

File Nos. 1848 and 1855
Board Order No. 1848-1855-3

April 27, 2016

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 $\frac{1}{4}$ 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: By written submissions dated April 6, 2016 and April 13, 2016
from Venturion Oil Limited and April 8, 2016 from Roy Ralph
Juell

INTRODUCTION

[1] On December 1, 2015, the Board issued Order 1848/1855-2 determining compensation for Venturion Oil Limited's ("Venturion") right of entry to the lands in question for an access road. In addition, the Board also determined that the existing 1979 surface lease between William Ralph Shearer and Gulf Canada Resources Inc. as assigned (the "Surface Lease") be amended under section 164 of the *Petroleum and Natural Gas Act* (the "Act") to ensure that the use of the lands for an existing well site did not include use for a water source well or for a horizontal water injection well as proposed by Venturion.

[2] Section 164 allows for arbitration of a disagreement regarding 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." (emphasis added)

THE RECONSIDERATION APPLICATON:

[3] Venturion applies for reconsideration of the Board's order allowing the amendment of the Surface Lease. Further to section 155(1) of the Act and Rule 17 of the *Board's Rules of Practice and Procedure*, the Board may reconsider an order on the basis that the Board made a "patently unreasonable error of fact, law or exercise of discretion". Venturion says the Board made "patently unreasonable" errors in making findings of fact that could not be supported by the evidence before it.

[4] Venturion argues that the Board's findings that only a single oil well was proposed during the initial negotiation of the Surface Lease and that neither a water source well nor a water injection were proposed during those negotiations cannot be supported by the evidence before the Board.

[5] Counsel for the landowner, Mr. Juell, argues this application does not fit within the circumstances enumerated by Rule 17 and that it is improper for Venturion to attempt to introduce additional evidence or an explanation of evidence presented at the hearing through the affidavit of J. McCormick provided as support for the reconsideration application.

[6] Venturion denies it is attempting to introduce new evidence. It says that a party to a judicial review or a reconsideration application may adduce affidavit evidence that merely describes testimony given before the original decision maker, which is what it has done in support of this reconsideration application. The Board accepts the affidavit evidence to the extent that it describes evidence given at the hearing.

ANALYSIS:

[7] The Board can reconsider errors of law or fact that are "patently unreasonable". There are no Board decisions defining this term as used in Rule 17, but the courts have interpreted the term as used in the *Administrative Tribunal Act*, and as used as a standard of judicial review. For example, the term "patently" has been interpreted to mean "openly, evidently, clearly" and, accordingly, the phrase "patently unreasonable" as a decision that is "openly, clearly, evidently unreasonable" (*Speckling v. British Columbia (Workers' Compensation Board*, 2005 BCCA 80, *Jensen v. Worker's Compensation Appeal Tribunal*, 2010 BCSC 266 affd 2011 BCCA 310).

[8] In defining "patently unreasonable" as used as a standard of judicial review, the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, (2003 SCC 20) and quoted in *Dunsmuir v. New Brunswick* (2008 SCC 9), stated "[a] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable

decision has been described as ‘clearly irrational’ or ‘evidently not in accordance with reason’”. (see also *Canada (Attorney-General) v. Public Service Alliance of Canada*[1993] 1 SCR 941).

[9] As the Board is reconsidering or reviewing a Board’s decision, I adopt a similar interpretation and application of “patently unreasonable” as used in Rule 17. Therefore, the Board, in a reconsideration application under Rule 17, is not re-weighing the evidence, second guessing the conclusions or findings drawn from the evidence considered by the panel and substituting different findings of fact or inferences from those facts, or relying on evidence being insufficient. Only if there is no evidence to support the findings or the decision is “openly, clearly, evidently unreasonable” can the decision be said to be “patently unreasonable” (see *Jensen, supra.*).

[10] Venturion says the Board made a ‘patently unreasonable error’ when it found the following findings of fact that it says was not supported by the evidence before it:

1. Only a single oil well was proposed during the negotiation of the surface lease;
2. Neither a water source well nor a water injection well were proposed during the negotiation of the surface Lease.

[11] Venturion argues the current landowner, Mr. Juell, was not a party to the original lease and could not have known what was proposed during the negotiation of the Surface Lease; nor was there any evidence before the Board from anyone who was involved with the negotiation of the Surface Lease at the time. Rather, the only, and best, evidence before the Board of what had been “proposed during the negotiation” of the Surface Lease were the terms of the lease itself. As no evidence was led from the original parties to the Surface Lease, Venturion says the Board erred by speculating that, at the time the Surface Lease was entered into, the parties did not contemplate anything more than a single oil well.

[12] In the Board’s decision, the Board specifically held that section 164 allowed the Board to go beyond the words of the Surface Lease itself to consider evidence of what

was proposed during the negotiation of the surface lease regardless of whether the terms of the lease reflect otherwise. The Board considered that it had no evidence from the original signatories of the Surface Lease as to what was proposed during its negotiation. The Board considered and weighed other, extrinsic evidence, including Mr. McCormick's and Mr. Juell's testimony, as well as evidence of what was actually constructed and the use of the site over time. The Board made an inference from this evidence. The Board had some evidence on which to make its finding that the proposed oil and gas activity during negotiation of the Surface Lease was an oil well and not a water source well or a water injection well. Consideration of changes in technology from the time of negotiation to the current time was not determinative. It cannot be said the Board had "no evidence".

[13] Venturion submits the Board also made a patently unreasonable error in deciding that the current permitted oil and gas activity (water flood) was "substantially different" than originally contemplated. Venturion also submits that the evidence before the Board was that there is no difference in the impact to the surface of the land between the existing vertical well or the proposed horizontal water injection well and relies on Mr. McCormick's Affidavit in support. It argues that the landowner has the burden to prove that what was proposed during the negotiation of the lease was "substantially different" and this burden was not met here.

[14] The Board considered section 164's remedial purpose and the impact of the permitted activity and reviewed the evidence before it, including that of Mr. McCormick, along with the Board's experience of "modern surface leases". The Board considered and weighed the evidence before it to make its conclusion and inferences as required. There was some evidence on which to make its finding. As indicated above, the Board will not reconsider a decision on the basis of insufficient evidence nor will the Board re-weigh the evidence or second guess findings of fact which I find is what Venturion is seeking here.

CONCLUSION

[15] I find that there was some evidence to support the Board's findings. I find the decision is not "openly, clearly, evidently unreasonable" such that it is "patently unreasonable".

[16] For the reasons above, I am not satisfied that there are circumstances warranting an exercise of the Board's discretion to reconsider Order 1848/1855-2.

ORDER

[17] The reconsideration application is dismissed.

DATED: April 27, 2016

FOR THE BOARD



Simmi K. Sandhu,
Vice-Chair