

*Case Name:*

**DORIN and DORIN v. DYCO PETROLEUM CORP.**

[1980] A.J. No. 814

30 A.R. 105\*

2 A.C.W.S. (2d) 181

DCR 11090

Alberta Court of Queen's Bench  
Judicial District of Calgary

**Moore, J.**

February 1, 1980

(7 pages) (24 paras.)

**CASES JUDICIALLY NOTICED:**

Casell v. Alexandra Petroleums Ltd., [1972] 3 W.W.R. 706, ref'd to. [para. 5].

Lamb v. Canadian Reserve Oil and Gas Ltd., [1976] 4 W.W.R. 79; 8 N.R. 613, ref'd to. [para. 6].

Livingston v. Siebens Oil & Gas Ltd., 8 A.R. 439, ref'd to. [para. 8].

**STATUTES JUDICIALLY NOTICED:**

Surface Rights Act, R.S.A. 1972, c. 91, s. 23(2) [para. 4].

**COUNSEL:**

R.A. COAD, for the appellants

J.D. McCARTNEY, for the respondent

[\*page106]

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This case was heard by MOORE, J., of the Alberta Court of Queen's Bench.

The judgment of MOORE, J., was delivered at Calgary, Alberta on February 1, 1980.

1 MOORE, J.:-- This is an appeal from a decision of the Surface Rights Board acting under authority granted it by the

Surface Rights Act, R.S.A. 1972, chapter 91 with amendments thereto.

2 The land granted to Dyco Petroleum Corporation consists of 2.81 acres in the S.E.1/4 of Section 18, Township 31, Range 1, West of the 5th Meridian in the Province of Alberta. The appellants contend the board erred in calculating the value of the well site, and neglected to properly consider the present worth of the appellants profit potential, the present discounted worth of loss from future lot sales, if the property is subdivided, and the present worth of future servicing costs of the well site.

3 The board ordered compensation be paid to the appellants as follows:

1.	Compensation for area granted and related damages	\$ 24,242.00
2.	injurious affection	21,444.00
3.	General disturbance	1,185.00
4.	Incidental damages	154.00
5.	Compensation for agricultural loss	500.00
6.	Costs	2,250.00
		\$ 49,775.00

4 In determining the issue of compensation the board considered the factors set forth in section 23(2) of the Surface Rights Act, which states:

"(2) The Board, in determining pursuant to subsection  
(1) the amount of compensation payable, may consider

(a) the value of the land,

- (b) the loss of use by the owner or occupant of [\*page107] the area granted to the operator,
- (c) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
- (d) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
- (e) such other factors as the board considers proper under the circumstances."

5 It is interesting to note the often referred to judgment of Allen, J.A., in *Casell v. Alexandra Petroleum Ltd.*, [1972] 3 W.W.R. 706, at 708:

"although I have pointed out that the hearing is in the nature of a trial de novo, it is nevertheless an appeal from the findings of the tribunal making the award. Tribunals such as the Right of Entry Arbitration Board may be presumed generally to be selected because of knowledge or experience in the field in which they are to operate. They are dealing with these types of cases very frequently and they must be deemed to gain knowledge of their particular field through

that experience. When they make detailed findings of fact, as they did in this case, after viewing the area and hearing representations from both sides, and render written reasons as extensive as they did in this case, I think that their findings should not be lightly disturbed. In other words I think it would require cogent evidence to establish where they were wrong and why their awards should be varied or revised upward or downward. The very informality of their proceedings may suit the type of case with which they are dealing better than formal court procedure.

These boards were set up to meet a demand that compensation be fixed on a fair and adequate basis where lands or rights are expropriated for private operations, and considerable weight should be attached to their findings, except where they are clearly demonstrated to be wrong." [\*page108]

**6** This decision was approved in principle in the Supreme Court of Canada decision of *Lamb v. Canadian Reserve Oil and Gas Ltd.*, [1976] 4 W.W.R. 79; 8 N.R. 613, per Martland, J., at 87 (W.W.R.):

"Nonetheless, in my opinion, the District Court Judge was entitled to consider and was right in considering the findings of the board as having substantial evidentiary value, and in giving to them the weight to which the judgment in the 'Caswell' case said they were entitled.

In my view the appeal provision in question here is not, in its context, analogous to the provisions as to trial de novo contained in the Criminal Code dealing with appeals from summary convictions."

and Martland, J., states further at page 87:

"An appeal under the Act is concerned with the assessment of compensation and involves the determination, inter alia, of land values, damage to land, the effect upon land resulting from the right of entry and allowance for nuisance. The appeal is from a tribunal which, in dealing with compensation claims throughout the province, acquires an expertise in these matters. The appeal is to a district court judge, at the judicial centre nearest to the land in question, who is not a specialist in these matters. He hears evidence, and, it may be, fresh evidence. He can assess the credibility of the witnesses, but in determining land values, the adverse effect on other land resulting from right of entry and compensation for nuisance, he should have some regard for the opinion of the board. By this means a measure of equitable compensation can be achieved which will be uniform throughout the province, rather than varying decisions by different district court judges in various areas of the province."

**7** Clearly there must be cogent evidence that the board erred before this court alters the award.

**8** In *Livingston v. Siebens Oil & Gas Ltd.*, 8 A.R. 439, the Alberta Court of Appeal per McDermid, J.A., held that a court should not lightly disturb the findings of the board and that cogent evidence was required to establish where the board was wrong and why its award should be varied. [\*page109]

**9** The board, in the instant case, heard the evidence of J.R. Owsley of J.R. Owsley Consultants Ltd. on behalf of the landowners and the evidence of J.C. Leslie of J.C. Leslie Appraisals Ltd. on behalf of Dyco Petroleum. It accepted, after careful consideration, the evidence of J.C. Leslie over the approach to compensation taken by Owsley. Counsel agree that I heard essentially the same evidence on this appeal.

**10** Both appraisers were of the view at the time of the hearing in June 1978 that the land would be developed in the near future. Leslie thought the land might be developed in 1978 and Owsley indicated he thought the land would be developed within two years of the date of the Right of Entry Order which was granted August 5, 1977. As of January 1980 no steps have been taken by the appellant to develop the land.

**11** Mr. Leslie indicated in his evidence before this court that the land in question, which was annexed by the Town of Didsbury on February 1, 1978, would not be as valuable as new subdivisions in many other Alberta towns because of its proximity to a trailer park and light industry. He further testified that the north-west portion of the quarter section could be used for a school and that the necessary community reserve which must be committed on subdivisions could all be

committed to the school site, making it unnecessary to commit any community reserve to the well site.

**12** I am of the view that the board carefully weighed the evidence of Owsley at the June 1978 hearing and rejected it. I do not feel there is any cogent evidence which would allow this court to vary the compensation granted for the land taken, or for injurious affection.

**13** On appeal the appellants indicated that the board had failed to assess damages for the mental anguish they endured in the summer of 1977. Mr. and Mrs. Dorin are both teachers and have resided on the quarter section since May 1970. They became registered owners of the land in February 1974. Mr. Dorin operates a cattle business involving approximately 250 - 350 head depending upon the time of year. He moves the majority of his herd each spring into summer pasture several miles west of Didsbury retaining a small herd at the home place. When the herd was returned in the fall of 1977, they kept escaping from the pasture field due to inadequate fencing. When snow fell in the fall of 1977, drifting occurred and the cattle would simply walk up the drifts and over the fence onto the adjoining roadway. The cattle escaped on many occasions [\*page110] and Mrs. Dorin sometimes had to leave school in Didsbury where she was engaged as a substitute teacher to round up strays.

**14** The board compensated the Dorins for the cattle operation by awarding \$ 400.00 for the inconvenience. Mrs. Dorin said she finally had to give up teaching as the constant problems resulting from the well site and the inadequate fencing simply subjected her to too much pressure.

**15** However, she pointed out that while the well was being drilled in the summer of 1977 they were very concerned that the drilling would affect their water supply. They obtained a letter from Dyco dated July 21, 1977 saying that if the "capability or water quality of the water well situated in the corral and presently serving the household is appreciably damaged then Dyco Petroleum Corporation will endeavour to rectify the trouble". Mrs. Dorin said they worried for some time about the meaning and adequacy of the words "will endeavour to rectify" and after much consternation contacted Dyco's agent, Gus Hobbs, who finally undertook in writing:

"to replace a well comparable to the present well or better, or if this is impossible, Dyco agrees to pay all costs of connection to the town water supply and compensate you for future water costs, for a period of --."

Hobbs did not complete the undertaking. The document was entered as Exhibit 41 on appeal.

**16** Although the water supply was not affected by the oil well drilled nearby, I am satisfied on the evidence that the Dorin's endured several weeks of mental anguish over their water supply.

**17** During the course of the drilling which took three weeks Mr. and Mrs. Dorin were subjected to extensive noise twenty-four hours a day, making sleep almost impossible. Indeed the noise continues. After the well was completed Mr. Dorin, who had resumed teaching at a school in Calgary, could not sleep due to the noxious gas fumes escaping into the air in close proximity to their house.

**18** The board did not make an award for mental anguish suffered by the Dorin's in the summer and fall of 1977. I am satisfied on the evidence that the appellants suffered a great deal of mental anguish as a result of the drilling of [\*page111] the well and the noxious gas fumes and that they should receive compensation. I assess damages for mental anguish in the sum of \$ 7,500.00.

**19** The board was of the view that any physical damage to the land was not of immediate consequence of the Dorin's and that since the land is ultimately to be used for urban development the physical damage at the time termination of the right of entry is effected will not be of consequence. No steps have been taken to subdivide the land. The top soil has been scraped off and piled into a high embankment.

**20** Mr. John Scrymgeour, Vice President of Westburne Petroleum & Minerals Ltd., testified that Westburne has become the operator of the subject well by virtue of a pooling agreement in 1978. Westburne is prepared to landscape

and tree the well site area, and to relocate, if necessary, the access road when and if subdivision takes place. Scrymgeour further stated that Westburne was prepared to convert the pump to a quiet electric motor once a permanent access road has been decided upon as it would be necessary to run electrical lines along the access road.

**21** I agree with the board that the question of physical damage to the land is not a factor for consideration in assessing damages, particularly in light of Westburne's willingness to landscape the area.

**22** Lastly, the appellants seek a higher rate of interest than that awarded by the board. With the greatest respect, I am of the view that the interest award as set forth on page 12 of the board's decision is fair and reasonable.

**23** Accordingly the judgment of the board is confirmed in every respect save and except for the sum of \$ 7,500.00 awarded for mental anguish.

**24** The appellants will be entitled to costs of this hearing on a party-party basis on column 4, no limiting rule to apply.

Appeal allowed in part.