

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 DISTRICT

(The "Lands")

BETWEEN:

Dennis Raymond Nelson and
Mavis Eileen Nelson

(APPLICANTS)

AND:

Imperial Oil Resources Limited

(RESPONDENT)

BOARD ORDER

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