In the Court of Appeal of Alberta

Citation: Jorsvick v. Pennzoil Petroleums Ltd., 1988 ABCA 108

Date: 19880413
Docket: 18931
Registry: Calgary

Between:

Kenneth Jorsvick

Appellant

- and -

Pennzoil Petroleums Ltd.

Respondent

The Court:

The Honourable Mr. Justice Kerans
The Honourable Madam Justice Hetherington
The Honourable Mr. Justice Irving

Memorandum of Judgment
Delivered from the Bench

COUNSEL:

P.J. Madden, Esq., for the Appellant

H. Locke, Esq., for the Respondent

MEMORANDUM OF JUDGMENT DELIVERED FROM THE BENCH

KERANS, J.A. (for the Court):

[1] This is an appeal from the variation in Queen's Bench of an award for annual compensation by the Surface Rights Board under the Surface Rights Act R.S.A. 1980, c. S-27.1.

[2] The original compensation order was made in 1963. In 1980, the Board made what was in effect a new award but which simply set out a settlement between the parties. The matter was brought before the Board for review again in 1985 by the owner. The

Board held a new hearing, and increased the annual compensation over that awarded in 1980.

[3] The operator appealed to the Court of Queen's Bench and the learned Queen's Bench judge said, and I quote:

> This is an appeal from compensation order 5/86 whereby the Board increased the compensation payable to the land owner to $2,700.00 per year from the amount of $1,400.00 per year set five years earlier. The Board in its reasons for decision takes into account those factors usually considered in making an award but does not give any reasons which justify a decision to almost double the amount of the award.

[4] This seems to be an adoption of what was said by Associate Chief Justice Miller in a decision (apparently unreported) in Amoco Canada Petroleums Limited v. Leluik dated April 26, 1983 where he said, at p.6:

> The burden therefore rests upon the owner lessor to prove the change in circumstance that would warrant a review upwards of the rental provided for in the negotiated agreement between the parties initially.

[5] The respondent argued before us that a review of annual compensation cannot result in a changed order unless the applicant shows circumstances have changed since the making of the previous order. It also argued that the onus is on he who has agreed to an award to prove that the agreed award does not adequately compensate him.

[6] We do not agree. The scheme in s. 27 of the Act is for cinquennial review by the Board of awards for annual compensation. It follows that the duty of the Board on this review is to fix an annual award that would be fair for the next five years and no further because a projection beyond that date would be unrealistic. It is true that the review is not automatic. This merely indicates that, if the prior award happens yet to be satisfactory to the parties, no further steps are required. We note that the review may be triggered by either party.

[7] We emphasize that the function of the Board on each review is to look forward. The "changed circumstances" test, therefore, is not appropriate. Here, for example, the Board in 1980 was to make a judgment about the period 1980 to 1985. Now it is to assess the period 1985 to 1990.

[8] It follows that once either party triggers a review, the entire question of annual compensation is at large, and must again be fixed by the Board on the basis of the material then before it. What happened earlier is merely a factor to be considered. It is not correct to say that the applicant, to gain a change in the award, must show altered circumstances. It is correct to say that, to gain any new award, the applicant will only get

the award he proves he is entitled to. The onus is on the applicant, whoever he may be. There is no presumption for or against the previous award.

[9] It follows that the approach of the Board here was correct. It treated the matter as at large before it.

[10] We note that the application before it was labelled as a s. 28 matter. We think that section only applies to orders made before 1972. Once an amending order is made, as was done here in 1980, the matter is no longer, we think, a “pre-1972” matter, and any application should have been under s. 27. We add, however, that this distinction seems not to be important in this case, because both of these sections call for a review.

[11] The learned Queen’s Bench judge restored the 1980 order on the ground that no change was shown. This was an error, and his decision is vacated.

[12] The question now is whether to order a new hearing or to affirm the Board order.

[13] The dispute throughout was as to both loss of use and adverse effect. The owner claimed $325.00 per acre for loss of use, a figure reduced by the Board to $225.00 by reason of his miscalculations. Both before the Board and before the learned Queen’s Bench judge, the evidence of the operator was that the value of the loss was about $110.00 an acre. The main difference between the parties on this was as to the degree of pessimism of each about the international grain market over the next few years, and what a farmer can do about replacement markets. While both sides built up their cases for the Queen’s Bench judge (with more experts and more detail) the issue remained the same.

[14] We think that this is an issue where, according to the very special standard of review for these cases, a measure of deference to the views of the Board is appropriate. We would not interfere with its decision.

[15] The other dispute was about adverse effect. The owner claimed, and the Board accepted, an assessment of $1,700.00. The operator suggested $1,100.00 to the Board and, before the learned Queen’s Bench judge, suggested less than $500.00. It called new expert evidence in aid.

[16] The assessment of adverse effect is very much a matter of judgment. After a careful review of the evidence before the Court, we think that it has not been shown compellingly that the Board’s valuation was wrong. Again, we think it appropriate to defer to the judgment of the Board.

[17] We accordingly allow the appeal, vacate the order in Queen’s Bench, affirm the Board decision.