MEDIATION AND ARBITRATION BOARD
Under the Petroleum and Natural Gas Act
114, 10142 101 Avenue
Fort St. John, BC V1J 2B3

Date: May 11, 2001

File No. 1429 Board Order No. 338ARR

BEFORE THE ARBITRATOR:

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT BEING CHAPTER 361 OF THE REVISED STATUTES OF BRITISH COLUMBIA AND AMENDMENTS THERETO:
(THE ACT)

AND IN THE MATTER OF A PORTON OF THE SOUTHWEST ¼ SECTION TWENTY-TWO, TOWNSHIP EIGHTY-EIGHT, RANGE EIGHTEEN, WEST OF THE SIXTH MERIDIAN, PEACE RIVER DISTRICT,
(6-22-88-18 W6M)
(THE LANDS)

BETWEEN:

ROSE PRAIRIE WOLFE RANCH LTD.
BOX 90
ROSE PRAIRIE, BC
V0C 2HO
(THE APPLICANT)

AND:

ENCAL ENERGY LTD.
10228 101ST AVENUE,
FORT ST. JOHN, BC
V1J 2B5
(THE RESPONDENT)

RENT REVIEW ARBITRATION ORDER

BACKGROUND

A rent review Arbitration Hearing pursuant to Section 12 of the *Petroleum and Natural Gas* Act was conducted March 8, 2001 in the Boardroom of Execuplace Business Centre, located at 10142 101st Avenue, Fort St. John, BC.

The Applicant for the rent review, Rose Prairie Wolfe Ranch Ltd. (hereinafter referred to as "Wolfe Ranch") was represented by Philip and Roberta King, the company's principals as well as Andrea Hull, of Carter Lock & Horrigan.

The Respondent, Encal Energy Ltd. (hereinafter referred to as Encal), was represented by Kevin Aitchison and Robert Hinkley.

John Ross, local landowner, appeared as an observer.

The Arbitration Panel consisted of Mavis Nelson, William Wolfe and Rod Strandberg. Ivor Miller a member of the Board, attended as an observer and played no role in the decision.

The Applicant had sent the 60 day notice pursuant to Section 11 of the *Petroleum and Natural Gas* Act, requesting renegotiating of the rental conditions on 21 September 1999.

Nature of the Application

Wolfe Ranch is the owner of property located north of Fort St. John. Encal has assumed ownership of a lease site known as "ENCAL ET AL RIGEL 6-22-88-18' situated on the Applicant's property. The original lease was signed August 11, 1993 and therefore was eligible for review pursuant to Section 11 of the *Petroleum and Natural Gas* Act on August 11, 1998. The parties agreed that any renegotiated rental amount would be effective August 11, 1998.

POSITION OF THE PARTIES

Applicant

The original lease was for an access road to the lease site and the lease site itself. The access road and lease site is south of the residence of Phil and Roberta King. The current annual rental is $ 3,325.00. The access road and lease affect 6.63 acres of land directly.

In the years since the lease was signed, the access road and lease have become used not only for accessing the existing lease but accessing 20 other sites in the area. Eleven of those sites belong to Encal. The other 9 sites belong to four other companies.

There has been greater use made of the road and, indeed, the lease site for access to these other sites than was initially contemplated by the parties.

The Applicant says that traffic on the road and through the well site has caused great nuisance and inconvenience. The traffic causes difficulties with moving equipment and livestock over the access road and the lease. There are numerous phone calls on a daily basis from Encal employees, and others, regarding access through the lease as well as the need to render assistance to persons using the road when they become stuck or have difficulties. The Applicant says that the lease road itself is poorly maintained and that

some of its equipment has been damaged by inadequate maintenance.

The Applicant provided what it suggested were comparable Board Orders and leases in the area dealing with the appropriate compensation for this road and well site.

After reviewing the factors found in Section 21 of the *Petroleum and Natural Gas* Act the Applicant suggested that, based on a formula derived from the factors enumerated in that section, that should be payable as follows:

1. Nuisance at $ 250.00 per acre, for a total of $ 1,675.50,

2. Loss of grazing and hay loss $ 250.00 per acre, for a total of $ 1,675.50,

3. Severance, 5.5 acres at a range of $ 180.00 - $ 250.00 per acre, for a total of $ 990.00 to $1,375.00,

4. Nuisance and disturbance $ 8,287.50 based on the existing $ 250.00 per acre amount multiplied by five reflecting the use of five companies on the road.

In the original lease there was a weed control agreement providing that the Respondent would pay the Applicant $ 500.00 per year for weed control. This was only paid for two years. The Respondent then wrote a letter terminating this agreement and made no further payments to the Applicant. The Applicant said that this agreement was really disguised compensation from the Respondent for the lease characterized as a payment for weed control to keep the total reported compensation for the lease lower than it otherwise would have been. The Applicant has controlled the weeds on the access road and lease site notwithstanding that the Respondent has ceased paying for this service.

The Applicant also submitted that 11 power poles along the access road on the lease lands are eye sores, which detract from the natural attributes of the property, and causes concern for the safe movement of machinery along the access road. The Applicant submitted that $ 550.00 based on $ 50.00 per pole was appropriate compensation for these poles.

The Applicant wanted signs at access points to its land to warn of overhead lines.

Finally, the Applicant submitted that his horse trailer axles had been damaged as a result of low clearance and the ruts due to improper maintenance of the access road by the Respondent. Compensation for the cost of repairing the axles was approximately $ 4,000.00

Respondent

It was Encal Energy position that the appropriate comparables of this Board to be used as guidance for compensation payable would be as of August 11, 1998, the date for commencement of the revised rental payments.

The Respondent advised that there were five companies making use of the access road and, to a lesser extent, the lease to access other sites as follows:

1. Dom Can, which access meter sites;

2. Westcoast Energy Inc., which access a sales line;

3. Williams, which access a meter site;

4. Pembina Pipelines, or Western Facilities which access a land farm; and

5. The Respondent.

Encal Energy position was that there should be no issue regarding the power poles. The site had been electrified without an objection by the Applicant to reduce the noise from a pump jack near to the King residence.

Encal also indicated that the signs regarding overhead power lines would not be a problem.

It was Encal's position that, in part, any increase in nuisance or disturbance as a result of increased use of the access road and lease had been accounted for by increased compensation in other lease agreements with the Applicant and that this road and well site should receive no increase in compensation to reflect use of it.

On the issue of weed control, the Respondent said that increased WCB regulations restricting the type and nature of persons who could perform this work necessitated the Respondent in canceling the weed control agreement. It was agreed that $ 500.00 per annum was a fair price payable for weed control on this lease site.

Encal provided a strictly formulaic approach to compensation based on the factors enumerated in Section 21 of the *Petroleum and Natural Gas* Act.

Encal felt appropriate compensation in this matter was as follows:

1. Loss of hay from the access road and lease occupied by the Respondent that the appropriate amount for loss and profit would be $ 93.33 per acre multiplied by 6.63 acres, for a total of $622.75.

2. Concerning severance, the Respondent noted that north of the access road there was some brush area which were not accessible and this was a severance. The Respondent did not accept the severance in the corners where the access road met the lease although the Applicant said that machinery had difficulty maneuvering in there. The amount offered for severance was $ 296.12.

3. Concerning nuisance, based on previous Board Orders, Encal offered $ 250.00 per acre for 6.63 acres for a total of $ 1,657.50.

4. For other factors, Encal offered $ 325.00.

The Respondent's offer, based solely on the formulaic approach in this matter, was $ 2,839.94. This represents a reduction from the compensation currently paid.

Discussion

The Board makes the following initial observations:

1. The factors enumerated in Section 21 of the *Petroleum and Natural Gas* Act are not exhaustive. The Board does not accept that there is a rigid formula that can be used to determine compensation in any matter brought before it. The factors enumerated in Section 21 of the *Petroleum and Natural Gas* Act are merely illustrative of the factors, which the Board is required to consider in determining fair and reasonable compensation. Other relevant factors may be considered by the Board in determining what would be fair compensation on the market place. Thus this suggests that there can not be a formula applicable in all cases.

2. While comparable decisions of the Board are of some assistance to the Board and to parties appearing before it in determining compensation as they are designed to reflect the fair market value at any given time, each decision is based strictly on the specific and unique facts before it and the use of comparables, while useful, is not determinative of any issues dealt with by the Board; and

3. The well site under consideration at this Arbitration is unusual and extraordinary because of the large number of companies and well sites accessed through this lease site. Accordingly, the compensation which is ordered to be paid by the Board in this rent review arbitration will reflect these unique circumstances and may not be comparable to any other lease or well site which may be dealt with in the future.

Upon reviewing the evidence adduced before this Arbitration, the submissions of the parties and having consideration to the factors set out in Section 21 of the *Petroleum and Natural Gas* Act the Board concludes:

1. The position of the Respondent regarding loss of profit on the land does not take into account the loss of production of cattle, approximately six cow/calf units, which would be generated by grazing on the land in the spring and following the removal of the hay in the summer;

2. The Board accepts that there is more severance than suggested by the Respondent. Encal feels that severance is only found north of the access road between the access road and the brush. The Board accepts that there is also severance where machinery cannot easily be used to cultivate the land;

3. On the issue of disturbance and nuisance, the Board finds that the well site itself, although there is some traffic through it, does not present a substantially greater nuisance or inconvenience than any other well site. However, the extensive use of the access road does represent an extraordinary disturbance and nuisance to the Applicant.

4. The Board also notes that the weed control agreement was specifically incorporated into the initial lease signed by the Applicant and the Respondent. The Board does not accept that the Respondent can unilaterally cancel a tern of a negotiated lease simply by a letter as it purported to do in this case. Allowing this would allow any party to a lease to simply terminate a condition of the lease without the agreement of the other. This would cause uncertainty for parties to any lease. It is also of note that it is possible that any specific term in a lease is dependent upon other terms of the lease. If one clause of the lease is terminated then the entire agreement may fall.

Costs

The Applicant sought costs in this matter as compensation for legal fees as well as for the time spent by Phil and Roberta King in dealing with this re-negotiation. In discussions, counsel for the Applicant indicated that she was not a member of the Law Society of the province of British Columbia.

As Ms. Hull is not a member of the Law Society of the Province of British Columbia then it would be improper for this Board to grant a request that she be compensated when she is acting contrary to the terms of the *Legal Profession* Act. Accordingly, the Board declines to award any cost to the Applicant except for the sum of $500.00 representing time taken by Phil and Roberta King in dealing with this matter.

DECISION

The Mediation and Arbitration Board decision is as follows:

IT IS HEREBY ORDERED THAT;

1. Based on the agreement of the parties that any increased compensation should be back dated to the 11 August 1998; the Board Orders that the Respondent pay to the Applicant for the period 11 August 1998 to 10 August 1999, the sum of $ 9,250.00. This amount represents an increase in the annual compensation to $ 7,250.00 plus the annual weed control payment, which should have been made by the Respondent to the Applicant which, was not made.

2. Pursuant to Section 12 (2) of the *Petroleum and Natural Gas* Act, the rental provisions of the surface lease signed 11 August 1993, paid by the Respondent to the Applicant are varied from $ 3,325.00 per annum to $ 7,250.00 per annum. The varied rental provisions commence 11 August 1999 and shall be paid by the Respondent to the Applicant on the 11th day of August each year thereafter until agreement of the parties or further order of this Board.

3. The total amount due and owing from the Respondent to the Applicant as of the date of this Order, is, therefore, $ 21,750.00 less any annual payments which the Respondent may have made to the Applicant pursuant to the existing lease agreement.

4. The Respondent will, within 60 days of this Order, provide an accounting to the Board of the payments actually made to the Applicant due on 11 August 1998, 1999 and 2000 indicating the amount due and owing to the Applicant and will pay the balance due and owing within that time period. Should this money not be paid within 60 days, then the Applicant will be entitled to receive interest on the unpaid funds calculated at the rate of interest payable on judgments pursuant to the *Court Order Interest* Act of the Province of British Columbia until the increased compensation is paid in full.

5. The Respondent will pay to the Applicants the sum of $ 500.00 with 30 days for the Applicants' costs.

6. As agreed between the Respondent and the Applicant, the Applicant will provide confirmation within 60 days that the signs required by the Applicant has been put into place.

7. As agreed to by the Respondent, the Respondent will provide to the Board a copy of all documents

and assignments of ownership necessary to clarify the current ownership of the well site and access road, given that ownership of the well site and access road has exchanged hands since 1993.

8. Nothing in this Order varies expressly or by implication any of the other terms of the original existing lease signed 11 August 1993.

9. Nothing in this order is or operates as consent, permit or authorization that by enactment a person is required to obtain in addition to this order.

Dated at the City of Fort St. John, British Columbia, this 11th day of May 2001.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

_____
Rodney J. Strandberg, Chair

_____
Mavis Nelson, Member

_____
William Wolfe, Member