

**File Nos. 1778, 1779, 1780,
1781, 1782**

Board Order No.1778-82-2

December 23, 2014

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

**DISTRICT LOT 3263 PEACE RIVER DISTRICT
DISTRICT LOT 3264 PEACE RIVER DISTRICT
(The "Lands")**

BETWEEN:

Silvio Salustro

(APPLICANT)

AND:

Progress Energy Canada Ltd.

(RESPONDENT)

BOARD ORDER

Reconsideration: Written submissions closing October 24, 2014

Written Submissions: From Silvio Salustro and Elvin Gowman, for the
 Applicant, and Darron K. Naffin, Counsel for the
 Respondent

INTRODUCTION

[1] This is a reconsideration of Board Order No. 1778-82-1 dated October 18, 2013 (the “Original Board Order”), as directed by the Supreme Court of British Columbia (the “Court”) in its decision (the “Decision”) in *Progress Energy Canada Ltd. v. Salustro*, 2014 BCSC 960.

[2] The Original Board Order was issued upon arbitration of five rent review applications filed by Mr. Silvio Salustro under Section 166 of the *Petroleum and Natural Gas Act*, RSBC 1996, c. 361 (the “Act”) with respect to the following surface leases (collectively, the “Leases”) Mr. Salustro granted to Progress Energy Canada Ltd. (“Progress”) for the purposes of operating oil and gas well sites and associated dispositions:

Table 1

1	2	3	4	5	6	7	8
Lease Reference No.	Lease Date	Effective Date	Lease Location	Disposition	Size (Acres)	Annual Compensation (Current)	Board File No.
1.	Sept. 8, 2006	Sept. 8, 2011	B-077-A-094-G-02	Well Site & Access Road	6.87	\$3,500.00	1778
2.	Dec. 13, 2006	Dec. 13, 2010	C-067-A-094-G-02	Well Site & Access Road	5.29	\$3,300.00	1779
3.	Dec. 13, 2006	Dec. 13, 2010	D-077-A-094-G-02	Well Site & Access Road	4.03	\$2,700.00	1780
4.	Mar. 26, 2007	Mar. 26, 2011	Riser B-77-A	Valve Site	0.09	\$250.00	1781
5.	June 30, 2007	June 30, 2011	Road B-68-A	Access Road	1.31	\$1,000.00	1782

[3] The Original Board Order increased the annual compensation due to Mr. Salustro in respect of the Leases.

[4] Progress applied to the Court for judicial review of the Original Board Order, which application was heard on March 21, 2014 with reasons for judgment (the “Reasons for Judgement”) delivered on May 30, 2014.

[5] The Order of the Court was entered on July 29, 2014 (the "Court Order") and it, in part, states as follows:

2. The Board's finding that it was reasonably probable and foreseeable that Mr. Salustro would bring the lands in District Lots 2363 and 3264 of the Peace River District, British Columbia subject to the leases described in the table below . . . into hay production in the future, and its decision as to tangible impacts, are patently unreasonable and therefore set aside: . . .
3. The Board's award for annual compensation under the Leases is set aside;
4. The Board is directed to reconsider on the record the amount of compensation payable under the Leases in light of paragraph 2 above and in accordance with the Reasons for Judgment herein;

[6] According to the Board's direction, the parties then filed written submissions with respect to this reconsideration.

ISSUE

[7] The issue is to reconsider the annual compensation that Progress must pay to Mr. Salustro with respect to each of the Leases.

[8] This reconsideration is to be based on the record (the evidence before the Board at the initial hearing on May 14, 2013) and in accordance with the Court Order and the Reasons for Judgment.

ANALYSIS

Annual Compensation

[9] In determining annual compensation, the guiding provision is Section 154 of the Act, which provides as follows:

154 (1) In determining an amount to be paid periodically or otherwise on an application under this Part, the board may consider, without limitation, the following:

- (a) the compulsory aspect of the right of entry;
- (b) the value of the applicable land;
- (c) a person's loss of a 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 one or more 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.

(2) In determining an amount to be paid on an application under section 166, the board must consider any change in the value of money and of land since the date the surface lease or order was originally or last granted.

[10] Only the factors in Sections 154(1)(c) (loss of a right or profit), 154(1)(e) (severance), 154(1)(f) (nuisance and disturbance), and 154(1)(i) (other leases) are relevant in this case. I will address these factors and the global amount of compensation in light of the Decision. I will also consider Section 154(2) which the Board must consider in every application under Section 166.

[11] The Court's conclusions with respect to these factors are as follows:

(a) Section 154(1)(c) – loss of a right or profit:

- “it is well-established that a party making an application has the onus of proof (subject to any reverse onus requirements)” and in this case the onus “was on Mr. Salustro to establish his ongoing prospective losses and to establish that any increase is warranted” (para. 66)
- “there was no evidence that Mr. Salustro farmed, or intended to farm, the property” (para. 75)
- “on the issue of whether it was reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the future is unreasonable in light of all of the evidence” (para. 89)

(b) Section 154(1)(e) – severance:

- the Court did not take issue with the Board's finding that there was no severance with respect to any of the Leases

(c) Section 154(1)(f) – nuisance and disturbance:

- **Tangible impacts:**
 - the Court questioned the presence of any tangible impacts “for farming that is foreseeable but not actually taking place” (para. 94), and set aside the Board's decision on tangible impacts (para. 95)

- **Intangible impacts:**
 - “intangible impacts can occur in the absence of farming activity” (para. 96) and the Court found “no error on the part of the Board on the issue of intangible impacts” (para. 104)

(d) Section 154(1)(i) – other leases:

- The Court found “no basis for finding that the Board made its determination on this issue [use of Progress’ lease comparable 1] on the basis of a pattern of dealings approach” (para. 107) and denied Progress’ “application for review of the Board’s decision on the issue of the use of Progress Comparable 1/pattern of dealing” (para. 110)

(e) Section 154(2) – change in value of money and of land:

- The Court did not take issue with the Board’s acceptance of Mr. Telford’s application of the Consumer Price Index (“CPI”) factor in determining the change in value of money and the Board’s finding that there was no evidence from either party to determine whether there should be a change to compensation based on a change in the value of land (para. 44)

[12] So, I am now directed to reconsider on the record the amount of compensation payable under the Leases in light of the Court’s Order No. 2 set out above and in accordance with the Reasons for Judgment.

[13] The effective date for annual compensation is determined pursuant to Section 166(4) of the Act. It provides that the effective date for varying the rental provisions in a surface lease is the anniversary of the effective date of the surface lease immediately preceding the date of the notice under Section 165(2) of the Act. For each of the Leases, Mr. Salustro served Progress with a Notice to Negotiate dated September 21, 2011. The effective dates for the Leases are set out in Table 1 above, and the parties do not dispute these dates.

[14] When conducting a rent review, the Board on numerous occasions has indicated that an award for annual compensation would necessarily have to be based on evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified (*Arc Petroleum Inc. v. Piper*, MAB Order 1598-2, December 5, 2008; *McDonald v. Penn West Petroleum Ltd.*, SRB Order 1742-1, November 21, 2012).

[15] As stated above, the Court in its Decision concluded that the onus was on Mr. Salustro to establish his ongoing prospective losses and to establish that any increase is warranted. It also concluded that it was not reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the

future, and that because no farming was actually taking place, there can be no tangible impacts.

[16] I am, of course, bound by the Decision, and since the reconsideration is on the record, there is no further evidence to consider.

[17] In his submissions on the reconsideration, Mr. Salustro argues that his evidence at the initial Board hearing included the “history of his acquisition of the lands by way of agriculture leases from the Crown and his subsequent investment to develop the lands, in accordance with the lease requirements, leading to the issuance of Crown Grants. Given the nature of his development in the form of cultivated land . . . it would be unreasonable to conclude that he would simply abandon his investment and let the land revert to its native state of brush and trees.” He also refers to Mr. Telford’s evidence that the “Lands do not appear to have been used recently for agriculture, although they retain the ability to produce forage crops if the owner chooses to do so.” He submits that he “gave no evidence that agricultural use of the lands was abandoned” and that the Lands “remain available for cropping.”

[18] Progress objects to this argument. It says “the Board is not tasked with finding rationality in a given landowner’s chosen use of their property (i.e. consideration of the potential “abandon[ment]” of an “investment”). It is the “reasonably probabl[e] and foreseeable use of the lands”, as borne out by the evidence, that guides the Board’s analysis, not any assessment of the reasonableness of those actions.”

[19] The Court, at para. 85, said “the parcels making up the property are “good lands” with ALR qualification and they are centrally located. However, that speaks to the potential rather than the foreseeability of farming. . . . whether farming is reasonably probable and foreseeable must surely be an objective test. The subjective intention of a landowner is a relevant factor but other evidence is required.”

[20] Unfortunately, Mr. Salustro has not pointed me to any “other evidence,” and I am otherwise bound by the Decision.

[21] On the reconsideration, Progress submits that where the landowner fails to meet the burden of establishing ongoing prospective losses and present a quantifiable claim to the Board, the Board may order that annual compensation should not change. It refers to the following passage from the Board’s decision in *Velander v. Imperial Oil Resources Limited*, SRB Order No. 1726-2 (December 11, 2012), at para 42:

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. . . . 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. . . .

[22] Progress submits the same reasoning was applied in *Encana Corporation v. Piper and Dowd*, SRB Order No. 1803/1810-2, August 25, 2014 ("*Piper*").

[23] However, the Court, at para. 115, said that the Board may reconsider "[t]he issue of a global amount of compensation . . . if it decides it is appropriate in light of any reasonably probable and foreseeable use of the property and any tangible impacts."

[24] To this, Progress submits that the evidence of Mr. Salustro and Progress in the arbitration hearing was based on the fundamental assumption that hay was being grown on the Lands, but that the Court has overturned this assumption with the result that there is no credible evidence remaining on the record with respect to Mr. Salustro's actual use of the Lands or any tangible impacts arising from such use. Therefore, Progress submits that Mr. Salustro cannot satisfy the burden of demonstrating a basis for annual compensation, and in keeping with the authority of *Velandar* and *Piper*, Mr. Salustro's application for an increase in compensation should be dismissed, and the current rentals confirmed.

[25] In light of the Decision, I have no option but to dismiss Mr. Salustro's application for an increase in compensation and confirm the current rentals for the Leases, subject only to the adjustment pursuant to Section 154(2) discussed below.

Section 154(2) – Change in value of money and of land

[26] Subsection 154(2) of the Act requires the Board to consider "any change in the value of money and of land since the date the surface lease or order was originally or last granted."

Change in value of money:

[27] Neither the Court nor Progress objects to the Board applying the CPI factor as the best indicator in determining the change in value of money from the time the Leases were last reviewed (2006/2007) to the effective date (2010/2011). Mr. Telford's evidence indicates an increase of 5.27% to 7.78% for the Leases. Applying these rates to the reconsidered annual compensation indicates the following change in value of money:

Table 2

1	2	3	4	5	6
Lease Ref. No.	Lease Date	Effective Date	Annual % Change	Reconsidered Annual Compensation under S.154(1)	Change in Value of Money under S.154(2)
1.	Sept. 8, 2006	Sept. 8, 2011	7.78	\$3,500.00	\$3,773.00
2.	Dec. 13, 2006	Dec. 13, 2010	5.27	\$3,300.00	\$3,475.00
3.	Dec. 13, 2006	Dec. 13, 2010	5.27	\$2,700.00	\$2,842.00
4.	Mar. 26, 2007	Mar. 26, 2011	5.91	\$250.00	\$265.00
5.	Jun. 30, 2007	Jun. 30, 2011	5.91	\$1,000.00	\$1,059.00

Change in value of land:

[28] There is no evidence to support any award based on this factor.

CONCLUSION

[29] Based on the Court Order, the Reasons for Judgement, and the parties' submissions on the reconsideration, I have determined that the annual compensation that Progress must pay to Mr. Salustro with respect to each of the Leases is as shown in Column 6 of Table 2 above.

ORDER

[30] The Surface Rights Board orders that the rental provisions under the Leases are amended to provide those amounts, effective those dates, as the annual compensation payable to Mr. Salustro as shown in Column 6 of Table 2 above. Progress shall forthwith pay to Mr. Salustro any difference in annual compensation paid since the effective dates and the reconsidered annual compensation as of the effective dates.

DATED: December 23, 2014.

FOR THE BOARD



Valli Chettiar, Member and Arbitrator