

**ALBERTA SURFACE RIGHTS BOARD**  
(the "Board")

**Citation:** Penn West Petroleum Ltd. v. Parkland Industrial Estates Ltd., 2014 ABSRB 135

**Date:** 2014-02-19

**File No.** SL 2012.0105

**Decision No.** 2014/0135

**In the matter of** the *Surface Rights Act*, RSA 2000, c S-24 (the "Act")

**And in the matter of** land in the Province of Alberta within the:

Plan 0740392, Block 2, Lot 223 (SW ¼-10-53-26-W4M)

as described in Certificate of Title No. 072 706 478 +2

(the "Land")

BETWEEN:

PENN WEST PETROLEUM LTD.,

Operator,

- and -

PARKLAND INDUSTRIAL ESTATES LTD., (owner)

Lessor.

BEFORE: D.A. Sibbald Q.C.  
(the "Panel")

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**DECISION**

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**APPEARANCES**

For the Operator: - Daron K. Naffin, counsel, Bennett Jones LLP

For the Lessor: - Keith Wilson, counsel, Wilson Law Office

**1.0 BACKGROUND**

This decision is limited to a determination of a preliminary issue concerning the effective date for a review of compensation under Section 27 of the *Act* for a surface lease.

Written submissions were provided to the Board pursuant to the timetable established at a Pre Hearing Dispute Resolution Conference held on October 7, 2013.

**2.0 THE LESSOR'S POSITION AND KEY SUBMISSIONS**

The Lessor submits that the effective date for the review of the compensation payable should be September 29, 2012. It is argued that in an agreement dated February 13, 2007, the parties agreed "the anniversary date review period would be calculated from September 29, 2012."<sup>1</sup>

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<sup>1</sup> Written Submission dated November 1, 2013 at page 2

The position is advanced the surface lease dated May 15, 1984, is “no longer valid.”<sup>2</sup>The basis of that position is that there is only one caveat registered on title to the subject land and that it is with respect to the February 13, 2007, agreement and not the May 15, 1984, surface lease. The Lessor relies on Section 60 of the *Land Titles Act*, RSA 2000, as amended (*LTA*).

It is acknowledged that the Lessor signed a rental review letter dated June 26, 2008, in which it is stated the next review would be in 2014. It is submitted, however, that it was “signed in the ordinary course without a review of the lease arrangement and appropriateness of the compensation being proposed.”<sup>3</sup>

In an apparent alternative argument raised in its reply submissions, the Lessor submits that since the hearing date for the compensation review is set for July 8, 2014, being after the effective date the Operator proposes, the “Board clearly has jurisdiction to proceed regardless of the Board’s ruling on the preliminary matter of effective date.”<sup>4</sup>

### 3.0 THE OPERATOR’S POSITION AND KEY SUBMISSIONS

The Operator’s central position is that the effective date for the next review should be May 15, 2014, being calculated in five-year increments from the original surface lease dated May 15, 1984. Flowing from that is the position that the May 2, 2012, rent review application of the Lessor is premature.

It is further argued that the Lessor’s application was brought too late for a review with an earlier effective date of May 15, 2009.

The Operator rejects the Lessor’s position that the 1984 surface lease is no longer valid. The basis of that position is that a caveat does not create rights but rather only serves to provide notice to a potential third party purchaser of an interest in the land. It is noted that contrary to the assertion of the Lessor, the 2008 caveat explicitly references a claim of an interest in land under the 1984 surface lease.

The Operator relies on the 2008 rental review letter as evidence of an explicit agreement for the next review to be in 2014.

### 4.0 RELEVANT LEGISLATION

For ease of reference, the relevant legislation is set out in Appendix A.

### 5.0 ISSUES

1. What is the effective date for the next review of the rate of compensation payable under the surface lease?
2. Should the hearing scheduled for July 8, 2014, proceed?

### 6.0 DECISION

1. The effective date for the next review of the rate of compensation payable under the surface lease is May 15, 2014.
2. A Pre Hearing Dispute Resolution Conference shall be scheduled for as early a date as practical to address the question of proceeding with the hearing scheduled for July 8, 2014, based upon a May 15, 2014, effective date.

### 7.0 FINDINGS AND ANALYSIS

The original surface lease is dated May 15, 1984.

<sup>2</sup> Written Submission dated November 1, 2013 at page 4

<sup>3</sup> Written Submission dated November 1, 2013 at page 2

<sup>4</sup> Reply Submission dated December 13, 2013 at page 1

The purpose of Section 27 of the *Act* is to provide an opportunity for the parties to have the annual rate of compensation payable under a surface lease reviewed every five years from the effective date of the surface lease. (See Section 27(2)(b) of the *Act* ) The Lessor's position is that the sequential five-year review periods was changed either by an agreement between the parties or by the surface lease being invalid and replaced by a new agreement.

The 2007 agreement relied upon by the Lessor is identified clearly as an Amendment to Surface Lease and as such would be read together with the Surface Lease it purports to amend. Neither party has provided a copy of a surface lease dated September 19, 1986, and the Operator suggests in paragraph 4 of its submission that "there is no such agreement." There is insufficient evidence to conclude that this document somehow replaces the 1984 Surface Lease.

*Shepstone v. Surface Rights Board (Alberta)*<sup>5</sup> is the clear answer to the Lessor's first argument. The Court states "...the parties are not entitled to amend the "review date," effective date," "date the lease commenced" insofar as determining the process under s. 27 of the statute...." [Emphasis in the original at para 21] The Lessor's position that the February 13, 2007, agreement changed the effective date is rejected.

The Lessor's argument that the 1984 Surface Lease is invalid is dependent on a finding that the caveat registered on title is not with respect to the 1984 Surface Lease and by operation of Section 60 of the *LTA* that lease becomes invalid and is replaced by the February 2007 agreement.

The merits of the argument concerning Section 60 of the *LTA* need not be addressed in light of the unchallenged evidence establishing that the 1984 surface lease is explicitly referenced in the caveat filed on title.

The Panel considered the Operator's submission that the 2008 rental review letter is evidence of an agreement for the next review to be in 2014. Based on the *Shepstone* decision, such an agreement cannot be used to determine the effective date for a review under Section 27.

For the purposes of this review May 15, 1984, is the effective date of the Surface Lease. For the reasons set out, the Panel finds that the effective date for the next review of the compensation payable is May 15, 2014.

In the event of such a finding, the Lessor proposed in its reply submission that the currently scheduled July 8, 2014, hearing proceed based upon the effective date for the review being May 15, 2014. The Operator has not responded to that proposal. Proceeding in that manner does not appear to have been contemplated when this preliminary matter was directed by the Presiding Member at the Pre Hearing Dispute Resolution Conference held on October 7, 2013, nor has it been fully canvassed in the parties' written submissions. Therefore, a further Pre Hearing Dispute Resolution Conference shall be scheduled for as early a date as practical to address the question of proceeding with the hearing scheduled for July 8, 2014, based upon a May 15, 2014, effective date.

Dated at the City of Edmonton in the Province of Alberta on February 19, 2014.

SURFACE RIGHTS BOARD

MEMBER

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<sup>5</sup> 2000 ABQB 1003

## APPENDIX A

Relevant legislation:

Section 27 of the *Surface Rights Act*:

### **Review of rate of compensation**

**27(1)** In this section,

- (a) “lessor” means a party to a surface lease who is entitled to receive compensation under that surface lease
- (b) “operator” means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;
- (c) “parties” means,
  - (i) with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and
  - (ii) with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;
- (d) “rate of compensation” means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).

**(2)** For the purposes of this section,

- (a) the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and
- (b) the term of a surface lease shall be computed from the effective date of the lease.

**(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.

**(4)** An operator shall give a notice to the lessor or respondent, as the case may be,

- (a) on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or
- (b) where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.

**(5)** A notice under subsection (4) shall state

- (a) that the operator wishes to have the rate of compensation reviewed,
- (b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or
- (c) where no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,

in respect of the compensation years of the term subsequent to the year in which notice is given.

**(6)** If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.

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- (7) When the parties agree on a rate of compensation
- (a) under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and
  - (b) under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.
- (8) If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for a hearing to determine the rate of compensation.
- (9) An application pursuant to subsection (8) shall set out
- (a) the name and address of the operator,
  - (b) the name and address of the lessor or respondent, as the case may be,
  - (c) the rate of compensation under the surface lease or compensation order, and
  - (d) the amount the applicant believes to be a reasonable and fair rate of compensation,

and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.

(10) Repealed 2009 c31 s11.

(11) The Board shall hold proceedings to determine the rate of compensation and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).

(12) An order under subsection (11) may be appealed as though it were a compensation order under section 23.

(13) With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.

(14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.

(15) If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case

- (a) subsections (6) to (13) apply,
- (b) the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and
- (c) the Board may make any order regarding the payment of interest that it considers appropriate.

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Section 60 of the *Land Titles Act*:

### **Obligation affecting land**

**60(1)** The owner of land in whose name a certificate of title has been granted shall, except in case of fraud in which the owner has participated or colluded, hold it, subject (in addition to the incidents implied by virtue of this Act) to the encumbrances, liens, estates and interests that are endorsed on the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever except the estate or interest of an owner claiming the same land under a prior certificate of title granted under this Act or granted under any law heretofore in force and relating to title to real property.

**(2)** Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which the person claiming priority or any person through whom that person derives title has held possession.

RSA 1980 cL-5 s64;1988 c27 s29