

Board File Nos. BR2011.0015, BR2011.0056, BR2011.0057,
BR2011.0058, RR2011.0023 and RR2011.0024
(Refer to Board File No. CR739)

NOTICE OF DECISION NO. 2012/0468

Re: Camino Industries Inc. (“Camino”)
now Midway Energy Ltd. (“Midway”)
SE ¼-18-31-1-W5M (the “subject lands”)
Herman and Shirley Dorin (Applicants)
Right of Entry Order No. C263/77, dated August 5, 1977 and
Compensation Order No. C634/78, dated September 20, 1978

A Panel of the Surface Rights Board (the “Board”) convened in the City of Edmonton on July 10, 2012, to consider a request under S. 29 of the *Surface Rights Act* (“the Act”) to review Board Order Nos. C263/77 and C634/78 as amended.

BEFORE: Edward V. Zenko
(the Panel)

BACKGROUND

In 1977, the Board granted Dyco Petroleum Corporation (“Dyco”) a Right of Entry for a Well Site and a Roadway by Board Order No. C263/77 (the “ROE Order”). In September 1978, the Board ordered that Dyco pay compensation in the sum of \$49,775.00 to Herman and Shirley Dorin (the “Dorins”) through Board Order No. C634/78 (the Compensation Order). The reasons for the issuance of this Order were set out in Board Decision No. C46/78 (the “Compensation Decision”) on the same day. The Dorins appealed certain aspects of the Board’s decision to the Alberta Court of Queen’s Bench in *Dorin and Dorin v Dyco Petroleum Corp.*, [1980] AJ No. 814 (“*Dorin and Dorin*”). In that decision, at paragraph 23, Moore J wrote that “... the judgment of the board is confirmed in every respect save and except for the sum of \$7,500.00 awarded for mental anguish.” As a result of the action of section 24(11) of the *Act* as it then stood, the Board was required to amend Order No. C634/78 to include the award for mental anguish granted by Moore J in *Dorin and Dorin*. Board Order No. C342/80 effected this amendment. In 2003, the Dorins sought, among other things a review of the Compensation and ROE Orders before this Board. In Decision No. 2003/0142 (“the 2003 Decision”), a Panel of the Board refused to amend the compensation amount, indicating that the factual circumstances were much the same as they had been in 1978.

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The Panel found that:

- It had no jurisdiction to order the abandonment of the subject well;
- It had no jurisdiction to terminate the ROE Order until furnished with a reclamation certificate;
- It "...should not award compensation with respect to landscaping and permanent access road [*sic*] until there is at least a registered plan of subdivision," but that "...it is hoped the Operator would be involved in the development of the plan of subdivision."

"...If the Board was to consider annual compensation it would require evidence of what the present value of the lump sum award made in 1978 would be in 2003..."

The Board Orders have subsequently been amended to reflect a change in the Operator. The Operator currently shown on the ROE and Compensation Orders is Camino Industries Inc., however, Midway holds the well licence issued by the ERCB.

In 2011, the Board received several applications from the Dorins. In some cases the Dorins have made requests for relief in the event that their application for review is successful. For the purposes of this decision the applications will be referred to with reference to either S. 29 or S. 27. All of the Applications relate to the ROE and Compensation Orders issued in 1977 and 1978 respectively and the Applications can be briefly summarized as follows:

Application	Board File No.	Brief Description	Section
#1	BR2011.0056	An application under S. 29 of the <i>Act</i> to amend the Operator named on the ROE.	29
#2	BR2011.0057	An application under S. 29 of the <i>Act</i> to review/amend/rescind the order amending the compensation Order to provide for annual compensation effective 1978.	29
#3	RR2011.0023	An application under S. 27 of the <i>Act</i> in the event the Landowners' section 29 application is successful to review the rate of compensation going back 4 review periods (1982 forward), seeking separate amounts for each review period.	27
#4	BR2011.0058	An application under S. 29 which requested that the Board rescind the 2003 decision in its entirety.	29
#5	RR2011.0024	An application under S. 27 of the <i>Act</i> to review the rate of compensation from 2007 onward. (with an alternative to review it under S. 29 of the <i>Act</i>)	27

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Application	Board File No.	Brief Description	Section
#6	BR2011.0015	An application under S. 18* and S. 29 of the <i>Act</i> . The S. 29 portion of the application requested "...relief in the form of emergency interim annual compensation, awarded and paid immediately without prejudice to other pending applications, mediation or future hearing(s)...," and that the Board set five-year review dates for the Compensation Order beginning in 1982.	29

*The request for relief under S.18 was withdrawn.

Board Administration sought and received submissions from all of the parties on each of the S. 29 Applications. The submissions are listed in Appendix A.

This Panel will first answer the preliminary question of whether any of the above noted applications under S. 29 meet the threshold requirement to trigger a review and if so what the next steps will be with respect to the various applications.

ISSUES

1. Have the requirements for a reconsideration or review under S. 29 of the *Surface Rights Act* and under Rule 37 of the *Surface Rights Board Rules* (the Rules) been met such that the 2003 Decision, Compensation Order and/or the ROE Order should be reviewed?
 - a. Do either of the Orders, or any of the associated Board Decisions, show an obvious and important error of law or jurisdiction?
 - b. Do either of the Orders, or any of the associated Board Decisions, show an important error of fact or an error of mixed fact and law that affects the decision?
 - c. Are either of the Orders, or any of the associated Board Decisions, based on a process that was obviously unfair or unjust?
 - d. Are either of the Orders, or any of the associated Board Decisions inconsistent with earlier Board decisions, judicial authority, or any provision of the *Surface Rights Act*, the Rules or Regulations?
 - e. Is new evidence now available that was not available on reasonable and justifiable grounds at the time of the original decisions that is relevant to either of those decisions, and is likely to have had an impact on the decisions?

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2. Should the Board determine interim awards as per the request in Application #6?
3. If the Panel determines that any or all of the Decisions or Orders should be reviewed, what nature of proceeding is required to affect the review(s)?
4. Should the Board review the S. 27 applications at this time?

KEY SUBMISSIONS OF THE PARTIES

THE DORINS:

The Dorins asserted that their land could not be economically developed largely due to the existence of an active flare pit at the subject well site and that on multiple occasions, potential land sales have been adversely affected by the operations of the Operator.

The Dorins argued that the compensation awarded for the ROE was awarded on the assumption that no such difficulties would occur, and that therefore the Compensation Order was and is necessarily based on error. The Dorins asserted that, in making the Compensation Order, the Board clearly believed that the subject lands would be developed and sold by the Dorins within 1-2 years. The Dorins contended that the issues regarding the ROE site have compounded over the years to such an extent that they now constitute an emergency; they contended that it may, at this point, be impossible for them to be “made whole” for the taking of their land.

The Dorins also asserted that the compensation awarded under the Compensation Order was clearly “...‘First Year’ or ‘Initial’ compensation.” The Dorins argued that annual compensation was not awarded only because the Board expected that the land around the well site would be sold shortly after the granting of the ROE; and the fact that land was not sold, the Dorins argued, is sufficient reason to review the decision. The Dorins argue that “on a plain reading of the Compensation Order it is clear that it provides for compensation for the loss of agricultural use on a periodic basis,” and that the Compensation Order “...provided for a payment for loss of agricultural use to be paid periodically after the first year payment.”

The Dorins asserted that the Operator undertook to abandon and reclaim the area granted by the ROE Order prior to 2010, but did not do so. The Dorins argued that they should be granted access to and use of the area granted by the ROE Order, since it would not cause any undue interference with the Operator’s operations. The Dorins asserted that their purpose in obtaining this access would be to obtain a reclamation certificate for the area granted by the ROE Order, with the ultimate purpose of requesting a termination of the ROE Order. The Dorins assert that the Operator has already performed the tests required in an application for a reclamation certificate, but that the Operator has refused to share those results with them.

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Furthermore, the Dorins asserted, the Compensation Order did not include compensation for the access roadway to the site because the Board believed the road to be temporary, and that it would be relocated to coincide with the subdivision plans. In actuality, the Dorins contended, the road was never relocated, and the affect of the road on the surrounding lands has never been addressed. The Dorins also asserted that the Operator agreed to screen the well site from view with trees, and that the compensation awarded by the Board was based on that agreement, but the Operator never did so. The Dorins submitted that this failure on the Operator's part was, by itself, sufficient reason for the Board to review the Compensation Order under S. 29 of the *Act*.

The Dorins assert that there is currently evidence of adverse effect and injurious affection that was not available to the Panel of the Board at the time of the Compensation Decision; specifically, they assert that there is evidence that:

- There have been “increased costs” due to the location of the granted area and the refusal of the Operator to move the road;
- Changes in lot size and shape were required during the Dorins’ most recent subdivision of the subject land because of the presence of the well;
- The Dorins have lost the use of the granted area because of the Right of Entry;
- The Dorins’ plans to develop the subject lands have been delayed for more than 8 years because of the presence of the Right of Entry.

CAMINO:

Camino argued that “...the Board does not have the power to award interim annual compensation...,” and that “...all compensation awards of the Board are final.”

Camino argued that the Board “...does not have jurisdiction under S. 29 to consider [the Dorins’ application],” because the Compensation Decision and Order were appealed and “...once an appeal from [a] Board decision has been commenced, the Board loses its jurisdiction to review and reconsider it.” In support of this assertion, it cited *Canada (Attorney General) v Von Findenigg*, [1984] 1 FC 65 (FCA) (“*Findenigg*”) and *Johnson v Alberta (Workers' Compensation Board Appeals Commission)*, 2011 ABCA 345 (at paragraphs 8-10) (“*Johnson*”). Camino asserted that the Dorins were essentially asking the Board to “...act as a court of appeal from Queen’s Bench Orders....”

Camino also argued that the Compensation Order is, in substance, the same as the order made by the Court in *Dorin and Dorin*, and that, as such it is not an order made by the Board, but an order made by the Court. Accordingly, Camino argued, the Compensation Order cannot be reviewed

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by the Board because S. 29(b) of the *Act* only grants the Board the power to review decisions or orders “made by it.”

Camino further argued that even if the Board has jurisdiction to review the Compensation Order under S. 29, the Board does not have jurisdiction to order Camino to pay additional compensation, because Camino does not fit the definition of an “Operator” found in the *Act*.

Camino argued that although the Dorins were asking for a review of the 2003 Decision, their request amounted to a request to review and amend the Compensation Order and the same argument applies.

MIDWAY:

Midway then argued that the Dorins’ application did not meet the threshold test to trigger a review under S. 29 of the *Act* because it did not meet the requirements found in Rule 37 of the *Rules*. Midway also argued that, since more than 30 years have elapsed since the release of the Compensation Decision and Compensation Order, allowing a review at this time would be prejudicial to Midway. Moreover, Midway argued that the Compensation Order was the subject of an appeal to the Court of Queen’s Bench, and was “upheld in its entirety” with the exception of the addition of a \$7,500.00 award, and that therefore the Board does not have jurisdiction to review it. Midway argued that, at the time of *Dorin and Dorin*, the Board was obliged to vary the Compensation Order to comply with the Court’s findings, and that the Compensation Order as it now stands is therefore an order the Board was required by statute to grant. Midway further argues that the Board has no jurisdiction to review it and that to allow otherwise in situations such as this would be to allow the applicant to make a collateral attack on a Court’s finding without employing the proper channels of appeal.

Midway also argued that the relief sought by Application #6 is outside the jurisdiction of the Board as the *Act* does not provide the Board with the power to grant joint use of the ROE area to the Dorins, and that imposing joint use on an ROE area is not a “condition” which can be imposed under S. 15(6)(b) of the *Act*.

Midway also asserted that the Board does not have the power to award interim compensation or to deal with an application on an “emergency” basis. Midway also argued that the Dorins had not demonstrated the existence of an emergency in any event.

Midway specifically asserted that the ROE Order was not issued in error, and that the Dorins did not show any other errors. Midway argued that the Compensation Order could not be based on an unfair process, since it was ratified by the Court.

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Midway asserted that there is no evidence that was unavailable to the Dorins at the time the Compensation Order was made, that the Dorins' application is based rather on a change of circumstances, and that a change of circumstances does not constitute new evidence. Midway further argued that a change in circumstances does not fit within the requirements found in Rule 37, and that it therefore cannot form the basis of a S. 29 review.

Midway argued that a plain reading of the Compensation Order indicates that it does not award annual compensation. Midway also argued that a review under S. 27 of the *Act* is only available when the compensation order in question awards annual or periodic compensation, and that therefore such a review is not available in this case.

Midway asserted that the Dorins have presented no evidence that the decision-making process was unfair, and that, indeed, if the process had been unfair, it would have been noted in the *Dorin and Dorin* decision, which it was not.

Midway submitted that a "change in circumstance" was not referred to in either the *Act* or the *Rules*, and that accordingly the Panel should not consider it as a reason for reviewing a decision.

Midway also argued that the Panel should not waive any requirement of the *Rules* (*per* Rule 6(3)), since the Dorins have neither asked for nor provided any basis for such a waiver.

DECISION

1. The Panel finds that the Dorins' applications meet the threshold requirement to trigger a review of the ROE and Compensation Orders under S. 29 of the *Act*, which review will include the requests to amend the operator.
2. The Panel is not satisfied that interim awards of compensation are appropriate at this time.
3. The Panel directs Board Administration to schedule a prehearing dispute resolution conference to facilitate the review process.
4. Requests to proceed with the remaining S. 27 applications can be addressed at the prehearing dispute resolution conference should that be necessary.

REASONS FOR DECISION

Although the Dorins have presented a large number of different arguments and assertions, at their core, they are all related to a request to review the ROE and Compensation Orders (and, implicitly, the 2003 Decision). In order to simplify its process the Panel will consider the

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Dorins' applications under S. 29 of the *Act* together in the review of the ROE and Compensation Orders. Ultimately it will be for the Panel hearing the merits of the case to determine the outcome of the review and whether or not any additional compensation is appropriate.

The applications to amend the Operator from Camino to Midway should be addressed by the Board. Midway is the current holder of Well Licence No. 0065135. Concerns raised by all parties suggest that there may be issues surrounding the effective date of an amendment to the Operator and the impact, if any, on potential liability for compensation should that be affected. Therefore, it is appropriate that these requests to amend the Operator be considered at the same time as any review under S. 29. Both Camino and Midway will be invited to participate in this process.

In their applications, the Dorins argued that the circumstances surrounding the Right of Entry have changed so much since the Compensation Order was made as to render it made in error. The Panel notes that this change needs to be considered to determine if there is sufficient reason to amend the Compensation Order; certainly the allegation of changed circumstances is sufficient to warrant an oral hearing on the matter.

Midway argued that a Panel cannot consider a change of circumstances as a reason for a S. 29 review. This argument is mistaken. Midway is certainly aware that the Board regularly amends the Operator on Right of Entry and Compensation Orders, almost always because the party holding the relevant licence has changed. These amendments, under S. 29, are based on nothing other than a change in circumstances. Significant injustices could result if the Board was precluded from considering the effect of a change of circumstances on its orders.

In this particular case, and again without prejudice to any decision of a future Panel, the Panel notes that the Board's apparent implicit determination (in the Compensation Decision) that the subject lands would be sold within two years might be an important fact to subject the decision to review under Rule 37(5)(b); furthermore, the Board's considerations in assigning compensation may have been incorrect or insufficient (an error of law), therefore subjecting the decision to review under Rule 37(5)(a).

Certainly the factual circumstances in this case raise enough questions surrounding what the compensation award was actually intended for to warrant further inquiry by the Board. The intent of the *Act* is to make the landowner whole. Even if the circumstances do not fit clearly under one of the basic requirements outlined in Rule 37, Rule 6 of the *Rules* allows this Panel to waive or vary a requirement of the *Rules*. A review may very well result in the conclusion that the Dorins' were adequately compensated for their ongoing losses in the form of a single payment but this conclusion cannot be made simply on the basis of the written submissions provided to date. If development around the site was anticipated at the time of the original compensation award and did not ultimately occur as the result of events that followed and were

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not known at the time of the award; this factual circumstance requires further exploration. Further, S. 27 is in the *Act* to allow for regular consideration of actual loss of use and adverse effect arising from the activities of the operator. The factual circumstances of the original compensation award require further exploration to determine if the award was intended to preclude such a review in this case, or whether the calculation of compensation for agricultural loss leaves that open for future consideration.

Midway and Camino also argued that the Board does not have jurisdiction to review an order that has previously been appealed to the Court of Queen's Bench. The Panel has carefully considered this argument and finds that the issue is not sufficiently clear-cut to preclude a hearing on the merits or the review; Midway and Camino may bring this or other jurisdictional arguments to the hearing. Again, the facts surrounding the original award will be relevant in determining the limits of such a review.

Applications #3 and #5 are requests to review the rate of compensation under S. 27 of the *Act*. Normally when a completed Application is received under S. 27 of the *Act*, Board Administration schedules a Prehearing Dispute Resolution Conference, however, in this case there were concurrently filed Applications under S. 29 of the *Act*. It appears reasonable to first answer the preliminary question of whether the Orders should be reviewed before launching into the S. 27 Applications. The parties also disagree whether an annual or periodic payment is provided for in the existing compensation order.

Dated at the City of Edmonton in the Province of Alberta on July 10, 2012.

Board Member

APPENDIX A

- On January 7, 2012, the Board received a written submission with respect to these applications from Camino Industries Inc. (“Camino”).
- On January 10, 2012, the Board received a written submission with respect to these applications from Midway Energy Ltd. (“Midway”).
- On February 9, 2012, the Board received a written response from the Dorins.
- On February 21, 2012, the Board received a written reply from Midway in response to the February 9, 2012 submission of the Dorins.
- On March 22, 2012, the Board received another response from the Dorins.

APPENDIX B

Legislation

Relevant portions from Section 27 and 29 from the *Surface Rights Act* read as follows:

Review of rate of compensation

27

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(3) This section applies to compensation orders and surface leases

- (a) that provide for the payment of compensation on an annual or other periodic basis, or
- (b) that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.

...

Rehearings

29 The Board may

- (a) rehear an application before deciding it;
- (b) review, rescind, amend or replace a decision or order made by it;
- (c) repealed 2009 c31 s13;
- (d) notwithstanding anything in this Act, and with or without a hearing, amend a compensation order to show as a respondent a person who is neither an owner or occupant of the land concerned, and to make compensation payable to that person, when the Board is satisfied that that person is legally entitled to receive the compensation that would otherwise be payable to an owner or occupant.

RSA 2000 cS-24 s29;2009 c31 s13

Section 6 and relevant portions of Section 37 from the *Surface Rights Board Rules* read as follows:

6. Application of Rules

- (1) All parties must comply with these Rules and any Board Guidelines issued unless the Board otherwise orders.
- (2) The Board may exercise any power under these Rules on its own initiative or on the application of a party.

- (3) The Board may waive or vary a requirement of these Rules and may shorten or lengthen any time limits in these Rules at its discretion.

...

37 Reconsideration of a Decision or Order

...

- (5) The panel must review an application for reconsideration and only decide that a matter must be reconsidered if the basic requirements for reconsideration are met

The basic requirements for reconsideration are that:

- (a) the decision shows an obvious and important error of law or jurisdiction; or
 - (b) the decision shows an important error of fact, or an error of mixed fact and law, in the decision that affects the decision; or
 - (c) the decision was based on a process that was obviously unfair or unjust
- (6) A decision may also be reconsidered if the panel is satisfied that the decision is inconsistent with an earlier Board decision, any binding judicial authority, or is inconsistent with some other provision of the relevant legislation, *the Rules or Regulations*.
 - (7) A decision may also be reconsidered if the panel is satisfied that there was evidence at the time of the hearing that was not presented because it was unavailable to the party asking for reconsideration, and which is likely to make a substantial difference to the outcome of the decision.