File No. 1742
Board Order No. 1742-2

February 22, 2013

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

THE NORTH EAST ¼ OF SECTION 32 TOWNSHIP 83 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PLAN 8630

(The "Lands")

BETWEEN:

Laurie William McDonald

(APPLICANT)

AND:

Penn West Petroleum Ltd.

(RESPONDENT)

BOARD ORDER

[1] On November 21, 2012, the Board issued its decision in this application for rent review (Order 1742-1). The Board determined that the annual rent should be $4,900 effective August 4, 2009. Penn West Petroleum Ltd. (Penn West) applies pursuant to section 155 of the *Petroleum and Natural Gas Act* (*PNGA*) and Rule 17 of the Board's Rules of Practice and Procedure asking the Board to exercise its discretion to reconsider its decision.

[2] Rule 17(1) of the Board's Rules set out the circumstances that must exist to invoke the Board's discretion to reconsider an order. Those circumstances include at Rule 17(1)(c):

> (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.

[3] Penn West submits that the Board made a jurisdictional error consisting of a patently unreasonable error of fact, law, or an exercise of discretion in respect of matters within its jurisdiction in two portions of its decision, specifically its determination of $500 as compensation for severance and its determination of $3,400 as compensation for nuisance and disturbance.

[4] "Patent unreasonableness" is not defined in either the *PNGA* or the Board's Rules. It has been judicially defined as "clearly irrational" and "evidently not in accordance with reason" (See for example: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247). As recently articulated by the BC Court of Appeal, "If there is some evidence to support the findings and there is a tenable and not clearly irrational basis for the decision, it is not patently unreasonable" (*Phillips v. Workers' Compensation Appeal Tribunal* 2012 BCCA 304).

[5] With respect to the severance award, Penn West submits the Board had no evidentiary basis to find that severance had occurred as a result of the Lease. It submits for the Board to have concluded that "minimal severance" exists (para [56]) it must have based its decision on irrelevant factors or matters that were not in evidence, thereby making a jurisdictional error.

[6] As to the award for nuisance and disturbance, Penn West submits it includes compensation for time and expenditures more appropriately characterized as costs in relation to the application and not ongoing losses. Consequently, Penn West submits the Board made a jurisdictional error in making an award that exceeds the loss sustained.

[7] Penn West focusses on specific portions of the Board's reasons to challenge the result. In my view, these submissions parse the arbitrator's reasons too finely. A reconsideration based on a standard of patent unreasonableness, as with judicial review, does not permit me to review the evidence with a view to deciding whether I

would have made the same decision or whether I would have expressed the reasons differently, but involves a high level of deference. In reconsidering whether any particular findings meet the applicable standard, in this case patent unreasonableness, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes". (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62).

[8] It is evident from the arbitrator's decision that compensation attributed to severance was based, at least in part, on consideration of Penn West's offer that included an amount for severance despite the evidence of its expert that there was no severance, and was supported by other leases in evidence. Penn West's own submissions acknowledged support for the original offer for severance. It cannot now be said that the arbitrator's determination of compensation for that factor falls outside of the range of reasonable possibilities in light of the whole of the record before her. As to the award for nuisance and disturbance, the arbitrator considered various factors including extra time and aggravation experienced by Mr. McDonald in his dealings generally with Penn West. The arbitrator was clearly of the view that on the whole of the evidence before her, significant recognition needed to be given for intangible nuisance. The arbitrator recognized the difficulty in compensating for intangible nuisance, and exercised her discretion and judgement in consideration of the whole of the evidence and the unique circumstances of this case. I find there was some evidence to support the arbitrator's findings, together with a tenable and not clearly irrational basis for her findings.

[9] The arbitrator's determination of compensation falls above that advocated by Penn West and below that advocated by Mr. McDonald. The arbitrator thoroughly canvassed and considered all of the factors set out in section 154 of the *PNGA* and the evidence before her, then stepped back to consider whether the award in its totality exceeded or fell below proper compensation. I am unable to conclude that her award as a whole, or any particular part of it, is "clearly irrational" or "evidently not in accordance with reason" in light of the evidence and record before her.

[10] The application is dismissed.

DATED: February 22, 2013

FOR THE BOARD

Cheryl Vickers, Chair