ALBERTA SURFACE RIGHTS BOARD

(the "Board")

Citation: Penn West Petroleum Ltd. v. Parkland Industrial Estates Ltd. 2015 ABSRB 42

Date: 2015-01-20

File No. SL2012.0105

Decision No. 2015/0042

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 (ATS Ref: 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.,

Lessor.

BEFORE: Thomas Robert (Presiding Member)
Charles Newell
Edward V. Zenko
(the "Panel")

DECISION

APPEARANCES:

For the Operator:	-	Daron Naffin, Legal Counsel, Bennett Jones LLP
	-	Robert Telford, Appraiser, McNally Land Services Ltd.
For the Lessors:	-	R. F. (Bob) Horton, Chief Operating Officer, Trans America Group Ltd.
	-	Keith Wilson, Legal Counsel, Wilson Law Office
	-	Robert Berrien, Appraiser, Berrien Associates Ltd.

BACKGROUND:

The Board received an application from the Lessor, Parkland Industrial Estates Ltd. ("Parkland") as provided for in Section 27 of the *Act* requesting a review of the rate of compensation payable on a surface lease dated May 15, 1984.

Board Decision No. 2014/0135 determined the effective date of review to be May 15, 2014.

A hearing was held on July 8 & 9, 2014, in Edmonton, Alberta to address the matter of compensation.

FACTUAL OVERVIEW:

The Lease Agreement:

- Dated May 15, 1984
- Relates to a 3.53 acres wellsite
- There is no access road

The Land:

- Located in Parkland County
- Plan 0740392, Block 2, Lot 223-SW 10-53-26 W4 (LSD 6-10)
- Purchased by Parkland Industrial Estates Ltd. in 1999 as part of a larger parent parcel
- The parent parcel was subdivided and became Parkland Industrial Estates Ltd.
- All adjoining lots have been sold, this lot is unsold
- Established businesses are now operating out of all adjoining lots
- The titled unit is now fully taken up by the 3.53 acre lease agreement/wellsite
- There is no "remaining land" as referenced in s. 25(1)(d) of the *Act*
- Zoned Medium Industrial
- Fully serviced to property line

The Wellsite:

- 3.53 acres
- Accessed directly from paved Township Road 531A
- Includes a wellhead and flare pit

The wellsite has not been in production since 2007

ISSUES:

1. What is an appropriate rate of compensation payable as the effective date of review, May 15, 2014?
   a. Does a pattern of dealing exist?
   b. If yes, are there cogent reasons to depart from the pattern?
   c. If no, what is a fair and reasonable rate of compensation?
2. Is interest payable, and if so, at what rate?
3. Are costs payable, and if so, what amount is payable?

RELEVANT LEGISLATION:

The relevant sections of the *Act* are set out in Appendix A.

EXHIBITS FILED:

The Exhibits are listed in Appendix B.

DECISION:

1. What is an appropriate rate of compensation payable as of the effective date of review, May 15, 2014?
   a. A pattern of dealing does not exist.
   b. Having decided (a) as it did, the Panel need not answer this question.
   c. The Panel varies the annual rate of compensation to $35,700.00 effective on May 15, 2014.
2. Interest is not payable.
3. Costs are reserved.

KEY EVIDENCE AND ANALYSIS:

The Panel has thoroughly reviewed all of the evidence and arguments and acknowledges the efforts and contribution of the witnesses. However, it will focus on key evidence and arguments in outlining reasons for the award of compensation.

1. What is an appropriate rate of compensation payable as of the effective date of review, May 15, 2014?

Penn West Petroleum Ltd. ("Penn West") proposed compensation of $8,618.00 annually based on a suggested pattern of dealing. Alternatively, Penn West suggested $5,364.00 based on Robert Telford's empirical calculations.[1] This amount is comprised of $4,964.00 for loss of use (the current rate of $4,500.00 adjusted for inflation) plus $400.00 for adverse effect.

Parkland's position was that loss of use should be based on a return on the value of the 3.53 acre wellsite (7.6 percent of their appraiser's valuation of $1,517,900.00 = $115,360.00 per year).

a. Does a pattern of dealing exist?

It is the practice of the Board to base compensation on a pattern of dealing when one exists unless there are cogent reasons for doing otherwise. This approach is: a) based on the underlying premise that the marketplace is usually the best determinant of fair and reasonable rates of compensation, b) consistent with that used by the Court in *Livingston v. Siebens Oil & Gas Ltd. (1978), 8 A.R. 439 (C.A.)*, and c) now used routinely by the Court and the Board.

Parkland did not provide any pattern evidence, but rather, relied on its empirical evidence of loss of use.

Robert Telford ("Telford") provided pattern evidence for Penn West. He provided 21 agreements (including the subject) in support of Penn West's position that compensation should be $8,618.00 annually.[2] The agreements included 10 from Drayton Valley, 8 from Parkland County, and 3 from the Edmonton area; and range from $527.00 to $28,000.00 annually. Telford removed the $527.00 as an outlier and was left with a range of $2000.00 to $28,000.00. After also removing the subject property, he was left with 19 agreements with a mean of $8,618.00 and a median of $6,000.00 annually. Penn West and Telford suggested that this range could be considered a pattern of dealing and that an appropriate rate of compensation is $8,618.00.

Parkland argued that the agreements did not form a pattern of dealing because of: (a) lack of proximity of the Drayton Valley agreements/land, and (b) the agreements do not relate to similar wellsites (i.e. industrial zoned land, fully subdivided, fully serviced, all adjoining lots sold, with established businesses operating in new buildings).

The Panel finds that the agreements do not form a pattern of dealing in the Livingston-Siebens sense.

Firstly, the subject land is totally surrounded by industrial lots that have been sold and are being used for industrial purposes. The development is sold out with the exception of the subject wellsite. That is not the case with the agreements offered by Penn West. The Panel was not presented with similar situations where it could be determined---on a balance of probability---that the lease site would have been developed, but for the wellsite.

Secondly, the pattern evidence does not identify similar situations where a landowner acquires property, subdivides it, markets it, all with full knowledge of the existence of a wellsite.

Finally, even if other criteria are considered independent of the "saleable but for the wellsite" factor, there is no prevailing rate of annual compensation. The annual compensation provided in

[1] Exhibit 3, page 4

[2] Exhibit 4

Penn West's pattern evidence indicates a wide range of compensation and a wide range of circumstances with no obvious explanation. The Panel notes the following:

Compensation Range	# of Agreements
$0-$4,999.00	8 (varied uses)
$5,000.00-$9,999.00	5 (varied uses)
$10,000.00-$14,999.00	4 (varied uses)
$15,000.00-$19,999.00	2 (one with a pumpjack, one with a water injector well)
$20,000.00-$24,999.00	-
$25,000.00-$30,000.00	1 (a battery facility)
Total	20 (subject excluded)

The pattern evidence does not indicate a definitive amount of compensation for similar properties and circumstance upon which the Panel can base compensation---(i.e. no pattern of dealing in a *Livingston-Siebens*[3] sense). Notwithstanding that a pattern of dealing has not been established, the Panel recognizes and notes that in no case does annual compensation exceed $28,000.00.

b. If yes, are there cogent reasons to depart from the pattern?

Having decided as it did in (a) above, the Panel need not answer this question.

c. If no, what is a fair and reasonable rate of compensation?

Section 27(1) defines rate of compensation as: "*...the matters referred to in section 25(1)(c) and (d).* Section 25(1)(c) relates to loss of use. Section 25(1)(d) relates to adverse effect, nuisance, inconvenience, and noise.

These components of annual compensation: (i) loss of use, and (ii) adverse effect, nuisance, inconvenience, and noise, will be considered in turn.

i. Section 25(1)(c)---Loss of Use

Section 25(1)(c) states that in determining a rate of compensation it may consider: "*...the loss of use by the owner or occupant of the area granted to the operator.*"

The parties disagree on the relevance of Parkland's knowledge of the existence of the wellsite when it purchased the property. This difference is at the heart of this dispute.

Penn West's Position on Loss of Use

Penn West relied on the testimony of Robert Telford ("Telford") to support its position.

Penn West and Telford argued that, because Parkland was aware of the wellsite when it purchased the land, it should not now expect compensation when the site is not suitable for development.

[3] *Livingston v. Siebens Oil & Gas Ltd. (1978), 8 A.R. 439 (C.A.)*

In Telford's first scenario "Encumbered Property with a Restricted or Limited Use", he proposed loss of use compensation of $0.00. Telford defended this alternative as reasonable because:

> *"...it is logical to conclude that the owner purchased the property with the restriction precluding any use of the leased land, there is no loss of use associated with this property, as there never has been a use to lose."*[4]

Penn West argued that:

> *"...when the Landowner purchased the Subject Lands in 2000, it did so with full knowledge of the encumbrances on title and presumably would have acquired them at a discount as a result given the limitations imposed by the Subject Well in relation to the Landowners proposed use of the lands."*[5]

Penn West pointed out "*...the well-established doctrine of caveat emptor, or 'buyer beware'.*"[6]

Penn West also referenced a number of Board decisions in arguing its position. Each of these decisions addressed the question of known limitations and obstacles.

From *Devon Canada Corporation v Hill, 2011 CanLII 95538 (ABSRB)*, ("*Devon/Hill*"), Penn West cited: "*A claim for compensation for a known and accepted risk from a pre-existing limitation on the use of the lands is not supportable.*"[7]

In making that finding, the Panel considered and finds support in Nexen Inc. v. Farm Air Properties Inc. (Board Decision No. 2008/0182). In that case, the Panel held that compensation for alleged losses from design or development inefficiencies would be denied when a landowner purchased property knowing of the presence of a well site on the land. It was considered to be unsupportable to later claim compensation from the operator of the well site for limitations in developing the land which were or should have been known at the time of purchase..."[8]

Nexen Inc. v Farm Air Properties Inc., 2008 CanLII 88572 (ABSRB) ("*Farm Air*") specifically states: "*...a claim that the efficiency of the development was restricted by a known obstacle at the time of acquisition is not supportable.*"[9]

From *AltaLink v Royal West*,[10] Penn West quoted: "*...a knowledgeable investor would have demanded and gotten a discount if he/she were to purchase the subject property after the date of the right of entry order.*"[11]

Penn West also stated: "*How the Landowner took this information into consideration in negotiating the purchase price for the subject lands is not the concern of the Board or Penn West.*"[12] It further stated: "*Penn West notes that the evidence establishes that the Landowner did pay approximately 16 % less than the asking price for the property,*"[13] thereby at least implying that Parkland discounted the price because of the wellsite.

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[4] Exhibit 3, page 28
[5] Penn West Brief of Argument at paragraph 70
[6] Penn West Brief of Argument at paragraph 75
[7] Penn West Brief of Argument at paragraph 76
[8] Penn West Prief of Argument at paragraph 76
[9] *Nexen v. Farm Air* Properties at page 13
[10] *AltaLink Management Ltd. v. Royal West Property Corp., 2014 ABSRB 221 (CanLII)("Royal West")*
[11] Penn West Brief of Argument at paragraph 81
[12] Penn West Brief of Argument at paragraph 78
[13] Penn West Brief of Argument at paragraph 78

Penn West said that the rate of return methodology in *Rywood*[14] was awarded "*in lieu of market value.*"[15] Penn West argued that "*fair market value paid to the original owner is sufficient compensation, with the subsequent owner receiving rental payments plus the benefit of the reversionary interest.*"[16]

Notwithstanding Penn West's position that knowledge of the wellsite at the time of acquisition effectively ended Parkland's eligibility for compensation for loss of use under the *Act*, Penn West still offered $8,618.00 annually in global annual compensation because of a suggested pattern of dealing.

Parkland's Position on Loss of Use

Parkland relied on two witnesses to support its position. R.F. (Bob) Horton ("Horton"), is Chief Operating Officer of Trans America Group Ltd. (TAG), of which Parkland Industrial Estates Ltd. is a subsidiary. Horton provided evidence on behalf of Parkland. Robert Berrien ("Berrien") provided appraisal evidence on behalf of Parkland.

Horton provided a description of the land, a description of Parkland Industrial Estates Ltd., as well as a history of its development. Horton and Berrien described the surrounding development as follows (not disputed by Penn West):

- Zoned medium industrial
- Fully serviced
- Fully developed (except the subject)
- All adjoining lots sold
- Established businesses now operating in new buildings on adjoining lots.

Berrien further stated: "*The zoning, subdivision, servicing, and totality of development surrounding the site leaves no doubt that the site could be sold tomorrow.*"[17] (Panel note: From context, the Panel reads this to mean but for the wellsite.)

Horton confirmed that TAG/Parkland knew of the existence of the wellsite when it purchased the land in 1999/2000 with the intention of developing the land. Parkland developed and marketed the balance of the purchased land---the 3.53 acre wellsite remains unsold.

Parkland's position is that knowledge of the wellsite is irrelevant to the determination of compensation in this case.

In any case, Horton stated that Parkland did not discount the property because of the wellsite. Horton's position is that there was no reason for Parkland to do so because s.25(1)(c) of the *Surface Rights Act* provides for compensation for loss of use, and as use changes, so does compensation.

Parkland dismisses the suggestion that it should have considered the wellsite and paid less for the land because of it. Parkland Counsel argued that if Parkland had paid a lower price because of the presence of the wellsite, this would mean that the previous owner would have been paid less

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[14] *Rywood Resources Ltd. v. Winfield Power Company Ltd. et al. (SRB Decision No. 99/0080)("Rywood")*
[15] Penn West Brief of Argument at paragraph 85
[16] Penn West Brief of Argument at paragraph 85

[17] Exhibit 2, page 8

for the property than it would have but for the wellsite--- where would this owner have been compensated, it asked rhetorically.

Parkland cited *Rywood* in support of its position. Parkland stated that in the *Rywood* case: (a) the wellsite was visible when the developer bought the land, (b) the owner could not recoup its purchase and development costs because of the well, and (c) annual compensation was calculated based on a Rate of Return on Investment approach.

Parkland also cited *Muntean v. GNE Resources Ltd. [1993] 11 Alta. L.R. (3d) 299 (ABQB)* ("*Muntean*") in support of its position. This case, according to Parkland, suggested that the Board could either have used a cap rate or looked at comparable raw industrial land leases as a basis for annual compensation. *Muntean* ultimately uses comparable raw land leases to establish an annual rate of compensation.

Panel Analysis---Loss of Use---The Prior Knowledge Argument

The Panel is persuaded by Parkland's position that Parkland's knowledge of the wellsite prior to purchase has little or no bearing or relevance when determining the subject rate of compensation. An explanation follows.

The subject May 15, 1984, Surface Lease Agreement provided for an initial payment plus an annual payment. Because the agreement provides for annual compensation, s.27 of the *Act* provides for a review of the rate of compensation every five years. The rate of compensation is "*in respect of the matters referred to in section 25(1)(c) and (d).*" Section 25(1)(c) relates to loss of use, and s. 25(1)(d) relates to adverse effect, nuisance, inconvenience, and noise.

The Panel is not persuaded that knowledge of the wellsite by subsequent landowners in some way negates, nullifies or modifies their entitlement to compensation under the *Act* for loss of use. To suggest so, by extension, would mean that only an initial landowner is entitled to compensation for loss of use (or adverse effect for that matter). Penn West's interpretation would suggest, by extension, that subsequent landowners should not be entitled to compensation---because they knew the wellsite was there and should have adjusted the purchase price accordingly. The Panel is left wondering if this interpretation would apply to all landowners. Farmers typically know when wellsites are on prospective land purchases. Should they lose their entitlement to compensation for loss of use if they are a subsequent landowner? The Panel dismisses this suggestion/position in the subject case as without merit.

It is the view of this Panel that landowners should be able to confidently view annual compensation as a "patch" that keeps landowners (and the land) whole. This metaphorical patch gets larger or smaller as loss of use and adverse effect increases or decreases---hence the provision for five-year reviews in s.27. It is our view that annual compensation---both loss of use and adverse effect----must evolve as land ownership and land use evolves, and as circumstances change. There should be no need for landowners to consider the presence of wellsites when negotiating land prices, because they should be confident that s.25(1) (c) and (d) of the *Surface Rights Act* are there to offset any future loss of use and adverse effect they will experience. The anticipated present value of the income stream from the annual payments should provide the offset.

Penn West's interpretation would mean---as pointed out by Parkland---that initial landowners must accept a lower price for their land, when they ultimately sell, because of the existence of the wellsite (after all, the subsequent buyer and original seller are on opposite sides of the same transaction). Parkland's rhetorical question of "where would they go for compensation" clearly shows that Penn West's position is without merit. The Panel heard Telford's explanation that

initial landowners received an initial payment based on land value and that this is where they are compensated for any such loss. This explanation is not persuasive, because the *Act* clearly provides for initial compensation as well as ongoing annual compensation for loss of use, adverse effect, nuisance, inconvenience, and noise.

Penn West argued that the use of a rate of return approach would result in a windfall for the landowner.[18] Penn West further suggested that Parkland's approach would see Penn West repaying the full market value of the land every 8 years. In doing so, Penn West cited *Sandboe et al v. Coseka Resources Ltd. 74 Alta. L.R. (2d) 277* which stated: *"There is no mandate in the Act to overcompensate a surface owner. It is an error to overcompensate."* Firstly, the Panel notes an error in Penn West's calculation as Parkland's position would see "repayment" every 13 years (100 percent divided by 7.6 percent). Secondly, "repayment time" is only meaningful in situations where payments are made up of both interest and repayment on principal. That is not the case here. There is no repayment and no intended repayment. The calculation of a "repayment time" is an irrelevant and meaningless calculation in this case. Lastly, Penn West seemed to have a different understanding of the concept of a "rate of return." This approach simply provides for a return on an investment at an appropriate rate of return---which can go on forever if (a) an appropriate annual rate is chosen, (b) there is no repayment, and (c) nothing else changes.

Penn West further argued that in *Muntean*[19], the Court: *"...determined compensation on the basis of comparable leases, implying that the 'annual return on investment' approach was only appropriate in circumstances where no comparable leases exist."*[20] The Panel finds that that is the case here---no comparable leases were provided in evidence.

Penn West cited *Devon/Hill* and *Farm Air*. The Panel finds that *Devon/Hill* can be distinguished from the subject case because: (a) *Devon/Hill* relates to a right of entry order, (b) the quotation cited relates to a claim for compensation for a gravel deposit, and (c) compensation relates to the initial payment and not the annual payment. *Devon/Hill* did not relate to s. 25(1)(c) and (d) which specifically provides for annual compensation for loss of use, adverse effect, nuisance, inconvenience, and noise. *Farm Air* can be distinguished from the subject case because: (a) *Farm Air* relates to a right of entry order; (b) the quotation cited relates to a claim for initial compensation for design inefficiencies arising from a wellsite; and (c) the quotation cited relates to the initial payment and not the annual payment for loss of use. *Farm Air* did not relate to an annual payment under s. 25(1)(c) and (d) which specifically provide for annual compensation for loss of use, adverse effect, nuisance, inconvenience and noise. In fact, when annual compensation was determined in *Farm Air*, that panel determined that the rate of return approach was the appropriate methodology.

Penn West also cited *Royal West*. Penn West quoted from that decision: *"...a knowledgeable investor would have demanded and gotten a discount if he/she were to purchase the subject property after the date of the right of entry order."*[21] The Panel finds that *Royal West* is distinguishable from the subject case. That decision related to an initial taking of a power transmission line right-of-way. Wellsites, pipelines, and transmission line compensation each have their own, subtleties, nuances, and "pattern of dealing." The common thread is that

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[18] Penn West Brief of Argument at page 14

[19] *Muntean v. GNE Resources Ltd. [1993] 11 Alta. L.R. (3d) 299 (ABQB)*

[20] Penn West Brief of Argument at page 14

[21] *AltaLink Management Ltd. v. Royal West Property Corp., 2014 ABSRB 221* at page 13

landowners must remain whole. The issue in *Royal West* was injurious affection relating to the remaining lands. Annual compensation, in the case of power transmission lines, has historically been based only on the footprint of the structures. In *Royal West*, that panel found that even after the payment of annual compensation, the landowners were not whole because "*a knowledgeable investor would have demanded and gotten a discount if he/she were to purchase the subject property after the date of the right of entry order.*" The landowner was made whole by an award of compensation for injurious affection. Penn West's quotation, which was taken from the context of a power transmission line right of way decision, has little relevance to the subject case.

Penn West stated that *Rywood* is distinguishable because compensation was being determined for an initial taking, and the approach was used in lieu of land value. The Panel finds that *Rywood* had unique circumstances, and the Panel placed little weight on the decision. Notwithstanding this, the Panel places considerable weight on the *ConocoPhillips Canada Resources Corp. v. Lemay, 2006 ABSRB 134 (CanLII)* ("*Lemay*") decision which effectively says that landowners are entitled to be compensated for losses if they can demonstrate them logically, empirically, and persuasively.

The Panel is persuaded that, but for the wellsite, the subject 3.53 acre parcel would be marketable and, at market price, would sell readily. This is not a situation where subdivision is speculative or hypothetical---in the subject case, the land is already subdivided and all other adjoining properties have been developed and sold. No persuasive evidence was adduced to contradict this conclusion.

The evidence and arguments in the subject case were thorough, as both parties focussed on the key question---the relevance and significance of prior knowledge. In the subject case, the Panel finds that Parkland was aware of the wellsite when it purchased the land, and this is not a relevant factor in the determination of compensation. The *Act* provides for compensation for loss of use, adverse effect, nuisance, inconvenience, and noise. The *Act* is paramount and overriding, and the fact that Parkland knew of the wellsite at the time of acquisition is not relevant to the determination of compensation.

Panel Analysis---What is the proper methodology to determining loss of use in this case?

A pattern of dealing was not established in the subject case. Even if a pattern of dealing had been established, Parkland would still be entitled to compensation equal to its own losses, if it could persuasively demonstrate those losses. This principle was confirmed by the Court in *Lemay*.

Penn West's position was that compensation and/or loss of use should be based on Penn West's Pattern Evidence (a $8,618.00 global award) or, in the alternative should be based on Telford's "Encumbered Property with an Income Stream Taking Inflation into Consideration" empirical scenario ($5,364.00).[22] This amount included $4,964.00 in loss of use compensation.

In arriving at a rate of compensation for loss of use, the Panel considered Penn West's Pattern evidence proposal ($8,618.00), all amounts included in the Pattern Evidence ranging from $2,000.00 to $28,000.00 (Telford excluded the $527.00 agreement), each of Telford's four scenarios, and Parkland's proposal of $115,360.00. Furthermore, the Panel considered intermediate rates.

A pattern of dealing has not been established. The Panel noted a compensation range of $527.00 to $28,000.00 in the pattern evidence. The Panel considered whether this range of compensation

[22] Penn West Brief of Argument at paragraph 112 and 113

should be given some weight when establishing a rate of compensation notwithstanding that a pattern of dealing was not established. In the end, although considered, it was accorded little weight. The subject case differs in all of the ways mentioned earlier.

Parkland suggested that the rate of annual compensation should act as an incentive to Penn West to reclaim the wellsite. The Panel's role is to set compensation based on the *Act*. Its role is not punitive nor is its role to provide incentives. This aspect Parkland's position/argument is without merit and the Panel gave it no weight.

The Panel considered Penn West's argument that Parkland should sell the wellsite to Penn West at some uncertain price out of a requirement to mitigate.[23] Penn West stated: "*The Landowner...has failed to avail itself of an opportunity to possibly mitigate its own alleged impacts by entering into discussions with Penn West in relation to the purchase of the property.*"[24] Penn West referenced a number of SRB and court decisions that spoke to the matter of mitigation including *Gulf Canada Resources v. Moore, (1982) 22 Alta LR (2d) 328 (ABQB)* and *Alberta Oilsands Inc. v. Hi-Way 39 Industrial Park Inc. (SRB Decision No. 2012/0517)* Mitigation, by definition, refers to minimization of losses. It is the opinion of the Panel that, in this case, Parkland is in the best position to assess the losses, and consequences, of selling the subject land to Penn West. The Panel was not provided with a persuasive argument why Parkland should be expected to sell the subject property to Penn West at market price or at any other price, unless it so chose.

Having concluded this, the Panel was not presented with any other persuasive methodology. Penn West's alternative proposal using Telford's "Encumbered Property Taking Inflation into Consideration" bases compensation on the prior compensation adjusted for inflation. This fails to address the current use or potential but for the wellsite, and the Panel already concluded that annual compensation must evolve as land ownership and land use evolves.

The Panel finds that the proper methodology in this case is an award of compensation based on a rate of return on the market value of the land but for the wellsite.

Having decided as it has, the only matter remaining is to determine land value, an appropriate interest rate or rate of return, and an annual rate of compensation.

What was the value of the 3.53 acre site but for the wellsite as of May 15, 2014?

Berrien based his valuation on 11 sales, all of which are in Parkland Industrial Estates within one-half mile from the subject land. The prices range from $350,000.00 per acre to $430,000.00 per acre. All the sales are fully serviced, on paved roads, and carry the same zoning as the subject land. Berrien stated that no adjustments are required and the subject land has a value of $430,000.00 per acre.

Telford based his valuation on eight sales in Parkland County. These sales range in value from a low of $340,000.00 per acre to a high of $443,709.00 per acre. Telford arrived at an estimated market value of $380,000.00.

The Panel notes that Berrien's sales all relate to land in the immediate area of the subject land and were similar. The Panel also heard that: (a) some of Berrien's sales back onto Highway 16, (b)

[23] Penn West Brief of Argument at paragraph 96

[24] Penn West Brief of Argument at paragraph 96

some of the sales are conditional, and (c) some of the sales have a superior Business Industrial Zoning.

Both appraisers acknowledged that appraisals are subjective and accurate to within plus or minus five percent at best.

On balance, after considering all of the evidence, the Panel determines the land value, but for the wellsite, to be $400,000.00 per acre as of May 15, 2014.

What was a fair and reasonable interest rate or rate of return as of May 15, 2014?

Berrien proposed a "cap rate" of 7.6 percent while Telford proposed a "rate of return" of 7.5 percent. These two rates are essentially the same.

Notwithstanding the fact that both appraisers effectively agree on a "cap rate" or a "rate of return," the Panel is not persuaded by these rates. In both cases, the rates were treated in a cursory manner with little persuasive evidence that the rates were reasonable

The Panel does not accept either of these rates as a basis for determining a fair and reasonable rate of compensation for at least three reasons.

Firstly, the rates are based on bare land leases, but Horton repeatedly stated that Parkland was in the business of developing and selling land. The Panel heard that the land surrounding the wellsite has all been sold. This would seem to suggest that the subject land in all likelihood would be sold---but for the wellsite. The evidence before the Panel was that 7.5-7.6 percent were typical rates for a bare land lease.[25]

The Panel is not persuaded that such a commercial lease rate accurately reflects Parkland's opportunity cost. Based on the evidence, the Panel concludes that, but for the wellsite, the wellsite would most likely be sold and the money received would either pay down debt or be invested in some manner. The Panel did not hear evidence on which was most likely.

Secondly, the Panel did not hear any evidence on Parkland's marginal cost of (or return on) money/capital. Nor did the Panel hear whether Parkland was a net lender or a net borrower.

Thirdly, the presentations were devoid of any discussion/evidence/argument on the trade-off between risk and reward. The Panel is not persuaded that an annual payment from Penn West involves significant risk, and if little risk is involved, the Panel rejects a cost/return on capital of 7.5 - 7.6 percent per annum.

It should be common knowledge that the current prime lending rate at most if not all Canadian chartered banks is 3.0 percent and has been at that level since 2010. The Panel did not hear persuasive evidence in support of a rate of return higher than this rate.

It also should be common knowledge that typical deposit rates are below this rate.

In the absence of significant evidence on Parkland's opportunity cost/return on capital, and in the absence of persuasive evidence of significant risk, the Panel determines that a reasonable rate of compensation is 2.5 percent of the value, but for the wellsite, of the 3.5 acres.

[25] Exhibit 2, at page 12

What loss of use is payable under s.25(c) of the *Act*?

Loss of use---(3.53 acres)($400,000.00/acre)(0.025)=$35,300.00 annually

ii. Section 25(1)(d)---Adverse Effect, Nuisance, Inconvenience, and Noise

Section 25(1)(d) states that in determining a rate of compensation it may consider: "*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*"

Parkland did not request compensation under section 25(1)(d) of the *Act*. Its position and that of its appraiser, Robert Berrien ("Berrien") was that with no remaining land, there cannot be any adverse effect.

Telford suggested that $400.00 annually should be paid for the nuisance and inconvenience of dealing with an operator.

The Panel is in the unique position of having to choose between: (a) awarding a component of compensation that was not requested, or (b) not awarding a component of compensation that has been offered and convincingly argued.

The Panel looks to s. 25(1)(d) of the *Act* for guidance. It contemplates compensation for nuisance, inconvenience, and noise, in addition to "*adverse effect...on the remaining land.*"

The Panel determines compensation of $400.00 to be payable under s. 25(1)(d) of the *Act*.

iii. Summary

The Panel determines the total annual rate of compensation to be:

Loss of use	$35,300.00
Adverse effect	$ 400.00
Total	$35,700.00

2. **Is interest payable, and if so, at what rate?**

No evidence was presented on notice or interest, the matter of interest was not argued, and the Panel makes no award of interest.

3. **Are costs payable, and if so, what amount is payable?**

The matter of costs is reserved as agreed and requested by the parties.

ORDERS:

Orders will issue varying the rate of annual compensation as set out in this decision.

Dated at the City of Edmonton in the Province of Alberta on January 20, 2015.

SURFACE RIGHTS BOARD

MEMBER

Edward Zenko
Board Member

APPENDIX A

The relevant provisions of the *Act* are as follows:

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). (emphasis added)

Determining compensation

25(1) The Board, in determining the amount of compensation payable, may consider

...

(c) the loss of use by the owner or occupant of the area granted to the operator,

(d) 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,... (emphasis added)

Costs

39(1) The costs of and incidental to proceedings under this Act are in the discretion of the Board.

(2) and **(3)** Repealed 2009 c31 s16.

(4) The costs may include all preliminary costs of the respondent necessarily incurred in reaching a decision whether to accept the compensation offered by the operator.

(5) When

(a) the Board makes a right of entry order, and

(b) the owner or occupant refuses to allow the operator to enter on and use the land to which the operator is entitled as described in the order,

the operator may apply to the Board to deduct from the compensation payable under the compensation order the costs incurred by the operator in and incidental to obtaining entry on and use of the land pursuant to the right of entry order.

(6) The amount of costs, if any, to be deducted under subsection (5) is in the discretion of the Board.

RSA 2000 cS-24 s39;2009 c31 s16

APPENDIX B

EXHIBITS:

Exhibit number	Description	Filed by:
1.	A binder titled *Parkland Industrial's Exhibit Book #1*	Lessor
2.	A binder titled *Annual Compensation Estimate...* by Berrien Associates Ltd.	Lessor
3.	A binder titled *Estimate of Annual Compensation* by McNally Land Services Ltd.	Operator
4.	A binder titled *Negotiated Agreement Review*	Operator
5.	A binder *Summary of Vacant Land Sales...*	Operator