

Indexed as:
Muntean v. GNE Resources Ltd.

Between:
Edward Muntean and Bradley David Muntean, Appellants, and
GNE Resources Ltd., Respondent

[1993] A.J. No. 545

[1993] 7 W.W.R. 341

11 Alta. L.R. (3d) 299 p

143 A.R. 197

41 A.C.W.S. (3d) 888

No. 9101-15046

Alberta Court of Queen's Bench
Judicial District of Calgary

Moore J.

July 13, 1993.

(11 pp.)

SCHEDULE "A"

- 1) Lamb v. Canadian Reserve Oil & Gas Ltd., [1977] 1 S.C.R. 517
- 2) Caswell v. Alexander Petroleum Ltd., [1972] 3 W.W.R. 706
- 3) Sun Oil Co. Ltd. v. Whitehouse et al., [1982] 6 W.W.R. 289
- 4) NUL v. Edmonton, [1979] 1 S.C.R. 684
- 5) Jorsvick v. Pennzoil, [1988] A.J. No. 327 (Appeal No. 18931 of Alberta Court of Appeal, April 13, 1988)
- 6) The Law of Expropriation and Compensation in Canada, 2nd edition 1992, by Eric C.E. Todd

- 7) Irving Oil Co. v. R., [1946] 4 D.L.R. 625
- 8) Regina v. Maddison Development Corp. (1980), 22 L.C.R. 11
- 9) Patson Industries Ltd. v. Calgary (1983), 30 L.C.R. 190
- 10) Dau v. Maddison Development Corp. (1970), 73 W.W.R. 269
- 11) TAUC v. MacTaggart (Appeal No. 8703-0791 of Alberta Court of Appeal, December 14, 1989)
- 12) McKee v. Alberta (1967), 16 L.C.R. 35
- 13) Great Plains Development Company v. Lyka, [1973] 5 W.W.R. 786
- 14) Livingston v. Siebens Oil and Gas, [1978] 3 W.W.R. 484
- 15) Petryshen et al. v. Nova, An Alberta Corporation (1982), 27 L.C.R. 276
- 16) Markovich Farming v. PanCanadian Petroleum, [1984] 3 W.W.R. 416
- 17) Nova, An Alberta Corporation v. Bain (1985), 33 L.C.R. 91
- 18) Walde v. Great Basins Petroleum (Appeal No. 17152 of Alberta Court of Appeal, 1985)
- 19) Roen v. PanCanadian Petroleum (1977), 12 L.C.R. 143
- 20) Eastman v. PanCanadian Petroleum (1982), Medicine Hat Action No. 8208-00170; MacLean, J. (unreported)
- 21) Broomfield v. Canadian Western Natural Gas Company (1984) Fort Macleod action No. 8407-0064; Dea, J. (unreported)
- 22) Lomond Grazing Association v. PanCanadian Petroleum (1985), Lethbridge Action; MacLean, J. (unreported)
- 23) TransAlta Utilities v. Malmberg (1985), Calgary Action No. 8501-12404; MacDonald, J. (unreported)
- 24) Woronuk v. Alberta Power (1986), Grande Prairie Action Nos. 8504-9832, 8504-9833, 8504-9835; Bracco, J. (unreported)
- 25) Champlin v. Calco Ranches Ltd. (1986), 36 L.C.R. 131
- 26) Cabre v. Arndt (No. 1), [1986] 4 W.W.R. 529
- 27) Cabre v. Arndt (No. 2) (1988) Edmonton Action No. 8603-25291 (unreported)
- 28) Anderson Exploration v. Dion, Peace River Action No. 8309-0968; Bracco, J. (unreported)
- 29) Dome v. Richards (1985), 34 L.C.R. 1
- 30) Caswell v. Alexandra Petroleums Ltd., [1972] 3 W.W.R. 706
- 31) Lamb v. Canadian Reserve Oil & Gas Ltd., [1976] 4 W.W.R. 79
- 32) Cochin Pipe Lines Ltd. v. Rattray, [1981] 1 W.W.R. 732

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Corrigenda

Released September 13, 1993

MOORE J.:-- There were two errors in the Reasons for Judgment dated 13th July 1993 in this Action.

- 1) The last name of the Appellants was misspelt.
- 2) the wrong Schedule "A" was attached.

Please replace the first page, Schedule "A", and the backer with the attached four pages.

MOORE J.

STATUTES, REGULATIONS AND RULES CITED:

Land Surface Conservation and Reclamation Act, R.S.A. 1980, c. L-3.

Surface Rights Act, S.A. 1983, c. S-27.1, ss. 25(1)(d), 26(7) (d).

[Ed. note: Corrigenda were released by the Court September 13, 1993; the corrections have been made to the text and the Corrigenda are appended to this document.]

Mines and minerals -- Oil and gas -- Surface rights -- Appeals -- Rent, calculation of.

Appeal under Surface Rights Act. At issue was the proper rent for a five-year surface lease. In determining this there are two methods, and the better one was to be chosen. The first was "fair annual return"; the second was to compare leases.

HELD: The second method was preferred. Rent of \$15,050 was ordered.

B.K. O'Ferrall, for the Appellants.

S. Carscallen, for the Respondent.

REASONS FOR JUDGMENT

MOORE J.:--

Issue

This is an appeal pursuant to the Surface Rights Act (the Act), Statutes of Alberta, chapter S-27.1. The appeal is a new hearing. The Act governs surface leases for oil wells and gas wells.

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.

In this case, I prefer the second method - to compare one lease to another lease.

General Facts

The Act defines the "rate of compensation" and I have called it "rent". The appellants own 8.99 acres of land in the north-east industrial area of the City of Red Deer. Of the 8.99 acres, GNE leases 3.34 acres for its oil well. The surface lease dated September 20th 1985 is a standard form of Alberta surface lease. For the first five years, the rent was \$3,000.00 per year.

The appellants wanted an increase in rent. The Surface Rights Board (Board) held a hearing, and effective September 20th 1990, the Board increased the rent from \$3,000.00 per year to \$4,000.00 per year. The new rental of \$4,000.00 per year continues for five years (to September 20th 1995). The appellants now appeal the Board's award.

The surface lease says that GNE may use the land "for any and all purposes and uses as may be necessary or useful in connection with all its operations". The lease gives GNE the right to hold the land for a term of 25 years with an automatic renewal for a further term of 25 years. However, GNE has the right at any time to forthwith terminate the lease by written notice.

The lease severed a 0.29 acre parcel between the lease access road and the north boundary of the appellant's property, and the 0.29 acre is now useless.

The remainder of the appellants' land is 5.36 acres (8.99 acres minus 3.34 acres, and minus 0.29 acres). On the 5.36 acres, the appellants have a house, a large machine shop, and two separate garages. The configuration of the GNE lease diminishes the highest and best use of the remainder of the appellants' land. The configuration of the GNE lease makes it more difficult for the appellants to rent the remainder of their land. Section 25(1)(d) of the Act reads:

The Board, in determining the amount of compensation payable, may consider the adverse effect of the area granted to the operator on the remaining land of the owner ...

In Alberta, there are not many oil wells drilled within the boundaries of cities. The Board has much experience with surface leases for oil wells drilled in rural areas, but the Board does not have much experience with oil wells within cities.

Mr. McNally gave evidence for GNE. He is an appraiser, and he is qualified as an expert witness. Mr. McNally produced evidence of the purchase price of the appellants' land and the cost of the buildings and other improvements the appellants built on the land. Mr. McNally produced other evidence, and he then calculated a fair annual return on the appellants' investment. He calculated that the income stream for the GNE lease should be \$4,000.00 per year.

Mr. Berrien gave evidence for the appellants. He is an appraiser, and he is qualified as an expert witness. Mr. Berrien gave evidence of commercial leases of industrial land in the City of Red Deer. He says the five most comparable leases are:

Astral Energy	lease of 4.9 acres
GEO Probe	lease of 3.35 acres

Key Towing	lease of 2 acres
Shell Key Lock	lease of 1 acre
Fracmaster	lease of 4 acres

Comparable Leases

Are there comparable leases in the City of Red Deer? The appropriate annual compensation must be determined in relation to what other tenants are paying to lease similar lands in similar situations. Only if there were no comparable commercial leases in Red Deer should the income stream method be used to determine annual compensation. If there are a number of deals made such that it can be said that the pattern has been established by negotiations between landlords and tenants, the Board should depart from such compensation only with the most cogent reasons. Awards should be made so that like situations are treated in like fashion. There should be uniformity in compensation.

What are "comparable leases"? No two properties will be exactly the same. No two leases will be "truly comparable". An element of common sense must be applied to this question of comparability. Comparable leases should be within the City of Red Deer. They should be leases in an industrial area. They should be leases of unimproved land, or virtually unimproved land. They should be leases for industrial facilities. While the land size of each lease may vary, the leases should be comparable in size to 3.34 acres. The lease should be entered into near the September 20th 1990 effective date. The comparison of leases of property is similar to the comparison of sales of property. The Law of Expropriation and Compensation in Canada, 2nd ed., 1992, at page 101 says:

The direct sales comparison approach is preferred by courts and tribunals. In general, the other approaches are more complicated and require the use of more judgmental factors which may detract from the reliability of the resultant appraisal.

There may be hundreds of acres of vacant industrial land in the City of Red Deer. Unless the owners of those vacant lands are prepared to lease, the lands will not be leased. In the meantime, they may be used for horse pasture. It is only when prospective tenants are prepared to pay the rent being sought by the owners of these industrial lands that they will be leased. There may be a variety of good reasons why a landlord would prefer his lands remain vacant rather than lease them for less than the "market rate".

Champlin Canada Ltd. v. Calco Ranches Ltd. (1986) 36 L.C.R. 131 suggests that once prima facie comparability is demonstrated, it is up to the party opposing to show that the alleged comparable lease is not in fact comparable.

The Fracmaster Lease

The Fracmaster lease is comparable to the GNE lease. The Fracmaster lease is approximately 160 meters from the GNE lease. The Fracmaster lease is adjacent to land owned by Fracmaster. Fracmaster needed an additional storage yard adjacent to (or near) its own land.

If Fracmaster had no choice but to lease the four acres adjacent to its own lands, the Fracmaster lease indicates the level of rent paid in Red Deer for industrial land where the tenant is highly motivated.

Like Fracmaster, GNE was also motivated because it too had limited choices in picking a site for its oil well. Absent the Surface Rights Act which allowed GNE to expropriate the lease interest it needed, GNE might very well have paid a "motivated rent" in order to obtain the well site which was most suitable. A lease of industrial land in Red Deer to store heavy equipment is not fundamentally different from a lease of industrial land in Red Deer for a well site.

Rent

No two leases are truly comparable, so the rent must be adjusted. If Fracmaster is willing to pay \$21,500.00 per year to rent adjacent land, how much would Fracmaster pay to rent land which is 160 meters from its lands?

For Fracmaster, the adjacent land is handy, and the adjacent land is easy to guard with common security. I adjust the rent in the GNE lease to 70% of the rent in the Fracmaster lease. The Fracmaster rent is \$21,500.00 per year, so the rent in the GNE lease is \$15,050.00 per year. The new rent is effective on September 20th 1990, and on September 20th each year thereafter until the rent is varied by a further review.

Interest

The Board ordered GNE to pay interest on overdue rent, and fixed the rate at 12.61% per annum from September 20th 1990. Interest rates have decreased, so I reduce the interest rate to 10% per annum from September 20th 1990.

Costs

Pursuant to Section 26(7)(d) of the Act, GNE shall pay the appellants' costs on a solicitor and client basis. Costs may be spoken to within the next 30 days.

Not Relevant

- (1) Arguments regarding the reclamation costs for the appellants' land are not relevant. At this time, it is not known what reclamation is required. At the appropriate time, this matter will be dealt with by other authorities under the terms of the Land Surface Conservation and Reclamation Act, R.S.A. Chapter L-3.
- (2) The rental amount during the first five years of the GNE lease is not relevant. The Alberta Court of Appeal in *Jorsvick & Pennzoil*, [1988] A.J. No. 327 (Appeal No. 18931 dated April 13th, 1988), says that the function of the Board on each review is to look forward. The "changed circumstances" test is not appropriate.
- (3) The Fracmaster lease is four acres. The GNE lease is 3.44 acres. The small difference in size is not relevant.

Authorities

The authorities referred to me by the appellants and by GNE are on the attached Schedule "A".

MOORE J.