File No. 1633
Board Order 1633-6

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December 16, 2015

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

NE ¼ Section 17, Township 79, Range 14, W6M Peace River District;
NW ¼ Section 17, Township 79, Range 14, W6M Peace River District;
NW ¼ Section 21, Township 79, Range 14, W6M Peace River District except Plan H782;
NE ¼ Section 16, Township 79, Range 14, W6M Peace River District;
SW ¼ Section 5, Township 80, Range 14, W6M Peace River District;
NW ¼ Section 5, Township 80, Range 14, W6M Peace River District;
SW ¼ Section 8, Township 80, Range 14, W6M Peace River District;
NW ¼ Section 16, Township 79, Range 14, W6M Peace River District except Plan H782

(The "Lands")

BETWEEN:

ARC PETROLEUM INC.

(APPLICANT)

AND:

JOHN MILLER AND MARY MILLER

(RESPONDENTS)

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BOARD ORDER

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Heard:	by written submissions closing October 23, 2015
Appearances:	John and Mary Miller on their own behalf Rick Williams, Barrister and Solicitor, for ARC Petroleum Ltd.
Panel:	Rob Fraser

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[1] On September 24, 2015, John Miller and Mary Miller (the "Millers") asked the Board to reconsider Board Order 1633-3 (*ARC Petroleum Inc. and John Miller and Mary Miller)*.

History

[2] ARC Petroleum Inc. (ARC) applied to the Board for a right of entry order onto lands owned by the Millers for the purposes of the construction and operation of well sites and for the construction and operation of flowlines. The Board issued a right of entry to ARC, leaving compensation to be determined at a later date. The parties were unable to reach an agreement on compensation, and the dispute was referred back to the Board for arbitration.

[3] As a result of the arbitration, the Board issued Order 1633-3 on May 24, 2011.

Legislation

[4] The *Petroleum and Natural Gas Act* allows for the board or a party to apply for reconsideration of a board order as follows:

> **Reconsideration by board**
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> 155 (1) The board, on its own motion or on application, may reconsider an order of the board, and may confirm, vary or rescind the order.
> (2) The board may make rules as follows:

(a) specifying the circumstances in which subsection (1) applies;
(b) respecting practice and procedure relating to the exercise of the authority of the board under subsection (1).

[5] The Board has set out the procedure for applying for a reconsideration of a board order in Rules 17 of its *Rules of Practice and Procedure*

Reconsiderations

17. (1) The Board may reconsider an order of the Board and may vary or rescind the order under section 155(1) of the Act if the Board is satisfied that any of the following circumstances exist:

(a) there has been a change in circumstance since the making of the Board's order;
(b) evidence has become available that did not exist or could not have been discovered through the exercise of reasonable diligence at the time of the making of the Board's order;
(c) the Board made a jurisdictional error including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction.

(2) An application for reconsideration must be in writing and a copy of the application must be delivered to each other party.

(3) An application for reconsideration must state the grounds for reconsideration and must include as appropriate, a statement of the change of circumstance since the making of the board order, a summary of any new evidence relied on in support of the reconsideration, and the details of any alleged jurisdictional error.

(4) The Board may determine the procedures to be followed on a case by case basis in order to determine whether to conduct a reconsideration and how a reconsideration will be conducted.

(5) A party may only apply once for reconsideration of a Board order because of an alleged jurisdictional error.

[6] Rule 17 does not set out any time limits for filing a reconsideration application.

The Application

[7] John and Mary Miller allege the Board made errors of fact in paragraphs 31, 45, 64, 76, 77, 78, 79, 8, 81, 82, and 83 of Order 1633-3. They identify three main areas of dispute:

i) Compensation was not awarded on a per Individual Ownership Plan ("IOP") basis but on arbitrary segments lumped together by the Board;

ii) Loss of profit based on crop loss was not awarded equitably;

iii) Compensation for survey was not awarded for each flowline.

Submissions

[8] I have considered the Millers' application for reconsideration of September 24, 2015. It consists of 7 pages of text plus 12 exhibits, a two page response from ARC and a three page reply from the Millers' to ARC's submission.

Does the Application Fit Within Rule 17?

[9] In Rule 17, the Board must be satisfied that any of the following circumstances exist:

(a) there has been a change in circumstance since the making of the Board's order;

(b) evidence has become available that did not exist or could not have been discovered through the exercise of reasonable diligence at the time of the making of the Board's order;

(c) the Board made a jurisdictional error including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction.

[10] The Millers' application does not specify which if any of these circumstances they advance as the basis of their request for reconsideration.

[11] The Rule clearly sets out the circumstances necessary for the Board to reconsider an order. The Millers fail to identify any specific circumstances in their application. After reviewing their application, I find that if I apply a very strict interpretation of Rule 17, I would not consider their application for reconsideration as it does not fit within any of the circumstances listed. Their application raises disagreements with the Board's findings, but they do not raise issues specific to Rule 17(1)(a),(b), or (c). For example, the Millers do not allege nor provide evidence or submissions that there has been a change of circumstance since the making of the Board's Order, evidence has become available that did not exist or could have been discovered, or the Board made a jurisdictional error. Therefore, on the basis of the requirements set out in Rule 17, I dismiss the Miller's application for reconsideration.

[12] I recognize that the Millers have made a significant effort in preparing their application. Although I have dismissed their application, I wish to comment on their other issues plus the issue of the timing of their application.

Timing of the Application

[13] ARC notes that the Millers' provided no explanation for waiting for more than four years to file their application. The Millers', in reply, point out their history over the past four years, which include a number of personal challenges.

[14] The Board's Rules are silent regarding a time limit for an application for a reconsideration. However, waiting for more than four years strikes me as extremely excessive even with regard to the personal circumstances outlined. If the Millers thought there was fault with the Board's decision, they could have simply notified the Board and ARC that they would be seeking a reconsideration, or they could have filed an application for reconsideration and then sought an extension for provision of their submissions in light of their particular circumstances.

[15] Instead, the Millers waited for over four years before filing their application for reconsideration, without giving any notice or indication of their dissatisfaction with the Board's Order.

[16] Because many of the parties who are participants in the mediation and arbitration process are part of the agricultural industry and are constrained by the annual cycle of raising crops and/or livestock, the Board tries to accommodate their schedules. For instance, I have adjusted schedules to work around harvest times, or seeding or winter holidays. This is the reality when one party is almost always a farmer. The Board recognizes that farmers have constraints on their time.

[17] The Millers are part of the farming community. It strikes me as reasonable that they may have required some time to file their application. But, four years is simply too long. In spite of Mrs. Miller's challenges as a care giver and the medical challenges experienced by her husband and sons, I understand that there may have been a delay in the filing an application for reconsideration, however, four years is not reasonable amount of time.

[18] Any party in an arbitration ought to be entitled to some certainty once the Board has issued a decision. Fairness dictates that after some reasonable time a party can conclude that the process is final and complete. Reconsideration should not be open ended.

[19] In my view, the Millers have not been fair and reasonable and on this basis I would refuse to consider their application for reconsideration.

[20] However, even if I was to consider the Millers' basis for reconsideration, they would not be successful as set out below.

Compensation for Crop Loss

[21] The Millers allege that the loss of profit (crop loss) was not awarded equitably. I have reviewed the Millers' application regarding crop loss (paragraphs 8 through 15 of their submission) and compared it with the Board's decision. In Paragraph 45, the Board finds the only evidence for crop loss is provided by ARC's expert witness. Paragraph 47 and paragraphs 64 to 67 specifically deal with the arguments raised by the Millers regarding equitable compensation. It is not necessary for me to comment further, as the Millers' are simply trying to reargue their case after being unsuccessful at the hearing. Their arguments were considered in the decision and dismissed.

[22] The circumstances for reconsideration do not include reopening a decision to reargue issues already decided. For this reason, I decline to reconsider the decision regarding crop loss.

Survey Fees

[23] The Millers allege that compensation for survey entry was not awarded for each flowline. Compensation for the flowlines is found at paragraphs 75 through 83 of the Board's order inclusive. In paragraph 82, the Board dealt with compensation arising from surveying for the flowlines and awarded the Millers $500 for each entry.

[24] In paragraph 83, the Board finds the total compensation for the flowlines is $40,200.

[25] The compensation for the flowlines alone is $10,400+ $21,150 + $8,150 = $39,700. Subtracting the flowline compensation alone from the total compensation attributable to the flowlines ($40,200 - $39,700) leaves a difference of $1,500. The Board awarded $500 for each of the three entries or 3 x $500 = $1500.

[26] It is clear to me that the Board considered compensation for the survey entry, chose $500 for each entry, and this amount was included in the total amount of compensation of $40,200. In the decision, the Board included an award for survey entry and therefore, there is no error.

[27] Therefore I find there is no reason to reconsider the Board's award of compensation for survey fees.

Compensation Based on Individual Ownership Plans (IOP)

[28] The Millers allege that "$2000 per entry was not awarded on a per Individual Ownership Plan basis, but rather on arbitrary segments lumped together by the SRB". They rely on the wording found in paragraphs 18 and 57 of the Board's decision. Paragraph 18 refers to entry for the construction of the project as indicated on the IOPs attached to the entry orders. They then refer to the $2000 per entry for nuisance and disturbance found in paragraph 57. They contend that each landowner should receive $2000 per IOP rather than $2000 per entry. The Millers did not produce any Court or Board decision in support their argument that their view of compensation is correct or binding on the Board.

[29] ARC argues the Millers are under the misapprehension that the Board ought to award compensation based on a per IOP basis.

[30] For assistance in understanding I have included both paragraphs:

> *[18] The Board granted entry for the construction and operation of flowlines on the Lands and for temporary workspace as indicated in Individual Ownership Plans attached to the Entry Orders. Two of the proposed flowlines for which entry to the Lands was granted have been constructed. ARC has withdrawn its application with respect to one of the proposed flowlines, and one proposed flowline has not yet been constructed. The Board's Entry Order will be amended to rescind right of entry for the construction and operation of the flowline from 9-8-80-14 to 5-5-80-14 W6M. As ARC entered portions of the Lands to survey for the proposed flowline that was later not proceeded with, the Millers seek compensation for the entry.*
>
> *[57] Some loss for nuisance and disturbance, for example for time spent, can be tracked and accounted for, and some nuisance and disturbance, for example for noise and dust, is not capable of precise quantification and must be arbitrarily acknowledged. I find an initial payment of $2,000 per wellsite adequately compensates for nuisance and disturbance associated with the construction of the wellsites, and $1,000 annually for each of the wellsite areas adequately compensates for ongoing nuisance and disturbance. I find an initial payment of $2,000 per entry adequately accounts for the nuisance and disturbance associated with the construction and operation of the flowlines.*

[31] These paragraphs must be read along with paragraphs 76, 77, 78, 79 and 80. In each of these paragraphs, the Board refers to various properties included in these projects. Each is identified by an alpha-numeric description.

[32] Paragraph18 refers to IOPs attached to the entry orders. Compensation for nuisance and disturbance is set on a per entry basis in paragraph 57. Paragraphs 76, 77, 78, 79 and 80 refer to the various lands involved in these projects, and there would be a separate IOP for each section of land. Clearly the Board was cognizant of the fact there were multiple properties and IOPs, but chose to award compensation for nuisance and disturbance on a per entry or individual project basis. There is nothing unreasonable or arbitrary in the Board setting compensation in this manner.

[33] As well, I believe the Millers have misunderstood the decision by believing the wording in paragraph 18 that refers to the IOPs attached to the Entry Orders means that the reference to “entry” in paragraph 57 requires compensation on a per IOP basis. When read together with paragraphs 76, 77, 78, 79 and 80 it is clear that the Board intended to award compensation for nuisance and disturbance on a per project basis.

Conclusion

[34] I find no basis to reconsider Board Order 1633-3 and dismiss the application because the Millers do not satisfy the requirements of Board Rule 17. As well, the application was not filed within a reasonable time from the date of publication; the Board’s decision on the calculation of crop loss is not patently unreasonable; the Board’s decision on compensation for survey fees is not patently unreasonable; and the Board’s calculation of compensation based on the basis of per entry rather than per IOP is not patently unreasonable.

DATED: December 16, 2015

FOR THE BOARD

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Rob Fraser, Member