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