THE SURFACE RIGHTS BOARD OF MANITOBA

BRANDON, MANITOBA

Order No. 1/2002
File No. 390-87-A

IN THE MATTER OF: , ***THE SURFACE RIGHTS ACT***

AND IN THE MATTER OF: L.S.D. 1-4-2-25 W.P.M. all in Manitoba

BETWEEN:

[redacted]

Applicant (Owner)

- and -

NCE PETROFUND CORP.,

Respondent (Operator)

VARIATION ORDER

Manitoba) Order No. 1/2002
The Surface Rights Board) File No. 390-87-A

BEFORE: Mr. T.A. Cowan, Presiding Member
Mr. D. Cochrane, Deputy Presiding Member
Mrs. M. Hodgson, Member
Mr. C. Tolton, Member
Mr. I. Carey, Member

IN THE MATTER OF *THE SURFACE RIGHTS ACT*

- AND -

IN THE MATTER OF: L.S.D. 1-4-2-25 W.P.M. all in Manitoba

BETWEEN:

[redacted],

Applicant (Owner)

- and -

NCE PETROFUND CORP.,

Respondent (Operator)

VARIATION ORDER

This application, under Section 30 of *The Surface Rights Act*, seeking a variation of the annual compensation of $2,000 being paid under the Board Order No. 83/88, was heard in Waskada, Manitoba on January 25, 2002.

Upon hearing the evidence adduced and the submission of the Applicant's Legal Counsel and by the Representation of the Respondent, the Board delivering its reasons for decision concurrently herewith:

It is the Order of This Board That:

1. NCE PETROFUND CORP. is hereby responsible to clean up and dispose of all spill fluid and contaminated solids on L.S.D. 1-4-2-25 W.P.M. in accordance with the requirements established by the Manitoba Industry, Trade and Mines, Petroleum Branch pursuant to *The Oil and Gas Act and Regulations.*

2. NCE PETROFUND CORP. is hereby responsible for the control of all weeds on L.S.D. 1-4-2-25 W.P.M. in accordance with the requirements of Board Order No. 83/88 Clause (J.) and pursuant to *The Surface Rights Act.*

3. The amount of compensation for this wellsite, namely L.S.D. 1-4-2-25 W.P.M. be and is hereby increased to $2,500.00 effective October 12, 2001 until further order of the Board.

4. The Respondent shall pay to the Applicant interest at a rate of 6.0% per annum on any unpaid portion of the said increased compensation from October 12, 2001 until date of payment.

5. NCE PETROFUND CORP. shall pay all of the Applicant's costs incurred in preparing for the hearing held on January 25, 2002 providing same are just and reasonable and in accordance with Clause No. 4 of the Board's Policy and Procedure Manual.

6. This Board Order is without prejudice to the rights of either party.

Dated this 15th day of February, 2002.

T. A. Cowan
Presiding Member

THE SURFACE RIGHTS BOARD OF MANITOBA

BRANDON, MANITOBA

Files No. 390-87-A
425-88-A

IN THE MATTER OF: ***THE SURFACE RIGHTS ACT***

AND IN THE MATTER OF: L.S.D. 1-4-2-25 W.P.M.
L.S.D. 7-4-2-25 W.P.M.

BETWEEN:

[redacted]

Applicant (Owner)

- and -

NCE PETROFUND CORP.

Respondent (Operator)

REASONS FOR DECISION

Files No. 390-87-A
425-88-A

IN THE MATTER OF: ***THE SURFACE RIGHTS ACT***

AND IN THE MATTER OF: L.S.D. 1-4-2-25 W.P.M.
L.S.D. 7-4-2-25 W.P.M. all in Manitoba

BEFORE: Mr. T.A. Cowan, Presiding Member
Mr. D. Cochrane, Deputy Presiding Member
Mrs. M. Hodgson, Member
Mr. C. Tolton, Member
Mr. I. Carey, Member

DATE OF HEARING: January 25, 2002 - Waskada, Manitoba

DATE OF DECISION: February 15, 2002

BETWEEN:

[redacted]

Applicant (Owner)

- and -

NCE PETROFUND CORP.

Respondent (Operator)

APPEARANCES:

Mr. P. Elash	- Counsel for the Applicant
[redacted]	- Applicant
Mr. M. Brady	- for the Respondent

REASONS FOR DECISION
RE: APPLICATION FOR VARIATION IN COMPENSATION

The Relevant Evidence

Counsel for the Applicant, [redacted] brought applications for a variation in compensation for two separate wellsites, namely: L.S.D. 1-4-2-25 W.P.M. and L.S.D. 7-4-2-25 W.P.M. under Section 29 of *The Surface Rights Act*. Right-of-Entry for these two wellsites and access roads was granted by Board Order No.'s 83/88 and 65/87 to Omega Hydrocarbons Ltd., the original Operator.

The Right-of-Entry Order No. 83/88 granted entry to L.S.D. 1-4-2-25 W.P.M. on October 12, 1988 with an annual compensation of $2,000.

The Right-of-Entry Order No. 65/87 granted entry to L.S.D. 7-4-2-25 W.P.M. on December 4, 1987 with an annual compensation of $2,000.

The annual compensation has not been reviewed for either site since the original Right-of-Entry Orders.

Mr. P. Elash Counsel for [redacted] (Sworn) presented the Board with the following Owner's Exhibits:

1. Photographs re: L.S.D. 7-4-2-25 W.P.M. - Exhibits 1 to 7;
These photographs indicate the various weed growth, pump jack, two holding tanks

and access road.

2. Photographs re: L.S.D. 1-4-2-25 W.P.M. - Exhibits 7 to 11;

These photographs indicate the various weed growth, oil spill, pump jack, two holding tanks and access road.

3. Summary of [redacted] Surface Leases 1981-1986 - Exhibit 12;

Mr. Elash requested that the following leases be deleted from the summary:

[redacted] Roxy L.S.D. 4-9-2-25 W.P.M.; August 31/81
[redacted] Andex L.S.D. 2-6-2-25 W.P.M.; February 27/86.

4. Surface Lease dated November 28, 1985 between [redacted] and Andex, re: L.S.D. 11-4-2-25 W.P.M. - Exhibit 13;

5. Surface Lease dated February 14, 1985 between [redacted] and Andex, re: L.S.D. 8-9-2-25 W.P.M. - Exhibit 14;

6. Partial Surface Lease dated November 28, 1985 between [redacted] and Andex, re: L.S.D. 15-5-2-25 W.P.M. - Exhibit 15;

7. Partial Surface Lease dated November 28, 1985 between [redacted] and Andex, re: L.S.D. 14-4-2-25 W.P.M. - Exhibit 16;

8. Partial Surface Lease dated November 28, 1985 between [redacted] and Andex, re: L.S.D. 12-4-2-25 W.P.M. - Exhibit 17;

9. Partial Surface Lease dated February 13, 1986 between [redacted] and Andex, re: L.S.D. 10-9-2-25 W.P.M. - Exhibit 18;

10. Partial Surface Lease dated February 14, 1986 between [redacted] and Andex, re: L.S.D. 3-4-2-25 W.P.M. - Exhibit 19;

11. Partial Surface Lease dated February 14, 1986 between [redacted] and Andex, re: L.S.D. 15-9-2-25 W.P.M. - Exhibit 20;

12. Partial Surface Lease dated February 14, 1986 between [redacted] and Andex, re: L.S.D. 3-9-2-25 W.P.M. - Exhibit 21;

These leases were freely negotiated between the Landowner and Operator. The sites ranged from 2.85 acres to 5.19 acres with an annual compensation ranging from $2,350 to $4,200. The high end of the acreage and compensation was for a battery site, on L.S.D. 15-9-2-25 W.P.M., while another site namely L.S.D. 3-4-2-25 W.P.M with acreage of 3.60 acres and compensation of $3,200 was close to [redacted] residence.

13. Surface Lease Summary, [redacted] and EOG Resources, 2001 - Exhibit 22;

14. Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C15-4-2-25 W.P.M. - Exhibit 23;

15. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C11-4-2-25 W.P.M. - Exhibit 24;

16. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG

Resources, re: L.S.D. C14-4-2-25 W.P.M. - Exhibit 25;

17. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C16-4-2-25 W.P.M. - Exhibit 26;

18. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C10-4-2-25 W.P.M. - Exhibit 27;

19. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C7-9-2-25 W.P.M. - Exhibit 28;

20. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C9-9-2-25 W.P.M. - Exhibit 29;

21. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. D7-9-2-25 W.P.M. - Exhibit 30;

22. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. C3-9-2-25 W.P.M. - Exhibit 31;

23. Partial Surface Lease dated July 25, 2001, between [redacted] and EOG Resources, re: L.S.D. D3-9-2-25 W.P.M. - Exhibit 32;

These leases were freely negotiated between the Landowner and Operator. The sites ranged from 2.47 acres to 2.84 acres with an annual compensation ranging from $2,618 to $2,710. It was also noted that these sites are for 20 acre spacing. It is further noted that [redacted] signed the "Voluntary Three Day Waiver Form" pursuant to Section 18(1) of *The Surface Rights Act*.

24. Manitoba Surface Rights Board Order 1/91 - Omega Hydrocarbons and [redacted] re: L.S.D. 11-5-25 W.P.M.; annual compensation of $2,800 - Exhibit 33;

25. Manitoba Surface Rights Board Order 2/91 - Omega Hydrocarbons and [redacted] re: L.S.D. 13-5-2-25 W.P.M.; annual compensation of $2,200 - Exhibit 34;

26. Manitoba Surface Rights Board Order 3/91 - Omega Hydrocarbons and [redacted] re: L.S.D. 14-5-2-25 W.P.M.; annual compensation of $2,400 - Exhibit 35;

27. Summary of [redacted] and [redacted] Surface Leases. Annual compensation ranged from $2,635 to $3,000 with site size ranging from 3.03 acres to 4.52 acres. These leases were freely negotiated January 11 and 13, 1986 - Exhibit 36;

28. Surface Lease dated January 13, 1986 between [redacted] and Andex, re: L.S.D. 16-29-1-25 W.P.M., annual compensation of $2,800 with a site size 3.03 acres - Exhibit 37;

29. Surface Lease dated January 13, 1986 between [redacted] and Andex, re: L.S.D. 3-29-1-25 W.P.M., annual compensation of $3,000 with a site size 4.52 acres - Exhibit 38;

30. Surface Lease dated January 13, 1986 between [redacted] and Andex, re: L.S.D. 1-29-1-25 W.P.M., annual compensation of $2,635 with a site size 3.03 acres - Exhibit 39;

31. Surface Lease dated January 11, 1986 between [redacted] and Andex, re: L.S.D. 14-7-2-25 W.P.M., annual compensation of $2,635 with a site size 3.03 acres - Exhibit 40;

32. Manitoba Agricultural Review - Manitoba Agriculture and Food
    (a) Introduction
    (b) 2001 Crop Production Costs
    (c) Graph - Farm Income and Expenses 1971-2000
    (d) Graph - Bank rate, inflation rate, real rate of interest - 1978-1998;

    (a) The major focus of this publication is on primary agriculture;
    (b) These projected crop costs were prepared to assist agricultural producers in developing their own production costs and assumes continuous cropping - Exhibit 41;

33. Statistics Canada Consumer Price Index History - Exhibit 42;

34. Rural Municipality of Brenda Real Property Assessment Roll listing, re: SE 4-2-25 W.P.M. Assessed value $82,400 with 154.09 acres - Exhibit 43;

35. Manitoba Surface Rights Board Order No. 83/88, [redacted] and Omega Hydrocarbons, re: L.S.D. 1-4-2-25 W.P.M. annual compensation of $2,000 with a site including access road of 2.81 acres - Exhibit 44;

36. Manitoba Surface Rights Board Order No. 65/87, [redacted] and Omega Hydrocarbons, re: L.S.D. 7-4-2-25 W.P.M. annual compensation of $2,000 with a site including access road of 3.75 acres - Exhibit 45;

    Also filed as evidence was a brief of fact and law, which outlined the following as Exhibit 46;
    (a) Purpose of application and relief sought;
    (b) Relevant Statutory Provisions;
    (c) Criteria and reference to comparable lease agreements;
    (d) L.S.D. 8-4-2-25 W.P.M.;
    (e) Board awards;
    (f) Conclusion.

    In this submission the Applicant requests the Board's consideration for the following variation of annual compensation:
    (a) L.S.D. 1-4-2-25 W.P.M. from $2,000 to $3,400; effective October 12, 2001;
    (b) L.S.D. 7-4-2-25 W.P.M. from $2,000 to $4,100; effective December 4, 2001.

Mr. M. Brady (Sworn) was in attendance as the representative for NCE PETROFUND CORP.

Mr. Brady questioned why he had not received the evidence that the Applicant was going to use five days prior to the hearing.

Mr. Brady further questioned the Applicant as to why he waited until now to discuss the operation of NCE PETROFUND CORP. regarding weed control and clean up of spills.

The following freely negotiated surface leases were filed as evidence at the hearing by Mr. Brady:

1. Partial Surface Lease dated September 25, 2001, between [redacted] and EOG Resources Canada Inc. re: L.S.D. 2-30-2-25 W.P.M. annual compensation of $2,300 with a wellsite including access road of 3.31 acres - Exhibit 47;

2. Partial Surface Lease dated September 25, 2001, between [redacted]

and EOG Resources Canada Inc. re: L.S.D. 1-20-2-25 W.P.M. annual compensation of $2,250 with a wellsite including access road of 2.97 acres - Exhibit 48;

3. Partial Surface Lease dated October 7, 2001, between [redacted] and EOG Resources Canada Inc. re: L.S.D. 7-3-2-25 W.P.M. annual compensation of $2,500 with a wellsite including access road of 4.23 acres - Exhibit 49;

4. Partial Surface Lease dated October 10, 2001, between [redacted] and EOG Resources Canada Inc. re: L.S.D. 5-20-2-25 W.P.M. annual compensation of $2,400 with a wellsite including access road of 3.29 acres - Exhibit 50;

5. Partial Surface Lease dated October 25, 2001, between [redacted] and EOG Resources Canada Inc. re: L.S.D. 9-11-2-25 W.P.M. annual compensation of $2,300 with a wellsite including access road of 3.03 acres - Exhibit 51.

Counsel for the Applicant also questioned as to why they had not received the information five days prior to the hearing. Counsel did not object to the leases being submitted as evidence.

This then concluded the submission of evidence by the Applicant and Respondent.

The Board then heard closing arguments from Mr. Elash as to the reasons the variation of compensation as requested by the Applicant be allowed. As supporting material, Mr. Elash used the case of Transalta Utilities Corp. Vs. Greenfeld and the decision rendered by the Alberta Court of Queen's Bench dated December 10, 1986. This document is on file for future reference.

Reasons for Decision for Variation of Compensation

The Applicant applies under Section 25 and under Sections 29 to 33 of *The Surface Rights Act* on matters relating to a variation in compensation.

The Board proceeded to view the sites in question and scheduled hearing on January 25, 2002 in Waskada, Manitoba.

Issues:

1. Who is responsible for weed control?
2. Who is responsible for oil spills?
3. Is the Applicant entitled to a variation in compensation?
4. Is the Applicant entitled to costs?

The Board is of the opinion that sufficient evidence was submitted which would allow them to make the decisions for which the Applicant had requested.

To help the Board in the decision process with respect to weed control, it reviewed Clause (J.) of Board Order No.'s 65/87 and 83/88, which is the same in both orders and reads in part as follows:

"(J).....The Lessee will take all necessary precautions to keep down, destroy and continue to destroy, at the proper season of the year all noxious weeds on the demised premises, and if weed control is not maintained to the satisfaction of the Lessor, the Lessor may immediately take steps to control the weeds satisfactorily with costs borne by the Lessee. The Lessee shall not use any soil sterilants of any nature or description, but may use

herbicides and weed spray as approved by the Lessor....."

Therefore it is the Order of the Board, that the Lessee is responsible for the control of all noxious weeds on the demised premises. However, the Lessor may also take the necessary steps to control the weeds if he is not satisfied. All reasonable costs shall be borne by the Lessee. It is also suggested that the Lessor and Lessee devise a communication system to ensure the requirements of weed control are met to the parties' satisfaction with respect to Board Order No.'s 65/87 and 83/88.

It is further ordered by the Board that the NCE PETROFUND CORP. is to clean up and dispose of all spill fluid and contamination soils on L.S.D. 7-4-2-25 W.P.M. in accordance with the requirements established by the Manitoba Industry, Trade and Mines, Petroleum Branch pursuant to *The Oil and Gas Act and Regulations.*

Now going to the issue of variation of compensation for which this hearing was first intended.

In reaching its decision, the Board relied on Section 26(1) of *The Surface Rights Act*, which reads as follows:

"Determination of Compensation
26(1) In determining the compensation to be paid for surface rights acquired by an operator, the board shall consider the following matters:

(a) the value of the land having regard to its present use before allowance of surface rights;
(b) the loss of use of the land or of an interest therein as a result of granting surface rights;
(c) the area of land that is or may be permanently or temporarily damaged by the operations of the operator;
(d) the increased costs to the owner and occupant, if any, by reason of the works and operations of the operator;
(e) the adverse effect caused by the right of entry to the remaining land by reason of severance, if any;
(f) the nuisance, inconvenience, disturbance or noise, to the owner or occupant, if any, or to the remaining land, that might be caused by, arise from or is likely to arise from or in connection with the operations of the operator, and the damage, if any, to any adjoining land of the owner, including damage to or loss of crop, pasture, fence or livestock and like or similar matters;
(g) where applicable in the opinion of the board, the application of interest payable in addition to the amount awarded as compensation; and
(h) any other relevant matter that may be peculiar to each case, including
    (i) cumulative effect, if any, of surface rights previously acquired by the operator or other operators under a lease, agreement or right of entry existing at the time the surface rights were acquired with respect to the subject lands, and
    (ii) the terms of a comparable lease agreement that a party may submit to the board for consideration."

There is nothing in *The Surface Rights Act* requiring the Applicant to prove that there has been a change in circumstances to prove that something of significance exists now, which did not exist at the time of the Board Orders granting right of entry to L.S.D. 1-4-2-25 W.P.M. and L.S.D. 7-4-2-25 W.P.M., such that an increase in the annual compensation is justified. The Board is aware that Alberta case law has imposed such a requirement in variation hearings in Alberta. Though the Manitoba Board welcomes guidance from the Courts and Board of the Province of Alberta, the Manitoba Board is not bound by any of their rulings.

As a result, it will be in the discretion of the Board whether the Applicant in a given hearing

must prove a "Change in Circumstances".

If however, the Board is wrong, such that an Applicant must show a change in circumstances, the Board feels that [redacted] has succeeded in doing so at this hearing. The Board finds that the following changes in circumstances are sufficient to justify a review of the current compensation being paid annually:

a) *The Surface Rights Act* has been amended significantly since the previous Board Orders granting right of entry, and in particular Section 26(l)(h)(ii) has been added, such that the Board must consider any comparable leases presented to it in evidence;

b) The Board has knowledge, acquired prior to this hearing and by virtue of Section 17(i) of *The Surface Rights Act*, of the "market rate" being paid by various oil companies in the Province of Manitoba. The Board feels that it has the mandate or jurisdiction to use its own knowledge of what is happening in the surface rights business today. The "market rate" has increased significantly since the issuance of the right of entry Board Orders 65/87 and 83/88 dated December 4, 1987 and October 12, 1988, respectively. Moreover, the evidence given by the Applicant regarding the increments in compensation for all of his leases confirms the Board's knowledge of the increased "market rate" and further proves a "Change in Circumstances".

"Operator to file agreement with board

17(1) Every lease or agreement entered into after the coming into force of this act between an operator and an owner or between an operator and the occupant, if any, with respect to any surface right shall be in writing and a copy of the lease or agreement shall be filed by the operator with the board within 30 days after the date of execution thereof."

c) The composition of the Board has partly changed since the compensation for the two wellsites in question was last ordered. This Board does not feel bound by decisions of the previous Boards, although it may take some guidance from them.

Turning now to the proper amount of compensation to be awarded to [redacted] for each of the two wellsites in question. Much was said by Counsel at the hearing about the differences between the "global approach" and the "itemized approach".

The global approach consists of the Board considering all the evidence, which is relevant to all the factors, contained in Section 26(1) of *The Surface Rights Act* and arriving at a "global amount". The global approach recognizes that, in dealing with compensation for loss of rights, many of which are intangible, it is impossible to accurately assess and quantify each "head of damage" contained in Section 26(1). Mr. Elash points out that the Board must also consider each of the subsections of 26(1), (a) through to and including (h), and the evidence relevant thereto, and decide on an appropriate "bottom line" award.

Mr. Elash urges the Board to consider the reality of the market place and what is being done by other oil companies with the owners in the area; by the same oil company (EOG) with the same applicant on other leaseholds.

The Board is unsure of the position taken by the Respondent even with the filing of various surface leases entered into by EOG Resources Canada Inc. as evidence.

This leads to the method of approach that the Board used in arriving at compensation in this hearing.

The Board finds it highly desirable to arrive at a standard rate of annual compensation for wellsites, which are not unusual or typical, but are rather of the type most prevalent in

Manitoba. By an examination of Section 26(1) and considering each of its subparagraphs, the Board has concluded that these are two such wellsites.

As far as subsection (a) is concerned, there was evidence submitted to indicate that the value of the Applicant's land has changed and may be relevant to the issuance of an increase in annual compensation. The assessment in Manitoba is based on market value and past sales. Therefore, the Board considers this subsection applicable to these two reviews.

As far as subsection (b) is concerned, there was no evidence to suggest that there is anything extraordinary, exceptional, or unusual about the loss of use of the land in any of the two wellsites. In saying that, the Board is cognizant of the fact that each of the two wellsites has a different area of land lost from the Applicant's use. However, the Board does not feel that the differences in this regard are significant enough to make a difference in the amount of overall compensation to be paid. This is also taking into account the additional holding tank placed on L.S.D. 7-4-2-25 W.P.M. by the Operator.

Similarly, under subsection (c), the Board does not feel that the size of the wellsites differs to any significant extent as amongst each of them, or as compared to the normal area of the land that is taken for a wellsite. In Manitoba, the average wellsite is between two and four acres, and unless there is a significant deviation, either above or below this range, then the amount of compensation should not be affected.

As far as subsection (d) is concerned and aside from Exhibits 41 and 42 submitted by the Applicant, there was no material evidence filed by the Applicant that the costs had increased by 37.5%. Without any evidence of exceptional or extraordinary increases in costs, annual compensation will not increase beyond the standard determined by the Board from time to time when factoring in inflation costs.

In considering subsection (e), the Board was unable to find, on all the evidence, any exceptional or unusual adverse effect by reason of severance and therefore agrees not to deviate from the overall compensation to be paid.

Likewise, under subsection (f), the nuisance, inconvenience, disturbance, and noise factor, on an objective test, were not evidenced to the point of being so extraordinary, unusual, or exceptional, so as to affect the overall compensation.

With subsection (h), the Board considered every relevant matter peculiar to each of the wellsites in question and, in particular, is cognizant of the fact that there are different degrees of cumulative effect applicable to each of these wellsites. By the traditional treatment of cumulative effect, the more wellsites that are present on a given parcel of land, the greater the cumulative effect. The Board is of the opinion that the cumulative effect pertaining to the wellsites in question justified it in deviating from the standard that it is setting for annual compensation.

The Board, under Section 26(i)(h)(ii), considered the comparable leases presented in evidence, respecting the NCE PETROFUND CORP. wellsites. As well, the Board considered the other EOG Resources Canada Inc. recently negotiated. The Board also considered its own knowledge as to what is happening in terms of the "market rate" for annual compensation and has established that this area of Manitoba for the freely negotiated leases with respect to annual compensation was generally higher than other areas of the Province.

Based on all the foregoing considerations, the Board awards $2,500.00 annual compensation for wellsite located on L.S.D. 1-4-2-25 W.P.M. and $2,500.00 annual compensation for wellsite located on L.S.D. 7-4-2-25 W.P.M. Further, in considering subsection (g) in Section 26(1) of *The Surface Rights Act*, interest shall be payable by the

Respondent to the Applicant at the rate of 6.0% per annum from the respective anniversary dates of Board Order No.'s 65/87 and 83/88 on the outstanding payments or portions thereof.

As far as costs are concerned, the Board is guided by the Surface Rights Act, subsections 26(3), (4) and (5) which reads as follows:

"Costs in discretion of board.
26(3) Subject to subsections (4) and (5), the costs of and incidental to any proceedings of the board shall be in the discretion of the board."

"Costs where offer less than 90%.
26(4) Where the compensation payable to an owner or occupant, as the case may be, is determined by the board and the amount of the compensation that was offered by the operator before commencement of the hearing is less than 90% of the amount determined by the board, the board shall increase the compensation otherwise payable by the amount of such legal, appraisal and other expenses that are incurred by the owner or occupant, as the case may be, for the purposes of preparing and presenting a claim for compensation and that the board considers just and reasonable."

"Costs where offer more than award.
26(5) Where the compensation payable to an owner or occupant, as the case may be, is determined by the board and the amount of the compensation that was offered by the operator before commencement of the hearing is greater than the amount determined by the board, the board shall not award costs of any kind to the owner or occupant, as the case may be."

It was quite evident from the proceedings at the hearing that no negotiations had taken place between the Applicant and the Respondent. Although, Mr. Brady, on behalf of NCE PETROFUND CORP., had made an offer to [redacted] with no response. Therefore, the Board can only assume that the offers made by Mr. Brady were close to the freely negotiated leases he filed as evidence. The Board does not believe it right to base their decisions on an assumption. Also, there was no offer submitted by the Respondent before the commencement of the hearing. Therefore, the Board has determined that subsections 26(4) and (5) are not applicable in this case.

From the evidence filed at the hearing, considerable time and effort must have been spent by [redacted] and by his legal Counsel in preparing for this hearing. However, no detailed accounting of [redacted] expenses was filed and therefore, the matter of costs is at the discretion of the Board, subsection 26(3).

It is the order of this Board, that the Repondent pay all of the Applicant's costs including legal fees providing said expenses are just and reasonable and in accordance with Clause No. 4 of the Board's Policy and Procedure Manual.

If the parties are unable to agree, they can advise the Board Secretary and the Board will then determine this issue.

Decision delivered this 15th day of February, 2002.

T. A. Cowan
Presiding Member