to the Nelsons serving Imperial with a Notice to Negotiate.

[12] The Nelsons also seek to recover their costs of the Board's proceedings. The second issue is to determine whether Imperial should pay all or part of the Nelsons' costs associated with the Board's proceedings.

FACTS

[13] In addition to the facts set out above in the Introduction, the following facts are relevant to this application.

[14] Imperial uses 3.56 acres of the leased area for an oil well and .26 acres for a 15 metre access road. Petroleum is transported from the well site via pipeline. Imperial checks the well site about every three days.

[15] The leased area is not located on the Nelson's home quarter.

[16] The Lands surrounding the leased area are treed and used for cattle pasture.

ANALYSIS

Annual Rent

[17] Section 154(1) of the *PNGA* lists the various factors the Board may consider in determining an amount to be paid periodically or otherwise. The enumerated items include:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any, of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[18] Not all of the above factors will be relevant in every case or in the determination of annual compensation as opposed to initial compensation for an entry. There are no factors or criteria established by regulation.

[19] Section 154(2) of the *PNGA* further provides that in determining an amount to be paid on a rent review application, the Board must consider any change in the value of money and of land since the date the surface lease was originally granted or last renewed.

[20] The purpose of a rental payment is to address the immediate and ongoing impact of an operator's activity on private land to the landowner and to the lands (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). The rental payment must be based on actual or reasonably probable loss or damage caused by the operator's entry on and use of the lands. In an application for rent review, any revised rent is payable for the period following the effective date, not for past losses. In determining a revised annual rent with reference to actual loss and on consideration of the relevant factors, an analysis of probable future use of the land and probable future losses must be undertaken (*Canadian Natural Resources Ltd. v. Bennett, et al*, 2008 ABQB 19).

[22] The first part of the Nelsons' claim for annual rent of $5,722.99 is unfounded. First, the claim rests on the supposition that the Nelsons are entitled to recover the money paid back to Imperial. They are not. The Court found that any claim for annual rent prior to November 28, 1996 was extinguished. The Court found the Board erred in awarding the Nelsons the rent it awarded. No one appealed the Court's decision. The Nelsons were not entitled to the monies awarded by the Board for the period from 1988 to November 28, 1996, and are not now entitled to recover rent for that period.

[23] Second, the claim purports to recover an amount for inflation on rents already affirmed by the Court to be appropriate for the rental periods following November 28, 1996. The rents affirmed by the Court for the successive periods from November 1996 up until the current period commencing in March of 2004, cannot be retroactively adjusted for inflation or any other reason by the rent review process. A rent review must look forward to the next rent review period and determine what the appropriate rent going forward should be.

[24] An application for rent review is not an appropriate vehicle for claiming past losses (even if they are legitimate losses). A rent review anticipates losses going forward and provides annual compensation for those reasonably anticipated continuing losses.

[25] A claim for damages to land, or for past losses to the owner or occupant of lands (where they can be established with evidence to have resulted from an entry and are not otherwise barred) may form the basis for a claim under section

entry and are not otherwise barred) may form the basis for a claim under section 163 of the *PNGA*. Although the Nelsons' submissions allude to damage to Lands, they have not brought an application for damages under section 163 of the *PNGA* and have not produced evidence to substantiate that there is damage or that the damage is caused by the right of entry, or with which to calculate an appropriate monetary award should the claim be substantiated.

[26] The second part of the Nelsons' claim is a prospective claim for annual rent. This claim seeks annual rent of $5,138.97 or $1,345.28 per acre, for the period commencing March 16, 2009. They calculate this figure by inflating the 1988 annual rent ordered by the Board annually by 3.3% for inflation until 2011. Their evidence is that 3.3% is the average inflation rate calculated by Stats Canada between 1915 and 2012.

[27] Section 154(2) of the *PNGA* instructs the Board when reviewing rent payable under a surface lease or board order to consider the change in the value of money and of land "since the date the surface lease or order was originally or last granted." The rent in this case was last negotiated in 2006 effective March 2004. The relevant time frame for considering any change in the value of money and of land is from 2004, when the rent was last effective, to 2009 when it will be next effective. According to the Bank of Canada Inflation Calculator (http://www.bankofcanada.ca/rates/related/inflation-calculator/) a basket of goods that cost $3,050 in 2004 cost $3,320 in 2009 for an increase of 8.95% over 5 years, or an average annual inflation rate of 1.73%. If the inflation rate from 2009 to 2012 is to be considered, the Bank of Canada Inflation Calculator advises that a basket of goods that cost $3,320 in 2009 would cost $3,540 in 2012 for an increase of 6.63% over 3 years, or an average annual inflation rate of 2.16%. Imperial's offer of $3,850 more than accounts for any change in the value of money since the rent was last set.

[28] I have no evidence as to the change in the value of land in the area surrounding the Lands since 2004. The Nelson's evidence, reproduced from Farm Credit Canada "Farmland Values Online" is that between May 2010 and May 2012, there were eight cultivated land (grain) sales in the Peace River Region. The sales reflect a minimum per acre value of $864, a maximum per acre value of $1,670 and an average per acre value of $1,297. The evidence provides no details of these sales or their comparability to the Lands, which I note are not cultivated in grain. Imperial's offer reflecting $1,008/acre falls within the range of value indicated by these sales and reflects just over 77% of the average land value.

[29] Imperial's evidence, also reproduced from Farm Credit Canada is that "British Columbia farmland values remained stable over the last six months of 2009", with the last two reporting periods showing "an average decrease of 0.7% percent and an increase of 2.3% per cent respectively." The time frame for "the

last two reporting periods" is not identified. The evidence shows the semi annual percentage change in farmland values in BC from July 1, 2009 to December 1, 2009 to be 0.0%. The evidence indicates "British Columbia farmland values increased an average of 0.4 per cent during the second half of 2010", and that "values were unchanged in the first half of 2011" and "increased an average of 0.2% during the second half of 2011". The Spring 2012 Farmland Values Report indicates "[t]he land market in the Peace River area saw a limited number of transactions, with prices remaining generally stable. However, there was a slight increase in values for the highest quality farmland in the Dawson Creek area". I have no evidence as to the quality of the Lands as farmland. The Lands are not located in the Dawson Creek area. The evidence does not say anything about the change in the value of land since 2004. It suggests a slight increase in the value of farmland generally in BC since 2009, but does nothing to assist with an assessment of whether the value of the Lands or land in the immediate area has changed.

[30] As to the other factors listed in section 154(1) of the *PNGA* for the Board's consideration, I have no evidence of the Nelsons' anticipated loss of profit from the Lands arising from Imperial's use and occupation. I have no evidence of nuisance and disturbance arising from Imperial's use and occupation of the Lands. The lease does not create a severance.

[31] Both parties provide evidence of other surface leases. The Nelsons include extracts from three surface leases, one negotiated in 2006 reflecting a per acre annual rent of $1,277, and two in 2005 reflecting an annual rent of $1,000. The evidence does not provide sufficient evidence to enable me to compare the circumstances in these other surface leases to the circumstances of this lease, or to determine how the agreed compensation reflects the factors set out in section 154(1) of the *PNGA* or any other relevant factors. The Nelsons provide a chart including six renegotiated rents ranging from $854/acre to $960/acre. They do not provide the dates of these increases nor any other information enabling a comparison of these leases to the subject or an analysis of how the rent addresses relevant considerations. The chart includes several other leases indicated as being up for review. Again, no information is provided to assist me in comparing these situations with the subject.

[32] Imperial provides evidence of 20 other leases. The rental rates range from a low of $556/acre with an unknown commencement date for a suspended gas well and a relatively large taking for the access road on cultivated land in Township 83, to a high of $1,007/acre effective in 2010 for a producing oil well with a small taking for the access road on bush land in Township 85. While the evidence indicates the land use, which provides a relevant comparator, it likewise provides no information as to how the rent addresses relevant considerations.

[33] Of the array of leases before me, there is only one lease that is in excess of Imperial's offer. Imperial's offer falls at the high end of the range of lease rates presented.

[34] Neither party provides evidence of the Nelsons actual or anticipated loss arising from Imperial's use and occupation of the Lands. The Nelsons have not provided any evidence to demonstrate that Imperial's offer of $3,850 annually will not be adequate to compensate them for their anticipated loss arising from Imperial's continued use and occupation of the Lands. But for Imperial's offer, I would be hard pressed to find any evidence to even support the current annual rent.

[35] As Imperial maintains its offer, and as that offer is within the range of other leases in the area, I find the annual rent payable under the surface lease for Imperial's use and occupation of the Lands should be $3,850 commencing March 16, 2009.

Costs

[36] The Board may require a party to pay all or part of another party's costs in relation to a Board proceeding. Costs are discretionary. Other than in relation to an application for a right of entry order, there is no presumption in favour of a landowner recovering costs of a Board proceeding. In exercising its discretion to determine whether a party should pay all or part of the costs of another party, the Board will consider various factors including: the reasons for incurring costs; the contribution of counsel and experts retained; the degree of success in the outcome of a proceeding; and the reasonableness of any costs incurred.

[37] The Nelsons seek costs of $3,575.18 inclusive of consultant fees ($210) disbursements for items such as postage, title search and office supplies ($65.18), and landowner time for preparation (31 hours) and conference calls of (2 hours) at $100/hour ($3,300). The consultant fees were for services rendered in preparing the spreadsheet on due rent reviews and inflation accumulated rates.

[38] The Nelsons have not succeeded in having the annual rent set in excess of Imperial's offer. A large part of their claim was entirely illegitimate. I have found that the evidence did not support the remainder of the claim appropriately seeking an amount for prospective rent.

[39] The material prepared by the consultant in part addressed the illegitimate claim, and to the extent it was relevant to the prospective annual rent, was of little assistance and did not support the claim advanced. I decline to order recovery of the consultant's time.

[40] The other disbursements are reasonable and may be recovered.

[41] As to the landowner's time, the two hours claimed for attendance at conference calls is not unreasonable. The preparation time is not broken out as between the mediation and the arbitration. Given that I am inclined to award recovery for some hours on account of the mediation process but nominal hours on account of the arbitration process as the claim was largely illegitimate and otherwise unsupported, I find recovery of 15 hours for landowner preparation (approximately half of the total claim) is appropriate. In the absence of evidence to substantiate what a landowner can typically expect to be remunerated for his or her time, the Board applies $50/hour for landowner's time.

[42] The Nelsons may recover costs from Imperial in the amount of $915.18, representing 17 hours at $50/hour plus disbursements of $65.18.

ORDER

[43] The Surface Rights Board orders that the annual rent payable by Imperial Oil Resources Limited to Dennis Nelson and Mavis Nelson for its continued use and occupation of the Lands shall be $3,850.00 annually commencing March 16, 2009. Imperial Oil Resources Limited shall forthwith pay to Dennis Nelson and Mavis Nelson the difference between this revised annual rent and annual rent already paid to them as of March 16, 2009.

[44] Imperial Oil Resources Limited shall forthwith pay to Dennis Nelson and Mavis Nelson the sum of $915.18 for costs.

DATED: December 12, 2012

FOR THE BOARD

Cheryl Vickers, Chair