File No. 1598
Board Order # 1598-3

February 19, 2009

MEDIATION AND ARBITRATION 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 Sec 10 & Lot 2 Sec 15 of Rge. 15 TWP 79 W6M
(The "Lands")

BETWEEN:

Arc Petroleum Inc.

(APPLICANT)

AND:

Kane Piper

(RESPONDENT)

DECISION

Heard by written submissions:	Closing January 20, 2009
Panel:	Rob Fraser
Submissions by:	Rick Williams, Barrister and Solicitor, for the Applicant Darryl Carter, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] On December 5, 2008, the Board issued its decision regarding compensation for the loss of rights and loss of profits arising from Arc Petroleum's (Arc) construction of a pipeline across land owned by Kane Piper (Piper).

[2] Arc asks the Board to review and vary its order with respect to the compensation payable for the loss of profits, being crop loss, pursuant to Section 26(2) of the *Petroleum and Natural Gas Act*.

[3] Section 26(2) reads:

> (2) The board may, on its own motion or on application,
>
> (a) rehear an application before making a determination, and
>
> (b) review, rescind, amend or vary a direction or order made by it, the chair or a board member.

[4] The Board ordered Arc to compensate Mr. Piper a total of $16,612 to account for crop loss. Arc asks the Board to reduce this amount because:

- There is a likelihood the award overcompensates Mr. Piper;
- The award fails to consider Mr. Piper's evidence that his land outperforms other land by about 30% year after year and;
- The Board exceeded its jurisdiction by relying on best guesses, bald assertions and projections without any empirical basis.

[5] Piper says that Arc is simply re-stating arguments made in the arbitration hearing, and it is wrong to expect a different member of the Board to reach a different decision without hearing either evidence or argument.

ANALYSIS

[6] Arc requests the Board review its decision, which I take to be an application pursuant to section 26(2)(b) of the *Act*.

[7] Section 26 uses the word 'may', which means the Board has the discretion to rehear, review, amend or vary its order. The wording does not create a right or entitlement, but allows for the Board to exercise its discretion if there is sufficient reason for it to do so. Circumstances that might warrant the exercise of the Board's discretion include, but are not limited to, a change in circumstances since making the original order, new evidence not available at the time of the original order, a clear error of law, or an issue relating to fairness and the principles of natural justice.

[8] Arc argues the Board erred in determining the amount of compensation payable to Mr. Piper, and sets out an alternative calculation. In its decision the Board says at paragraph 39 that it accepted Mr. Piper's evidence, although based on a "best guess" and found that Arc had not provided any contrary evidence. Further in paragraph 43, the Board says that it applied percentage crop loss as applied by Mr. Piper, "in the absence of any other evidence with which to calculate the loss while the land regains the benefit of zero till".

[9] Arc now says that it did not receive a break down of Mr. Piper's evidence until the morning of the hearing and had no opportunity to lead contrary evidence. As well, Arc says that Mr. Piper's own admission points to his calculations being exaggerated and overstated. Arc asks the Board to vary its order to reflect a 30% difference between zero-till and non zero-till lands, and asks the Board to vary the compensation period from seven to three years.

[10] Arc says it was disadvantaged and caught by surprise by Mr. Piper's evidence. If that was the case, and there is nothing in the decision to support this allegation, Arc could have sought an adjournment or some other remedy to give them sufficient time to seek contradictory evidence. They did not, the hearing proceeded and the Board considered the evidence and submissions before it and reached a decision. I do not find this a compelling reason for the Board to exercise its discretion to review its decision.

[11] The basis for Arc's request for a recalculation of the compensation is Mr. Piper's assertion that the difference between zero-till and conventional till productivity is about 30%, yet Mr. Piper starts with a calculation of 86% for the first year of crop loss. A plain reading of the Board's decision points to Arc confusing concepts. The Board found as fact that there is a 30% difference in productivity. However, this is independent of the calculation of the time necessary to return his land from its disturbed state after the installation of the pipeline to its former zero-till state. The Board was faced with Mr. Piper's "best guess" that it would take ten years to regain the productivity and his disagreement that this could be achieved in five years. The Board chose a mid-point of seven years, accepted the starting point of 86% crop loss in the first year and adjusted for increased productivity until the land reached 100% zero-till productivity. I cannot accept Arc's contention that the Board relied on a "flawed calculation" in estimating crop loss. Therefore, the Board made no error.

[12] The Board's arbitrator says more than once that she relied on Mr. Piper's evidence, and that Arc produced nothing to the contrary. On that basis alone, I would find that Arc has failed to establish a circumstance where the Board ought to exercise its discretion and review the decision. The Board heard the evidence, decided what was most compelling, and reached a decision. I agree with Piper that Arc is asking the reviewer to reach a different conclusion without the benefit of hearing the evidence and hearing submissions, and this is administratively incorrect.

[13] In this review, I am limited to a review of the Board's decision and must base my decision on it's contents alone. I was not present at the hearing, nor do I have the benefit of hearing the parties' evidence, testimony and argument. It would be wrong for me to substitute my view of the evidence for those of the decision maker, unless the decision contains an error of law, a jurisdictional error, or fundamental flaw.

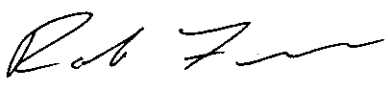
[14] Arc advances argument relating to the legislative intent regarding estimating reasonably foreseeable damages. Arc had the opportunity to advance this argument before the arbitrator during the hearing, allowing Piper an opportunity to provide rebuttal and allowing the Board to consider the merits of Arc's interpretation. They did not. Raising this argument in the review application, after the Board decision has been issued, is simply too late. If a party is allowed to raise new evidence and new argument in a review application, the Board will never be able to close a file, as the parties could continually apply for a review of some or all of a decision if they continued to disagree or if they wished to keep the arbitration process open. This is certainly could not have been the intention of the legislature in enacting section 26 of the *Act*.

CONCLUSION

[15] I find that Arc has not convinced me that their application falls within the circumstances where the Board could exercise its discretion to review and vary its decision. Arc in essence asks me to take a different view of the evidence presented, to view it in a different light, and come to a different conclusion. Therefore, the Board declines to exercise its discretion pursuant to section 26(2) of the *Petroleum and Natural Gas Act*.

Dated: February 19, 2009

FOR THE BOARD



Rob Fraser, Panel Chair