

SURFACE RIGHTS ACT
Chapter S-27.1
1983
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands within the North East Quarter of Section 9, Township 53, Range 25, West of the 4th Meridian, in the Province of Alberta, as described in Certificate of Title No. 982 015 098 (hereinafter "the said land").
Excepting thereout all Mines and Minerals.

BETWEEN:

RYWOOD RESOURCES LTD.,

Operator,

- and -

WINFIELD POWER COMPANY LTD.,
THE CITY OF EDMONTON
and
TELUS MOBILITY INC.,

Respondents.

DECISION

Order No. 3118/98 granting right of entry to the Operator was issued by the Board December 23, 1998.

The land subject to the said Order is 1.00 acre for a well site in the said land as shown on the plan attached to the Order.

A hearing was held by the Board May 10 and 11, 1999, at Edmonton, Alberta.

PRESIDING BOARD:

- A. D. MacKenzie,
- L. N. Miller
- F. Weber

Presiding Chairman

APPEARANCES:

For the Operator:

- Mr. J. Lorne Ryan, President, and Mr. Terry Woodman, Secretary/Treasurer, both with Rywood Resources Ltd.;
- Mr. Keith Wilson and Ms. Katharine L. Hurlburt, both with the law firm Wilson & Hurlburt, Counsel;
- Mr. James E. Wall, Appraiser with Wall and Associates; and
- Mr. Greg Hofmann, Principal Consultant with G.T. Hofmann & Associates.

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For the Respondents:

- Mr. T. E. Mogleston, President of Winfield Power Company Ltd.;
- Mr. Denis R. Noël with the law firm Reynolds Mirth Richards & Farmer, Counsel on behalf the Respondent Winfield Power Company Ltd.;
- Mr. Brian L. Frost with Frost & Associates, Real Estate Appraisals Inc.;
- Mr. Neill McQuay with Reid Crowther; and
- Mr. Herman Gee with Torode Realty Ltd.

The other Respondents were not represented although duly notified of the hearing.

EXHIBITS FILED:

- Exhibit 1: Binder of evidence from Winfield Power Company Ltd.
- Exhibit 2: Wall and Associates Complete Appraisal - Summary Report.
- Exhibit 3: City of Edmonton Asset Managements and Public Works Memorandum.
- Exhibit 4: Industrial Land Sale in Edmonton Industrial.
- Exhibit 5: Report from G.T. Hofmann & Associates.
- Exhibit 6: Laser photograph of tanks on the north west quarter of the site.
- Exhibit 7: Surface Lease between Hardy's Oilfield Services Ltd. and Westhill Petroleum Ltd., dated July 16, 1985.
- Exhibit 8: Alberta Surface Lease Agreement between The City of Edmonton and Canoga Resource Management Ltd., dated March 11, 1993.
- Exhibit 9: Copy of Board Decision No. E150/83, dated August 24, 1983.
- Exhibit 10: Map of Armstrong Industrial Subdivision.
- Exhibit 11: Map of the north west Industrial Area.
- Exhibit 12: Agreement of Purchase and Sale between Canadian Commercial Capital (1973) Ltd. & Argus International Ltd. and Winfield Power Company Ltd.
- Exhibit 13A: Letter to Wilson & Hurlburt from Reynolds Mirth Richards & Farmer, dated April 12, 1999.
- Exhibit 13B: Letter to Reynolds Mirth Richards & Farmer from Wilson Hurlburt, dated April 13, 1999.
- Exhibit 14: Frost & Associates Summary Valuation Report.

Exhibit numbers 2 to 11, inclusive, were filed for the Operator. Exhibit numbers 1, and 12 to 14, inclusive, were filed for the Respondent, Winfield Power Company Ltd.

SUMMARY OF THE EVIDENCE:History:

On September 20, 1988, Westhill Resources received a well licence to drill a directional well on L.S. 10-9-53-25-W4M. The minerals, which are the subject of the well licence, are located under the NW ¼-10-53-25-W4M. The well was drilled and resulted in a shut in sweet gas well.

On April 1, 1993, the well was transferred from Westhill Resources Limited to Rywood Resources Ltd. The ownership of the parcel was transferred from Barbican Properties Inc. (who owned the property since 1987) to Winfield Power Company Ltd. on January 7, 1998 (date of transferees affidavit) for a reported \$1,800,000.00. As at March 27, 1987, the mineral title for the subject lands stood in the name of Charles E. Learmonth, executor and trustee of the estate of Thomas Hourston (Deceased).

The right to drill and produce a well was originally acquired from Barbican Properties Inc. by the predecessor Operator by way of a privately negotiated surface lease but the agreement was never caveated on the certificate of title. Therefore, when the current owner purchased the land, there was no notification of the presence of a well site on the newly issued title. Thus, the Board issued a Right of Entry Order on December 23, 1998.

The well site formed a portion of a 66.22 acre parcel, more or less, which encompasses vacant land located generally north of 114 Avenue and west of 170 street in the City of Edmonton.

Operator's Evidence:

Mr. Wilson pointed out to the Board by virtue of his client's rights under the Surface Rights Act and the Right of Entry Order, the land on which the well site is located is not currently available for development.

Mr. Wall, an Appraiser for the Operator, stated the majority of the owner's parcel is classified as medium Industrial District with two exceptions. The two exceptions are 3.78 acre parcel where the well site is located, and 6.62 acres located on the north side of 114 Avenue, immediately east of the extension, of 174 Street, which are both zoned DC 5.

Mr. Wall also pointed out that subdivision approval (sub 198-0068) for the most southerly 11.7 acres was received by the City on September 17, 1998.

Mr. Wall was of the opinion that highest and best use for the subject parcel, is as land suitable for holding as a portion of a site for a substantial industrial improvement when market factors warrant full servicing, including the construction of 114 Avenue between 170 and 178 Streets and 174 Street north from 111 Avenue.

Mr. Wall used seven comparables (Exhibit 2) to arrive at his value of \$40,000.00 per acre based on unserviced land.

Mr. Wall testified that if he had known that servicing was to take place in the near future, his opinion of value would have been higher.

Mr. Greg Hofmann (Professional Planner) reported that when the subdivision was being designed the status of the subject well should have been determined by the developer. It was obvious that the gas well was located on the said land as per Exhibit 3. The layout of the Lots, particularly Lot 4, appears to have been based simply on the assumption that the well was to be abandoned. Mr. Hofmann suggested several alternative subdivision designs that would take the presence of the well site into account. Mr. Hofmann commented on the Landmark facilities for the proposed usage of the site.

Mr. Ryan, President of Rywood, reported that the plan for the gas well is to construct a pipeline in order to deliver the gas to the Chevron Plant located west of the City, or to develop a power generation facility on the well site with a Calgary based company (Landmark). He pointed out that the well site has been on the subject property since 1988 and should have been known to the Respondent.

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Mr. Terry Woodman, testified that he is a partner in Rywood Resources Ltd. and referred the Board to a number of comparable surface leases in the area, namely:

- (A) The City of Edmonton and Canoga Resource Management Ltd. for a well site in the NE ¼-5-53-25-W4M (L.S. 16), where the rent is \$10,385.00 per year from March 11, 1998, to March 10, 2003. The site is 2.47 acres in size and has 2 pump jacks on site.
- (B) Hardy's Oilfield Services Ltd. and Westhill Petroleum Ltd. for a 2.209 acre site which has a small battery site. The annual rent of \$1,980.00 was set in 1985.
- (C) Board Decision No. E150/83, where the Board awarded \$30,000.00 for the first year and \$3,000.00 annually for a 3.17 acre site.

Mr. Wilson, in summation, pointed out that the oil company has rights. The Board should look to Section 25(1) for the market value of the land, namely, Mr. Wall's estimate of \$40,000.00 per acre. Based on the foregoing, the compensation first year should be \$40,000.00.

Mr. Wilson suggested that the principle in Munteau v. G.N.E. Resources Ltd. applies here for the loss of use which would be 10% of the value of the land or \$4,000.00 per year. However, if the Board uses the comparable lease on the NE ¼-5 as a guide, the per acre rate of \$9,885.00 for 2.47 acres should be \$4,002.00 per year ($\$9,885.00 \text{ annual rent} \div 2.47 \text{ acres} = \$4,002.00$). Both methods of calculation result in \$4,000.00 annual rent for the subject well site.

Mr. Wilson reported that there is no adverse effect, as part of proposed Lot 4 can be used for storage. On the date of Right of Entry, the subject land was not subdivided so the market value should be based on the value as a holding property.

Respondent's Evidence:

Mr. Muggleston, President of Winfield, reported that he purchased the land to develop it, plus he required some of the land to expand his adjoining business located on 170 Street. When he purchased the land, Rywood's interests were not registered on the title. Shortly after the purchase of the land on January 15, 1998, Winfield commenced development by contracting the engineering firm, Reid Crowther, to prepare design plans and a subdivision application.

Mr. McQuay, Project Manager with Reid Crowther stated that Reid Crowther proceeded with submitting re-zoning and subdivision plans to the City of Edmonton. In the Spring of 1998, Mr. McQuay's firm started discussions with the City resulting in a formal application being filed in June 1998. The City passed a re-zoning bylaw on September 14, 1998, and approved a subdivision of Lots 3, 5 and 6. It was Mr. McQuay's opinion that if it were not for the well site, proposed Lot 4 would have been approved. Mr. McQuay stated that the cost to develop the land to a serviced state would be between \$50,000.00 to \$70,000.00 per acre. He stated that if the proposed Lot 4 was not serviced there would be a savings of about \$5,400.00, but this would not be practical.

Mr. Gee testified that the subject land is ready for subdivision once the services have been installed. To support his position, Mr. Gee made reference to Exhibit 1, Tab P, the Agreement for Sale of Lots 5 and 6, plus the proposed sale of Lots 1, 3, and part of Lots 2 and 4 (Exhibit 1, Tab Q). Also, in Mr. Gee's experience as an Industrial Realtor, an investor would expect a 10% return on a real estate investment (market value).

Winfield, through its witness, points out that they have received an offer to purchase part of the land (Exhibit 1), namely Lots 1, 3 and part of Lots 2 and 4, which includes the well site area. The offer to purchase is for 10.76 acres at a rate of \$160,000.00 per acre. As a result of the well site, the sale may crater. Mr. Gee reported he attempted to salvage the sale requesting the City relax its setback requirements for development adjacent to the well (Exhibit 1, Tab K). He was told no relaxation would be considered.

Mr. Brian Frost, AACI, with Frost & Associates stated that on the effective date of May 5, 1999, proposed Lot 4 would be worth \$135,000.00 per acre or \$510,000.00 (rounded). He based his opinion on the fact that a plan of subdivision will be completed whereby the proposed 3.78 acres Lot would be created. Mr. Frost said that the highest and best use of the proposed Lot was industrial development within zoning classification. He arrived at a value of \$135,000.00 per acre based on 6 Indexes (Exhibit 14) which showed a range of value of \$130,000 to \$145,000 per acre.

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Mr. Frost stated that even if the valuation date had been Dec 23, 1998, he would have assumed that the land was serviced as all the evidence supported that this was a reasonable assumption. He testified that by the end of 1998 the Respondent had taken steps to complete servicing. The fact that the land is currently being serviced bears out the reasonableness of the assumption.

Mr. Noël, for his client, summarized damages as follows:

SUMMARY OF DAMAGES

ALTERNATIVE 1:

Purolator Purchase Is Cancelled

A. LOSS OF VALUE OF LAND

1. LAND FOR WHICH RIGHT OF ENTRY
ORDER GIVEN, WITHIN LOT 4.

1 acre (0.405 ha) X \$145,000.00/acre \$145,000.00

2. LOSS OF VALUE OF
BALANCE OF LOT 4

3.777 acres - 1 acre
(1.53 ha - 0.405 ha) X \$145,000.00/acre \$402,665.00

B. ADVERSE EFFECTS ON REMAINING LANDS (Lots 1, 2 & 3, including loss of Purolator Sale)

1. NET LOSS

Total area of Lots 1, 2 & 3
11.16 acres (4.52 ha)
X
Decrease in Value
(\$160,000.00 - \$135,000.00)
\$25,000.00 difference \$279,000.00

2. INTEREST FACTOR DUE TO
DELAYED SALES OF LOTS

Interest on resale prices
11.16 X \$135,000.00/acre X 8% for 1 year \$120,528.00

C. DISTURBANCE AND NUISANCE DAMAGES

1. EXTRA ADMINISTRATIVE,
ENGINEERING COSTS \$ 15,000.00

- TOTAL \$962,193.00**

ALTERNATIVE 2:

Purolator Purchase Proceeds

A. LOSS OF VALUE OF LAND

- 1. LAND FOR WHICH RIGHT OF ENTRY ORDER GIVEN, WITHIN LOT 4
1 acre (0.405 ha) X \$145,000.00/acre \$145,000.00
- 2. LOSS OF VALUE OF BALANCE OF LOT 4
3.777 acres - 1 acre
(1.53 ha - 0.405 ha) X \$145,000.00/acre \$402,665.00

B. ADVERSE EFFECTS ON LOT 2

- 1. LOSS OF SALE OF PART OF LOT 2 (40%) AT HIGHER PRICE
1.35 ACRES
X
Decrease in Value
(\$160,000.00 - \$135,000.00)
\$25,000.00 difference \$ 33,750.00
- 2. INTEREST FACTOR DUE TO DELAYED SALES OF PART OF LOT 2
1.35 ACRES
X
\$135,000.00/ACRE
X
8% X 1/2 YEAR \$ 7,290.00

C. DISTURBANCE AND NUISANCE DAMAGES

- 1. EXTRA ADMINISTRATIVE, ENGINEERING COSTS \$ 15,000.00
- TOTAL \$603,705.00**

What the Board may consider in determining compensation is set out at section 25 of the Act, and having heard and considered the evidence of the parties, and having read the exhibits filed, the Board makes the following findings and determinations.

FINDINGS OF FACT:

The Operator's drilling operations have been completed and resulted in a shut in sweet gas well located within the municipal boundaries of the City of Edmonton.

The area granted consists of a 1.0 acre wellsite with access from adjoining 114 Avenue.

The remaining productive life of the well is unknown.

A part payment on compensation in the amount of \$16,500.00 was made to the Respondent, Winfield Power Company Ltd. on February 9, 1999.

DETERMINATION OF COMPENSATION:

The effect of the granting of right of entry to the Operator was to superimpose a second user right, which is an exclusive and dominant right (section 16(1)(a)) for the term of the Order, on the respondent landowner's existing right, resulting in damages of both tangible and intangible nature to the bundle of rights entrenched in the ownership and right of use and enjoyment of the said land. Notwithstanding any inherent right of the Operator to occupy such part of the surface as may be necessary to search for and evaluate its mineral interest underlying the said land, the exercise of that right has created an interference and a disturbance to the landowner's vested right of use and enjoyment of the surface of the land. It is this disturbance to the vested interest of the respondent landowner that attracts an award of compensation, together with any incidental losses and damages arising from that disturbance to the owner's use and enjoyment of the surface in his farming operations.

In the Board's view, the proper approach to valuation of the Right of Entry is to find the value to the owner.

The Board must take the view that the taking is for an indefinite period of time. The taking is a small parcel, affected the City of Edmonton's Policy found at tab K in Exhibit 1.

The value of the land is, in the Board's opinion, based upon the present value, not necessarily its present use, so that the potential for more intense use has to be considered. The Board relied on Clarence Copithorne v. Shell Canada Limited (1969) 70 WWR 410 and Calgary Power Ltd. v. Danchuk & Day 41 WWR 124.

Upon purchasing the land, Winfield subdivided out a 2.11 ha. parcel (Application No. 98.0041 in April 1998) for its own use. Then in June, 1998, Winfield applied to the City of Edmonton for the second subdivision on the subject lands. In May 1998, Calmont Truck Centre Ltd. and Winfield Power Company Ltd. entered into a Purchase Agreement. It was amended in July 1998, and again in October 1998. All of the above events were before the date of the Right of Entry Order (December 23, 1998).

The Board finds that the highest and best use of the land was for subdivision which was eminent as of the date of the Right of Entry Order.

Based on the Board's findings of the highest and best use, Mr. Gee and Mr. Frost's evidence is the most cogent. Thus, the Board accepts Frost & Associates's estimate of market value of \$135,000.00 per acre (rounded) as per Exhibit 14.

The evidence given by Mr. McQuay, points to the fact that the City's Policy Guidelines For The Integration of Resource Operations and Urban Development will adversely affect the 1.0 acre taking plus some adjoining area. The City of Edmonton's policy diminishes the potential use of Lot 4 because of the 50 metre radius setback requirement.

"2.1 Subject to conformance with the surface improvement requirements outlined in Section 4.0 of this report, the minimum separation distance between a well bore and the edge of the nearest develop able parcel shall be 50 metres (164 feet)."

On review of fair compensation or what would make Winfield whole, the Board reviewed the decision of Justice J. B. Moore in Edward Munteau and Bradley David Munteau v. GNE Resources Ltd. (1993) AJ No. 545 ARS 94-10230 for acceptable methods of calculating fair compensation. Justice Moore reported:

"The issue is to determine the proper rent for the surface lease for the five year term that commenced on September 20th 1990. There are two acceptable methods to establish the rent. In this case, which of the two methods is better?"

The first method provides a fair annual return on the investment (the land value). On land worth \$200,000.00, a 10% annual return - or "rent" on the investment - is \$20,000.00. The second method compares one lease with another lease, or it compares one lease with a number of other leases. If lease X is exactly the same as six other leases, and the annual rent for the six other leases is \$14,000.00, then the annual rent for lease X should be \$14,000.00."

The Board considered one alternate method of calculating fair compensation on industrial lands, known as the heads of compensation, namely, calculating a specific amount for land value, loss of use, adverse effect and any other factors.

The Surface Rights Act lists factors that may be considered by the Board in determining compensation. Those factors are not mutually exclusive. The Board's emphasis must be on determining what amount properly compensates Winfield for infringement of its right; neither over or under compensating Winfield, but rather "keeping it whole".

In the subject case, the Board reviewed the above methods of calculating fair and reasonable compensation. After reviewing the methods, the Board finds that the first method of fair annual return on investments (land value) is the most reasonable.

The Board finds that the two leases and the one Board decision submitted by the Operator are of little assistance in determining compensation. There was no evidence with respect to the 1985 Westhill lease and 1983 Rupertsland decision of the impact of the oil and gas facilities on the use of the adjoining lands. There was no evidence that development was imminent. On the City of Edmonton and Canoga lease there was no evidence lead on the impact of the well site to adjoining uses. On the plan attached to the agreement, it appears that an asphalt and concrete crusher site and a waste disposal site are operated on the same parcel. As a consequence, it may be that these uses are not incompatible and the well site would not adversely affect this type of activity.

The third method, heads of compensation, best compensates the owner where land use is stable and perhaps in agricultural use. The subject land is in transition and will be sold imminently for commercial or industrial use. If the Board awarded 100% of the market value at the outset, and then the owner ultimately sells the land, then the owner would be overcompensated. What is happening in this case is that the sale of the lands affected by the well site is deferred until some future date.

Further, the initial payment compensates for the impacts unique to the first year when drilling operations are conducted. In this case, the well was drilled prior to the current owner, thus he did not suffer these additional impacts. The right of entry was issued, well after the well was drilled, for the production of the minerals.

Lot 4 cannot be sold while the well exists. Thus the Respondent cannot recoup its purchase and development costs attributable to this Lot until the well site is reclaimed. Both the recovery of these invested costs and a return on the investment is delayed indefinitely. As a result, Winfield must forestall this return and continue to carry the development costs of Lot 4 until it can be sold. The financial impact of this imposed situation is the cost of carrying this investment. When the Lot is eventually sold the return of the investment will then be realized.

Therefore, as the Board stated before, Winfield should be compensated on the basis of a return on what the land could have been sold for.

The Board accepts a 10% rate of return as reasonable. Both Mr. Gee and Mr. Frost gave evidence on the appropriateness of this rate. Mr. Wilson in his summation also alluded to the appropriateness of this rate.

For the Right of Entry, the Board finds:

10% of \$135,000.00 (per acre) x 1 acre \$13,500.00 per year

For adverse effect on the remaining lands, the Board finds the total of proposed Lot 4, as per Exhibit 1, will be affected because of the City of Edmonton's Policy For The Integration of Resource Operations. The proposed Lot 4 is made up of 3.78 acres of which one acre is taken up by the well site.

2.78 acres (3.78 acres - 1 acre) x
\$135,000.00 per acre x 10% \$37,500.00 per year (rounded)

Winfield's loss of an annual return on its investment (land value) would be:

\$13,500.00 + \$37,500.00 \$51,000.00 per year.

Therefore, the Board finds \$51,000.00 annually is payable by the Operator to Winfield Power Company Ltd.

TO WHOM THE COMPENSATION IS PAYABLE:

The Board finds that the compensation as determined hereinbefore is payable to Winfield Power Company Ltd.

INTEREST:

The Board considers that it is proper to award interest on the compensation payable by the Operator, but excluding special damages, from the date of the right of entry until payment in full, having regard to the part payment made by the Operator; and that the appropriate rate for that period pursuant to section 25(9) of the Act is 5.25% per annum.

RESERVATION - RE: COSTS

The parties have agreed to try to settle costs privately. Failing a settlement, the parties have requested the right to return to the Board. The Board hereby reserves the right of either party to apply to the Board for a determination of costs.

ORDERS:

An Order will issue determining and fixing the compensation payable by the Operator as set out below.

The compensation payable by the Operator in respect of Right of Entry Order No. 3118/98 shall be as follows:

- (a) For the period December 23, 1998, to December 22, 1999, the sum of \$51,000.00, less \$16,500.00 part payment made;

TOGETHER WITH INTEREST calculated at the rate of 5.25% per annum on \$16,500.00, from December 23, 1998, to February 9, 1999, and on \$34,500.00 from December 23, 1998, until paid in full; and

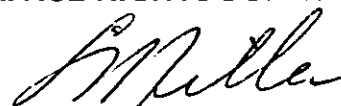
- (b) After December 22, 1999, and so long as the said Order No. 3118/98 is in effect, for each year or portion thereof, the sum of \$51,000.00, to be paid on or before December 23, 1999, and on or before the 23rd day of December in each year thereafter;

which amounts are payable to Winfield Power Company Ltd.

THEREFORE, the Operator shall forthwith pay to Winfield Power Company Ltd. the sum of \$34,500.00, together with interest calculated as directed above.

Dated at the City of Edmonton in the Province of Alberta this 12th day of July, 1999.

SURFACE RIGHTS BOARD



ACTING CHAIRMAN