File Nos. 1848 and 1855
Board Order No. 1848/1855-2

December 1, 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
THE NORTH WEST ¼ OF SECTION 27 TOWNSHIP 81 RANGE 14
WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

Venturion Oil Limited

(APPLICANT)

AND:

Roy Ralph Juell

(RESPONDENT)

BOARD ORDER

Heard: October 28, 2015 in Dawson Creek
Appearances: Rick Williams, Barrister and Solicitor, for Venturion Oil Limited
Darryl Carter, Q.C., Barrister and Solicitor, for Roy Ralph Juell

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INTRODUCTION

[1] In 1979, William Ralph Shearer entered a surface lease with Gulf Resources Inc. (Gulf) granting Gulf the right to use and occupy a portion of Lands then owned by him for various purposes (the Surface Lease). In accordance with the Surface Lease, Gulf drilled a well. The well was not productive and was never operated as an oil or gas well.

[2] In 1980, Roy Ralph Juell purchased the Lands from William Shearer. Mr. Juell and Mr. Shearer entered an agreement that all rents and compensation payable under the Surface Lease would be reserved to Mr. Shearer (the Assignment of Rents Agreement). Mr. Shearer passed away in 2013; payment of rent under the Surface Lease continues to be made to Mr. Shearer's estate (the Estate).

[3] Over the years, the Surface Lease was transferred to various operators and in 2014 was acquired by Venturion Oil Limited (Venturion). In October 2014, Venturion notified Mr. Juell of its intent to re-purpose the existing well on the lease site to a water source well and to drill a horizontal water injection well at the existing well site. Venturion says the Surface Lease gives it the right to enter and use the leased area to re-purpose the original well and to drill the new water injection well. The Oil and Gas Commission (OGC) has granted Venturion a permit for the proposed project.

[4] In January 2015, Venturion applied to the Board for a right of entry order to Mr. Juell's Lands to construct an access road to the existing well site (file 1848). The Board granted the right of entry order on April 21, 2015 and made an order for partial compensation (Order 1848-1). Venturion and Mr. Juell have been unable to agree on

the compensation payable to Mr. Juell arising from Venturion's use and occupation of his Lands to construct and operate the access road.

[5] In April 2015, Mr. Juell applied to the Board pursuant to section 164(1)(b) of the *Petroleum and Natural Gas Act* asking the Board to amend the Surface Lease on the basis that the oil and gas activity approved by the OGC on the Lands subject to the Surface Lease is substantially different from the oil and gas activity that was proposed during the negotiation of the Surface Lease (file 1855). Mr. Juell asks the Board to amend the Surface Lease "to make it clear that it did not cover using any of the land for a water source well or for the drilling of a new horizontal water injection well".

[6] The Board provided the Estate with notice of Mr. Juell's section 164 application and advised of its ability to apply to participate. The Board did not receive an application from the Estate to be joined as a party or intervener to these proceedings.

ISSUES

[7] The applications raise two issues:

I. What is the appropriate compensation payable by Venturion to Mr. Juell arising from its right of entry to the Lands to construct and operate the access road?

II. Is Venturion's proposed oil and gas activity on the Lands "substantially different" from the oil and gas activity that was proposed during the negotiation of the Surface Lease, and if so, should the Board amend the Surface Lease "to make it clear that it did not cover using any of the land for a water source well or for the drilling of a new horizontal water injection well"?

FACTS

[8] Venturion is a company incorporated pursuant to the laws of the Province of Alberta, and extraprovincially registered in British Columbia. Venturion carries on business in northeastern British Columbia and other places.

[9] Roy Ralph Juell is the fee simple owner of the Lands described as: The Northwest ¼ of Section 27, Township 81, Range 14, West of the 6th Meridian, Peace River District (the Lands). Mr. Juell purchased the Lands in March 1980 from William Ralph Shearer.

[10] The Lands are located approximately 35 miles northeast of Dawson Creek as the crow flies. They are designated A-2 (large Agricultural Holdings Zone) under the Peace River Regional District Zoning Bylaw, and are entirely within the Agricultural Land Reserve.

[11] On May 23, 1979, Mr. Shearer entered into the Surface Lease with Gulf for an access road, campsite, and wellsite on the Lands. The leased area comprises 6.45 acres in total. The Surface Lease authorizes:

> "use by the Lessee in mining operating for and producing oil, gas, casinghead gasoline and other hydrocarbons, drilling wells, laying pipelines, storing oil, erecting tanks, telephone, telegraph and power lines, building power stations and other structures thereon to produce, save, treat and take care of such substances…"

[12] The access road covered by the Surface Lease was never constructed as a permanent roadway. Gulf drilled a well on the wellsite, but it was never put into production. The well then sat for between 30 to 40 years and Mr. Juell was never approached by anyone about what to do with it.

[13] When Mr. Juell entered the Assignment of Rents Agreement, he did not anticipate that the well would sit for so long without being “put to bed” or that the operator would continue to pay rent for so many years for a well that was not producing.

[14] Venturion acquired various oil and gas assets, including the Surface Lease in 2014. Venturion acquired the assets with the intent to undertake a water flood to facilitate increased oil production and recovery from oil wells in the Mica Boundary Lake “A” Pool.

[15] Venturion provided Mr. Juell with an Invitation to Consult as required by regulation, advising of its intent to repurpose the existing well to be used as a water source well and to drill a horizontal water injection well on the wellsite. In discussions with Venturion’s land agent, Mr. Juell asked that the wellsite be accessed from the north off an existing road operated by Terra Energy instead of by the access road authorized by the Surface Lease. Venturion agreed to the proposed alternate access.

[16] On April 21, 2015, the Board issued a right of entry order granting Venturion the right to enter .89 acres of the Lands to construct and operate an access road in the location requested by Mr. Juell and ordered Venturion to pay Mr. Juell partial compensation of $3,300.

[17] The proposed access road will cross cultivated areas of the Lands. It is proposed to be a low profile roadway that allows equipment to cross over it with relative ease.

[18] The Lands are cultivated by Mr. Juell’s son, Dale Juell, who rents the Lands from his father on the basis of a verbal lease. Mr. Dale Juell does not remember the last time he paid his father to rent the Lands. Mr. Dale Juell rotates crops of canola, barley and wheat. He has farmed the access area under the Surface Lease since 1988 and farms all but about 2 acres of the wellsite area. He farms the field in all directions, never farming in the same direction two years in a row.

EVIDENCE AND ANALYSIS

I. What is the appropriate compensation payable by Venturion to Mr. Juell arising from its right of entry to the Lands to construct and operate the access road?

Evidence

[19] Jeremy Wasmuth, AACI, provided an appraisal report estimating the market value of the fee simple interest in the Lands on a per acre basis at $1,675.00 per acre. He agreed that this estimate reflects the probable market value on a per acre basis of the whole of the quarter section as if the whole quarter section were put on the market; it is not an opinion of market value for the .89 acres covered by the Board's entry order.

[20] Trevor Sheehan, Prof. Ag., provided an opinion that the right of entry will cause annual losses for crop loss and farming interruption of $622.00. This estimate is based on a number of assumptions favourable to the landowner and includes loss arising from areas severed by the right of entry and not just the .89 acres for the access road itself. He agreed that this estimate quantified tangible losses such as crop loss and other losses attributed to farming around the access road, but that the estimate did not attempt to quantify any intangible loss arising from the right of entry.

[21] Mr. Juell provided evidence of an agreement between him and Husky Oil Operations Limited (Husky Oil) respecting right of entry to the Lands for a 4.28 acre site comprised of a well site area of 4.18 acres and access of .10 acres, and compensation payable for the entry. The parties agreed to $12,000.00 for initial compensation and annual rent of $4,200.00. (Board Order 1766-1, July 27, 2012).

[22] Mr. Juell's evidence was that "all around us they get $1,000 an acre for rent". This evidence is not substantiated with any actual agreements.

[23] Mr. Juell did not provide evidence of specific tangible or intangible impacts to him or to the land arising from the right of entry.

Submissions

[24] Mr. Williams, on behalf of Venturion, submits the appropriate compensation for the .89 acre entry for the access road is $2,150.00 for initial compensation and $750.00 for annual rent. The initial compensation is a rounding up of .89 acre x $1,675/acre + $622.

[25] Mr. Carter, on Mr. Juell's behalf, submits appropriate annual rent for the access road is $1,500.00. He seeks an initial payment of $4,500.00 for the loss of rights associated with the right of entry.

Legal Framework

[26] Section 143(2) of the *Petroleum and Natural Gas Act* provides that a right holder is liable to pay compensation to the landowner "for loss or damage caused by the right of entry".

[27] Section 154(1) of the *Petroleum and Natural Gas Act* lists various factors the Board may consider in determining the compensation to be paid to a landowner. They are:

(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.

[28] Not all of these factors will be relevant in every case. There are no factors or criteria established by regulation.

[29] The Board has previously articulated a number of settled principles relating to compensation for entry under the *Petroleum and Natural Gas Act* that it has found to be binding upon it (*ARC Petroleum Inc. v. Piper*, Order 1589-2, December 5, 2008 and *Spectra Energy Midstream Corporation v. London*, Order 1694-3, February 24, 2015). A landowner is entitled to compensation for the loss sustained and not for more than the loss sustained. The Board exceeds its jurisdiction if it awards an amount of compensation in excess of the loss sustained (*Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458).

Analysis

[30] Mr. Carter submits that the compensation being sought by Mr. Juell is for the loss of his rights. There is no question that Mr. Juell is entitled to be compensated for the loss of rights arising from Venturion's right of entry to a small portion of the Lands. As Justice Berger said in *Dome Petroleum v. Juell* [1982] B.C.J. No. 1510 (BCSC) the landowner loses the right "to decide for himself whether or not he wants to see oil and gas exploration and production carried out on his land". Mr. Carter submits that in the case of a partial taking "no amount of money" allows landowners to replace what they have lost. Nevertheless, the challenge for the Board is to place a monetary value on that loss where the parties have been unable to agree.

[31] That challenge is not new. Courts and tribunals have struggled with this task for many years. Neither party's approach in this case is novel. Relying on *Western Clay*, Mr. Williams argues that awarding Mr. Juell compensation equivalent to the per acre value of the Lands fully compensates for his loss of rights. Mr. Carter argues, as he did

in *Spectra v. London*, that *Western Clay* is distinguishable on the basis that it involved the taking of a whole parcel of land.

[32] In this case, Venturion is not taking the whole quarter section and there is no suggestion that Mr. Juell should be compensated for the value of the whole quarter section. Mr. Juell is being required to share a small portion of the quarter section with Venturion. By analogy, Mr. Carter argues Mr. Juell is being required to share one room of his house with Venturion. He argues that fair compensation for his loss of rights to that room and his loss of quiet enjoyment with respect to the whole house does not equate to the room's value as a proportion of the value of the whole house.

[33] Mr. Carter's "room in a house" analogy is best articulated by Justice Miller of the Alberta Court of Queen's Bench in the 1985 decision in *Dome Petroleum Ltd. v. Richards et al* (1985) 34 L.C.R. 1 at page 59-60 as follows:

> Let us say you own a large house. Someone, who you do not care for very much, has acquired the legal right to lease from you a corner bedroom which he intends to use for a purpose that does not excite you and involves some extensive renovations to the room which may or may not adversely affect your enjoyment of the use of the rest of the house. You have reasonable grounds to believe that the lessee will periodically create noise and dirt in the bedroom and that unpleasant smells may emanate from the room. You are concerned that the overall security, safety and cleanliness of your house may be affected. There is no separate outside entrance to this bedroom, so in addition, the lessee needs to come through some other part of your house to access the bedroom. An expert in residential property comes along and tells you that, according to comparable sales in your neighbourhood, your house property is worth a total of $100,000 and, as the bedroom and access hallway only involves 3% of the total area of your house, you should be happy to receive a payment of $3,000 plus a few thousand dollars extra in the first year of occupancy to compensate for the noise, upset and dirt caused by the renovations and considerably less rental each year thereafter for an indefinite period of time.

[34] This analogy assists with an understanding of landowners' concerns with a right of entry for oil and gas purposes. Proponents of this approach argue, as Justice Miller points out and as Mr. Carter submits "that it is not just the loss of the bedroom or access

hallway that is the total problem, it is also the periphery matters which could be of even greater concern to the owner making compensation based on a percentage of total value meaningless."

[35] While the analogy is useful to illustrate the problem and to understand the tangible and intangible losses sustained by the landowner, it does little to assist with the task at hand which is to place a monetary value on that loss. Further, it actually ignores an important distinction with an entry for oil and gas activity or otherwise for the development of subsurface resources. When you buy a house, the government does not maintain the right to conduct activity within your house or to create a situation where a person can become an involuntary tenant in your house. When one thinks of having to involuntarily share a room in one's home, the reaction is understandably strong and negative. Landowners, however, do not own the resources beneath their land (unless the rights to subsurface resources were transferred with the original Crown grant). Those rights are retained by the Crown and a landowner's rights are and always have been subject to those rights retained by the Crown. When land is purchased in fee simple it is purchased subject to the rights retained by the Crown including the right to explore for and develop subsurface resources owned by the Crown. A landowner's rights with respect to the land are further impacted by legislation allowing entry for oil and gas activities including activities not necessarily associated with ownership of the subsurface resource.

[36] Despite Justice Berger's comments in *Dome v. Juell*, arguably landowners never have had the right to decide for themselves whether to allow oil and gas exploration on their land and consequently do not lose that right when entry to their land is made for that purpose. They enjoy the right to quiet enjoyment of their land only until a right holder under the *Petroleum and Natural Gas Act* requires entry to their land for an authorized purpose and the *Petroleum and Natural Gas Act* requires that owners be compensated "for loss or damage caused by the right of entry" (section 143(2)). In listing "the compulsory aspect of the right of entry" as one of the factors the Board may consider in determining the compensation payable, the Act acknowledges that the right

of entry is compulsory and that a landowner cannot say “no”. Unlike when you own a house and can control who you share that house with, land ownership does not include the right to refuse to share the surface of your land if it is required for oil and gas activities. Purchasers of land in northeastern BC know or ought to know that they may have to share the surface of their lands if the government disposes of the rights to develop the sub-surface resources to an oil or gas company or where an oil or gas company requires access to the land for an oil and gas activity. The landowner is, nevertheless, entitled to be compensated for loss or damage caused by the right of entry.

[37] In the particular circumstances of this case, the house analogy is even less helpful. Mr. Juell purchased the Lands with the Surface Lease in place. Applying the house analogy, he purchased the “house” knowing someone was already “renting the bedroom”. Further he agreed that the person renting the bedroom could continue to pay rent to the former owner. When the person renting the bedroom advised of its intention to come into the bedroom to construct additional renovations, he asked the person to use an alternate entrance than the one already leased. The person agreed. Mr. Juell now loses the use of the alternate entrance and will be impacted by the person’s use of the alternate entrance. But Mr. Juell already rents the “house” to his son, so it is his son and not he who will lose the use of the alternate entrance. The challenge remains how to quantify Mr. Juell’s loss.

[38] In *Dome v. Richards* Justice Miller finds that area agreements negotiated between several surface rights groups in the Grand Prairie and Peace River districts with several oil companies were the product of arm’s length negotiation and were, in the circumstances of that case, “the best evidence available in that area to determine the value of the ‘taking’ to both sides.” The area agreements covered all of the factors required to be considered by Alberta legislation.

[39] Mr. Carter argues in this case that the best evidence of the value of the taking is the value freely negotiated and agreed between landowners and companies. For this

purpose, he refers me to Mr. Juell's agreement with Husky Oil. However, Mr. Juell's agreement with Husky Oil is not an "area agreement" like those referred to in *Dome v. Richards*. Nor does it provide evidence of a "pattern of dealings" as discussed by the Alberta Court of Appeal in *Siebens Oil & Gas Limited v. Livingston* (1978), 15 L.C.R. 32 and other cases since then. I have no evidence of the particulars of the negotiation between Mr. Juell and Husky Oil or the considerations and motivations of the parties that led to the agreement. Certainly, it is some evidence of the value Mr. Juell places on his loss with respect to that particular entry, but it falls far short of establishing a pattern between willing sellers and willing buyers in arriving at appropriate compensation for loss in similar circumstances. I do not disagree that the Board could place great weight on evidence of voluntary agreements between landowners and companies in an area establishing a pattern of compensation for the loss of rights, but one agreement does not establish a pattern.

[40] In any event, the Husky Oil agreement is not comparable to the entry in this case. Although it is with respect to a portion of the same Lands it is for a much larger area. On a per acre basis, the agreement with Husky Oil reflects initial compensation of $2,804 per acre and annual rent of $981 per acre. The requested compensation expressed on a per acre basis reflects initial compensation in excess of $5,050 per acre and annual rent of $1,685 per acre. The Husky Oil agreement does not support the compensation requested for this entry.

[41] The Board cannot make bricks out of straw. Nor can it make law that is inconsistent with existing case authority binding upon it. Where there is no evidence of "area agreements" having been negotiated, or evidence of a clear "pattern" having emerged in an area, all the Board can fall back on are the considerations set out in the *Petroleum and Natural Gas Act* and the evidence before it relevant to those considerations, together with the principles articulated by Courts.

[42] With respect to Mr. Carter's argument that *Western Clay* can be distinguished on the basis that the entry in that case was over an entire parcel of land, I agree that

Western Clay does not stand for the principle that in a partial taking an award equivalent to the per acre value of the whole parcel multiplied by the acres taken necessarily fully compensates a landowner for his loss. The Board has never applied *Western Clay* in that manner. Including in an award an amount calculated on the per acre market value of the land is intended to provide compensation for the value of the land and the compulsory aspect of the taking. It does not preclude additional compensation for loss of profit, nuisance and disturbance or other tangible or intangible losses where appropriate. Using the per acre value of the whole parcel provides an objective benchmark to compensate for the value of the land and the compulsory aspect of the taking, but in the context of a partial taking it may not compensate for the nuisance, disturbance, inconvenience and discomfort associated with being required to share a portion of land. Nor does it compensate for any loss of profit arising from loss of use of the land that is subject to the right of entry or otherwise as a result of the right of entry.

[43] It remains for me to consider the factors set out in the *Petroleum and Natural Gas Act* and the evidence before me with respect to those factors.

[44] I have Mr. Wasmuth's appraisal estimating the market value of the fee simple interest in the whole of the Lands at $1,675 per acre. Mr. Carter argues that the per acre value of the whole quarter section is not a fair indicator of the value of the relatively small parcel taken. I have not been provided with any alternative appraisal evidence, however, to assist with valuing the small parcel. In *Dome v. Juell, supra*, the BC Supreme Court held that the Board was in error in awarding an arbitrary allowance to recognize that a small parcel was being taken. The Court accepted the principle set out in *Cochin Pipe Lines v. Rattray* (1980), 22 L.C.R. 198 that where a per acre value can be established for a parcel out of which a right of entry is granted, it is appropriate to accept that per acre value as being the top of the range of value as of the date of the taking, and to compensate the landowner for the land taken on that basis subject to any set off for the value of any residual or reversionary interest. I have no evidence with which to calculate Mr. Juell's residual or reversionary interest in this case.

[45] With respect to loss of profit, I have Mr. Sheehan's evidence estimating crop loss from the lease area and severed areas. Mr. Juell did not provide any alternate evidence with which to estimate any loss of profit arising from the right of entry.

[46] Mr. Sheehan acknowledged that his estimate does not attempt to value intangible losses. I have no evidence of the anticipated nuisance and disturbance to Mr. Juell arising from the right of entry, although I accept there likely will be some.

[47] Venturion submits the appropriate compensation for the .89 acre entry for the access road is $2,150 for initial compensation and $750 for annual rent. The initial compensation is a rounding up of .89 acre x $1,675/acre + $622. Mr. Williams says the proposed annual rent of $750 is intended to acknowledge that Mr. Juell may spend time dealing with the company, although the allowance above $622 is not based on any evidence.

[48] The right of entry is for an access road and is a relatively small area. Other than to argue he has lost rights as a result of the entry, Mr. Juell has not provided any evidence as to how he or the Lands will be affected by this entry, or of any particular impact to him or to the Lands. The evidence he has provided does not establish that there is a pattern of dealings or accepted area rates that the Board should give weight to.

[49] In the absence of evidence with which to quantify Mr. Juell's loss caused by the right of entry for the access road, I accept Venturion's proposed compensation as appropriate.

II. Is Venturion's proposed oil and gas activity on the Lands "substantially different" from the oil and gas activity that was proposed during the negotiation of the Surface Lease, and if so, should the Board amend the Surface Lease "to make it clear that it did not cover using any of the land for a water source well or for the drilling of a new horizontal water injection well"?

Purpose of Section 164

[50] Section 164(1)(b) of the *Petroleum and Natural Gas Act* provides that a party to a surface lease may apply to the Board for mediation and arbitration in respect of

> a disagreement respecting whether the surface lease should be amended based on a claim by a party that the oil and gas activity or related activity as approved by the commission on the land that is subject to the surface lease is substantially different from the oil and gas activity or related activity that was proposed during the negotiation of the surface lease.

[51] Section 164(3) allows the Board to make an order amending the terms of a surface lease in an application under section 164(1)(b).

[52] In interpreting and applying section 164, the Board must apply the modern approach to statutory interpretation, namely to read the words of the legislation "in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Bell ExpressVu Limited Partnership* v. Rex, 2002 SCC 42).

[53] A surface lease is a contractual agreement between two parties, yet the legislation gives the Board the authority to amend the terms of that agreement. In exercising its authority to amend contractually agreed terms, the Board must be satisfied that an approved oil and gas activity is substantially different from the oil and gas activity proposed during negotiation of the surface lease. The first question is whether the Board can look beyond the terms of the agreement to determine what was proposed during its negotiation.

[54] Venturion argues that it is a fundamental principle of contract law that the intention of the parties to an agreement must be discerned from the words of the agreement itself, and that extrinsic evidence is not admissible to show the parties' intent. It argues that if the words of the agreement permit the activity, that must be what the parties intended. Whether entry for a permitted activity is authorized by the terms of the Surface Lease is not the point of section 164. The point of section 164 is to enable the Board to amend a surface lease if a permitted activity is substantially different from that proposed during the negotiation of the surface lease, regardless of what activity the agreement authorizes. In giving the Board the authority to amend what would otherwise be a binding contract, the legislation implies that the ordinary rules of contract interpretation may not apply. Section 164 must allow the Board to go beyond the words of the agreement itself to consider evidence of what was proposed during the negotiation of the surface lease regardless of whether the terms of the agreement reflect otherwise.

[55] If the permitted oil and gas activity is not authorized by the words of the grant, there would be no need for section 164. The surface lease would simply not authorize the activity. If the holder of a permit wished to enter private land to engage in the permitted oil and gas activity, it would need to either negotiate another surface lease or obtain an order of the Board. Section 164, in offering a remedy that amends the terms of a surface lease, must assume that the permitted activity may be authorized by the grant in the surface lease, but that the other negotiated terms in the surface lease may not have contemplated the impact of the permitted activity because the activity is substantially different from the activity originally proposed. Although entry for the activity may be authorized by the agreement, the Board may nevertheless amend the terms of the agreement if it is satisfied that a permitted activity is significantly different than the activity proposed during negotiation in order to address or compensate for that difference in impact.

[56] It is not unusual, particularly with older surface leases, that the terms of the grant are so broad as to allow for many activities other than the specific activity that was

proposed when the surface lease was negotiated and for which entry to private land was originally required. The Surface Lease in issue in this case is no exception.

[57] Mr. McCormick is the Vice President of Land with Venturion and has worked in the oil and gas industry since 1975. He worked for Gulf from 1975 to 1978 and signed many leases similar to the Surface Lease. Mr. McCormick's evidence was that he negotiated surface leases where water floods would be carried out using the same grant as appears in the Surface Lease. The grant is broadly worded and allows virtually any activity for the purpose of producing oil, gas or other hydrocarbons including activities such as pipelines, telegraph, telephone and power lines that could not have been proposed during the negotiation of the surface lease because the configuration of the land acquired by the surface lease is not amenable to that type of activity requiring a lineal right of way. But just because the terms of the grant authorize entry for an activity does not necessarily mean that the activity was proposed or contemplated by the parties or that the rest of the terms of the agreement adequately address the impact of the activity if, indeed, it was not proposed or contemplated.

[58] Section 164 serves a remedial purpose. Amending the terms of an agreement must be to provide a remedy where the terms although agreed are found later to be inadequate to meet the expectations of the parties. For example, if the parties to a surface lease negotiated terms including terms for the payment of compensation based on their expectations of the impact of a proposed activity, and the activity permitted by the OGC is substantially different, it is open to the Board to amend the agreed terms of the surface lease, including potentially any agreement respecting compensation, because the permitted activity and its impact is substantially different than originally contemplated, even where the surface lease itself may authorize entry for the activity. To ensure this remedial purpose is met, Section 164 must allow the Board to consider extrinsic evidence beyond the terms of the surface lease itself to determine if the permitted oil and gas activity is substantially different from the oil and gas activity proposed during the negotiation of the surface lease.

Is Venturion's proposed oil and gas activity substantially different from the oil and gas activity that was proposed during negotiation of the Surface Lease?

[59] I have no evidence from the original signatories to the Surface Lease as to what was proposed during its negotiation, those parties being either deceased or otherwise not available.

[60] Mr. McCormick's evidence was that while water floods were in use as a method of oil production in 1979 when the Surface Lease was signed, the technology did not exist for a horizontal water injection well. A horizontal water injection well, therefore, could not have been proposed during the negotiation of the Surface Lease.

[61] Mr. Juell helped drill the existing well. He understood it to be a gas well. His evidence was that when they finished drilling it "not a drop of anything but a little bit of natural gas" came out. He said there was "not a drop of oil". Mr. McCormick's evidence was that the well was drilled as a potential oil well.

[62] I find it more likely than not, that the oil and gas activity proposed during negotiation of the Surface Lease was an oil well. I find it is likely that a water source well was not proposed during the negotiation of the Surface Lease on the basis that a water source well was not originally constructed, nor was any effort made by Gulf to convert the originally constructed well into a water source well.

[63] While both a water source well and a water injection well are authorized by the broad terms of the grant in the Surface Lease authorizing use of the Lands for producing oil or gas or other hydrocarbons, the drilling of wells (plural), and the building of any structures to produce, save, treat or take care of hydrocarbons, that their use is authorized does not mean that the Board cannot amend the terms of the Surface Lease if it is satisfied that a currently permitted oil and gas activity is substantially different than originally contemplated.

[64] What does “substantially different” mean and is the permitted activity “substantially different”? Venturion submits it has to be a different oil and gas activity altogether, for example a pipeline instead of a well. As the permitted activity is a well, although for a different purpose than the well originally drilled, Venturion argues it is not “substantially different”. For section 164 to serve a remedial purpose, however, it must be to address that the impact of a permitted activity is substantially different than initially contemplated (*Spectra v London, supra*).

[65] Mr. McCormick’s evidence was that repurposing of the existing well to a water source well will require a service rig to come onto the leased area for two to three days. Beyond that, I have no evidence of how often Venturion personnel or its contractors will have to attend the site to check on, service, or operate the water source well, or with respect to the impact of those activities on the Lands or the landowner. As I am satisfied that the oil and gas activity proposed during the negotiation of the Surface Lease was to drill a single oil well, repurposing that well necessarily involves some additional impact to the land and the landowner.

[66] Mr. McCormick’s evidence was that it will take anywhere from 12 to 30 days to construct the horizontal injection well. Again, I have no evidence as to how often Venturion personnel or its contractors will have to attend the site to check on, service, or operate the water injection well or with respect to the impact of those activities on the Lands or the landowner. The presence of a drilling rig on site for up to 30 days however, is not insignificant, and it is likely for that reason that most modern surface leases expressly provide for additional compensation for each well that is drilled.

[67] I am satisfied, on the balance of probabilities that the permitted activity was not proposed during the negotiation of the Surface Lease and that it is “substantially different” from the activity that likely was proposed, namely the drilling of a single oil well.

Should the Board amend the Surface Lease "to make it clear that it did not cover using any of the land for a water source well or for the drilling of a new horizontal water injection well"?

[68] The purpose of section 164 is remedial to provide a remedy when negotiated terms do not address the impact of a permitted oil and gas activity because the activity is substantially different than originally proposed and the impact could not have been contemplated.

[69] The Surface Lease authorizes the drilling of more than one well as is evident by the use of the words "drilling wells". It is not specific to the type of well, but from the entire context of the grant the wells must be for the purpose of producing oil or gas or other hydrocarbons or for building structures to produce, save, treat and take care of such substances. The water source well and the water injection well are for the purpose of producing oil and are, therefore, within the scope of the grant in the Surface Lease. An option for the Board would be to amend the terms of the Surface Lease respecting the compensation payable to address the change in impact to the land and the landowner as a result of the permitted activity. This option was not canvassed at the hearing and neither party has had the opportunity to address it. In any event, in the circumstances of this case, such an amendment would not serve the intended remedial purpose of the legislation as the landowner has assigned the rental payments to another party and therefore, would not benefit from an amendment to those terms.

[70] Mr. Williams argued that Mr. Juell would likewise not benefit from the requested amendment to the terms of the grant itself, as he says Venturion will be required to renegotiate terms of entry with the Estate as a result of the Assignment of Rents which provides at clause 4 that: "Nothing in this agreement contained shall be construed so as to give to the Purchaser any right, title or interest in the said lease, any renewals or modifications thereof."

[71] However, if the Board amends the term of the grant itself to expressly provide that it does not cover using any of the Lands for a water source well or a water injection well, if Venturion requires access to the Lands for that purpose, it will need to either negotiate a surface lease with Mr. Juell or obtain a right of entry order from the Board. Section 142 of the *Petroleum and Natural Gas Act* provides that

> a person may not enter, occupy or use land
> (a) to carry out an oil and gas activity…
> unless the entry, occupation or use is authorized under
> (d) a surface lease with the landowner in the form prescribed…or
> (e) an order of the board.

[72] The "landowner" is "the owner of the land that is subject to a right of entry or a proposed right of entry" and "owner, in relation to land means…a person registered in the land title office as the registered owner of the land…" (section 141(1)). Mr. Juell is the registered owner of the Lands, not the Estate.

[73] As I am satisfied that the permitted activity was not proposed when the Surface Lease was negotiated, then it follows that the terms of the Surface Lease did not contemplate that activity and, likewise, that the Assignment of Rents Agreement did not contemplate that use of the Lands or the impact of that use could change. It would be contrary to the intent of the *Petroleum and Natural Gas Act* for the Estate to require renegotiation of the Surface Lease. It is Mr. Juell who is the owner of the Lands and it is Mr. Juell who will be affected by any change to Venturion's use of the Lands. Mr. Williams submits there cannot be a surface lease on top of another surface lease. I make no comment on that submission, but the *Petroleum and Natural Gas Act* authorizes the Board to amend the terms of the current Surface Lease in the present circumstances and requires that Venturion will either need the landowner's agreement or an order of the Board to enter the Lands for the permitted activity, and requires the right holder to pay compensation to the landowner for loss or damage caused by the right of entry. I fail to see why the Board could not issue an entry order over the same area covered by a surface lease but for a different purpose if it is satisfied that entry is

required and at the same time address the loss and impact to the current landowner as a result of the entry. Amending the lease as requested is the only way, in the circumstances of this case, to ensure that the remedial intent of section 164 can be given effect.

[74] I find the lease should be amended to make it clear that it does not cover using any of the Lands for a water source well or for a horizontal water injection well.

CONCLUSION

[75] I find initial compensation of $2,150.00 and annual rent thereafter of $750.00 is appropriate to compensate Mr. Juell for his loss arising from the .89 acre right of entry for the access road.

[76] I find it is likely that the permitted oil and gas activity, namely the water source well and the horizontal water injection well, were not proposed during negotiation of the Surface Lease and that those activities are substantially different from the activity that likely was proposed. I find the Surface Lease should be amended to make it clear that it does not cover using any of the Lands for a water source well or for a horizontal water injection well.

ORDER

[77] Venturion Oil Limited shall pay Roy Ralph Juell $2,150.00 as initial compensation for its right of entry to the Lands for an access road, and shall pay annual compensation of $750.00 commencing April 21, 2016. Venturion may apply any compensation paid as partial compensation pursuant to Board Order 1848-1 against future rent in satisfaction of this order.

[78] The Surface Lease dated May 23, 1979 between William Ralph Shearer and Gulf Canada Resources Inc. is amended in the granting clause as follows:

THE LESSOR DOTH HEREBY LEASE to the Lessee all and singular that part or portion of the said lands shown outlined in red on the sketch or plan hereto annexed and marked Exhibit “A” (hereinafter called “the leased lands”), to be held by the Lessee as tenant for the term of twenty-five (25) years from the date hereof for use by the Lessee in mining, operating for , and producing oil, gas, casinghead gas, casinghead gasoline and other hydrocarbons, drilling wells, laying pipe lines, storing oil, erecting tanks, telephone, telegraph and power lines, building power stations and other structures thereon to produce, save, treat and take care of such substances, **but not including use of the leased lands for a water source well or for a horizontal water injection well** at a clear rental of:…

DATED: December 1, 2015

FOR THE BOARD

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Cheryl Vickers, Chair