

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 to be made as a separate application, particularly in the mediation context where a presumption in favour of payment of the landowner's costs applies, in the context of this case where the issue was defined as determining the amount of compensation (as distinct from 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