

CANADA / JUDGMENT

## Progress Energy Canada Ltd. v. Salustro

2014 BCSC 960

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 960 Progress Energy Canada Ltd. v. Salustro

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Progress Energy Canada Ltd. v. Salustro,

2014 BCSC 960

Date: 20140530

Docket: S138543

Registry: Vancouver

Between:

Progress Energy Canada Ltd.

Petitioner

And

Silvio Salustro and British Columbia Surface Rights Board

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for Petitioner:

M.P.Theroux

L. Gill

Counsel for Respondent The British Columbia Surface Rights Board:

R. Butler

In Person Litigant

S. Salustro

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 21, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 30, 2014

## Introduction

- [1] The petitioner, Progress Energy Canada Ltd., seeks judicial review of a decision of the respondent British Columbia Surface Rights Board (the "Board") that is dated October 18, 2013.
- [2] Silvio Salustro, also a respondent, owns five properties in north-eastern British Columbia and the petitioner pays rents to him for oil and gas operations on these lands. In its decision of October 18, 2013 the Board increased the rents payable by the petitioner. This petition now challenges those increases.
- [3] According to the petitioner, the Board made a number of errors when it made its decision. The petitioner alleges that the Board: misstated and reversed the applicable evidentiary onus in the applicable legislation; erred in jurisdiction and/or mixed fact and law by awarding compensation that exceeded Mr. Salustro's loss; and the Board erred in jurisdiction and/or mixed fact and law by awarding compensation to Mr. Salustro when there was no evidence that he farmed or intended to farm the lands. Further, according to the petitioner, the Board erred in jurisdiction and/or mixed fact and law with respect to tangible and intangible impacts and by increasing rents based on a comparable in the absence of a pattern of dealings.
- [4] As appropriate in these applications, the Board did not make submissions on the correctness of its own decision. It did make submissions, through counsel, on the applicable standard of review.
- [5] Mr. Salustro was served with notice of this petition but he did not appear in person, by means of a representative or otherwise make any submission.

## Background

- [6] Mr. Salustro owns five parcels of land in north-eastern British Columbia. The land is designated Class 5c under the Agricultural Land Reserve. The five parcels of land before the Board were identified as: Reference No. 1, Reference No. 2, Reference No. 3, Reference No. 4 and Reference No. 5.
- [7] The petitioner operates oil and gas facilities on the lands owned by Mr. Salustro. This includes wellheads, access roads and valve or riser sites. The petitioner pays rent to Mr. Salustro for the use of his lands pursuant to leases for each parcel.
- [8] The Board is a statutory body created under Part 17, Division 3 of the Petroleum and Natural Gas Act, RSBC 1996, c. 361 (the "Act"). It has the authority to mediate or arbitrate various matters including the right of entry onto property such as the lands owned by Salustro. Mr. Salustro is a "landowner" under the Act and the petitioner is a "right holder."
- [9] Until October 2013 the petitioner paid rents for the five parcels of land at issue in separate amounts of \$3,500 (Reference 1), \$3,300 (Reference 2), \$2,700 (Reference 3), \$250 (Reference 4) and \$1,000 (Reference 5). These amounts were negotiated between the petitioner and Salustro.
- [10] In September 2011 Mr. Salustro filed a Notice to Negotiate in relation to the rent for each of the five parcels of land and leases under s. 165(2) of the Act. The parties were not able to reach an agreement on the amounts of new rents. The issue of the amount of the rents then proceeded to arbitration pursuant to s. 166 of the Act.
- [11] A hearing was held on May 14, 2013 in Dawson Creek B.C. before a one-member panel of the Board. Evidence was heard from Robert Telford (an expert in property appraisal for the petitioner), Christopher Adkins (an employee of the petitioner) and Mr. Salustro. The petitioner was represented by counsel and Mr. Salustro was represented by a lay person, Elvin Gowman.

## Board decision of October 18, 2013

- [12] In a decision dated October 18, 2013 the Board increased the rents payable by the petitioner for each of the parcels of land owned by Salustro. The increased amounts were (with the previous amounts in brackets):

Reference No. 1: \$7,990 (\$3,500),

Reference No. 2 \$6,152 (\$3,300),

Reference No. 3: \$4,687 (\$2,700),

Reference No. 4: \$265 (\$250),

Reference No. 5: \$1,524 (\$1,000).

[13] The Board panel considered the factors in s. 154(1) of the Act and I reproduce that provision here:

154 (1) In determining an amount to be paid periodically or otherwise on an application under this Part, the board may consider, without limitation, the following:

- (a) the compulsory aspect of the right of entry;
- (b) the value of the applicable land;
- (c) a person's loss of a right or profit with respect to the land;
- (d) temporary and permanent damage from the right of entry;
- (e) compensation for severance;
- (f) compensation for nuisance and disturbance from the right of entry;
- (g) the effect, if any, of one or more other rights of entry with respect to the land;
- (h) money previously paid for entry, occupation or use;
- (i) the terms of any surface lease or agreement submitted to the board or to which the board has access;
- (j) previous orders of the board;
- (k) other factors the board considers applicable;
- (l) other factors or criteria established by regulation.

[14] In its decision the Board considered sub-sections 154(1)(c), (e), (f) and (l). The petitioner accepts that those were the correct subsections for the Board to consider.

[15] I reproduce the Board's subject headings and I summarize its conclusions and findings with respect to those subjects, bearing in mind that the petitioner's primary challenges are to the Board's decisions on compensation; tangible/intangible impacts; and use of comparables. (The petitioner also submits that the Board erred in applying the evidentiary onus).

### **Section 154(c) - loss of a right or profit**

[16] The Board noted that this factor is "intended to compensate the landowner for a loss of a right or profit (or use) ". Further, citing a previous decision of the Board (Arc Petroleum Inc. v. Kane Piper, MAB Order 1598-2, December 5, 2008 at para. 51), the Board stated that " an award for annual compensation would necessarily have to be based on evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified" (para. 15).

- [17] The Board considered the evidence of the petitioner's expert, Mr. Telford. On the basis of aerial photos taken in 2008 and 2012, and a physical inspection in 2012, Mr. Telford opined that the lands did not appear to have been recently used for agriculture although they retained the ability to produce forage crops. He concluded that the physical use of the lands was for forage (hay) production and livestock grazing (para. 16).
- [18] Mr. Telford also reviewed data with respect to forage yields and he opined that a rate of 2.0 tonnes per acre at \$100 per tonne, or \$200 per acre, was reasonable compensation for any potential losses associated with hay production on the property. Mr. Telford also stated that the actual loss would be less because a significant portion of the leased area is cropped and the \$200 per acre return was a gross return that did not include costs for seeds, chemicals and fertilizer. He estimated costs to be about \$60 per acre for fertilizer and chemicals and the seed costs would be nominal. The conclusion of Mr. Telford, as described by the panel, was that "the average gross loss of use would be \$200.00 and the net return would be \$140 per acre the loss of profit would be: \$140/ac if the property was utilized for hay" (paras. 21-23, emphasis in Board decision).
- [19] In his testimony before the Board Mr. Salustro said that he last grew hay on the lands in 1997 and last ran cattle on them in 1994. He stopped growing hay because "the cattle industry was bad" and then there was "no market" for hay. He moved to Dawson Creek with his family to be closer to schools and he confirmed that he does not live on the lands (para. 17).
- [20] The Board's decision on this issue was as follows:
25. I found Mr. Salustro to be a genuine and credible witness, and I accept that he grew about 4.0 tonnes of hay per acre on his lands. He did not provide any evidence on the rate that should be applied. Therefore, applying Mr. Telford's rate of \$100 per tonne, I find the probable gross loss is \$400 per acre.
- [21] With respect to whether farming operation costs should be deducted from the gross return the Board reviewed previous decisions (*Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd.*, 2008 ABQB 19 at paras. 125-6; *Conocophillips Canada Resources Corp. v. Lemay*, 2009 ABQB 72 at paras. 207-8) As described in the *Conocophillips Canada Resources Corp* decision, a landowner may have expended costs for things such as seed and fertilizer only to have the operator enter the land to the detriment of a growing crop. Therefore, the accepted approach is to award compensation in the form of gross revenue, rather than net revenue (except for specialty crops).
- [22] On this basis the Board concluded that the probable gross loss, rather than the net return, rate should be applied in determining compensation under section 154(1)(c) of the Act. The gross loss was, as above, \$400 per acre.
- [23] By way of a conclusion on the issue of loss of a right or profit, the Board said as follows:

30. At this juncture, I would like to address Progress' repeated submission that there is no basis for any increase in the annual compensation payable to Mr. Salustro. It points to Mr. Salustro's evidence that there was "no market for hay" and that it is not a reasonable [sic] foreseeable use that he would put the Lands into hay production anytime soon. Mr. Salustro's evidence was that he stopped growing hay in 1997 because, among other reasons I mentioned above, there was "no market for hay" at that time. It was not Mr. Salustro's evidence that there was "no market for hay" at the time he entered into the subject leases or at the effective dates. His evidence was that he has worked the Lands and other parcels he owns in the area for about 45 years, and the Lands are "good lands" with "farm qualification", are under the ALR, and are centrally located. When comparing the Helm lands [Helm v. Progress Energy Ltd. SRB Order 1634-1, December 2, 2010], he said "I feel my land is in the middle of Vancouver." So, it is not reasonably foreseeable that he would not put the lands into hay or other crop production in the future. If that is not the case, then why is Progress offering any compensation at all?
31. In awarding compensation for loss of profit, the Board can base its award not only on "actual, ongoing losses and impacts arising out of the presence of the Operations" as Progress insists, but also from "evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified" as the Board ruled in Piper, supra.
32. In this case, the probable loss of profits is quantifiable by applying Mr. Salustro's evidence of 4.0 tonnes per acre and Mr. Telford's evidence of \$100 per tonne.
33. With respect to loss of profits, at \$400 per acre except for Reference No. 4, I confirm as follows:

Reference No. 1 - \$2,740.00 (6.87 ac)

Reference No. 2 - \$2,116.00 (5.29 ac)

Reference No. 3 - \$1,612.00 (4.03 ac)

Reference No. 4 - Nil

Reference No. 5 - \$524.00 (1.31 ac)

[Emphasis in original]

- [24] In its submission on the hearing of this petition the petitioner emphasized that the evidence of Mr. Salustro before the Board also included his statement that, not only was there no market for hay in 1997, there was still no market at the time of the hearing before the Board in May and June 2013.

### Location of access road

- [25] There was an issue before the Board as to the location of the petitioner's access road on the property of Mr. Salustro. Mr. Telford's reports and opinion were based on the road being along a surveyed boundary line.
- [26] A lease document recorded the road along a boundary line but Mr. Salustro's evidence was that the road was located in the middle of the property but parallel to the boundary line. In cross-examination Mr. Telford confirmed that he inspected the property in winter and he did not see the road because of snow conditions. As well, a document in Mr. Telford's report described the road in the middle of the property. Mr. Salustro testified that he originally requested that the road put in the middle of the land.
- [27] The Board concluded that the access road was in the middle of the property.

### Section 154(e) - severance

- [28] The Board noted that this factor is intended to compensate a landowner where land is severed as a result of an entry by a right holder (for example, a road) and there is a loss of use of the occupied land as well as the use of other land (Helm).
- [29] The Board accepted Mr. Telford's evidence and found there was no severance with respect to Reference No. 3. With respect to Reference No. 2, the Board found that the access road was not along the lease boundary but rather in the middle of the property. Therefore, the Board found it was "not unreasonable to conclude that there is no severance associated with Reference No. 2." (para. 45)

### Section 154(f) - nuisance and disturbance from right of entry

- [30] The Board noted that this factor is intended to compensate for nuisance and disturbance arising from a right holder's entry and use of a landowner's land. Tangible and intangible impacts can be compensated in an annual payment and a summary of the Board's decisions on these matters follows.

### Tangible impacts

- [31] The Board reviewed the detailed evidence of Mr. Telford with regard to operations typically associated with a nine-year productive hay cycle. There was a dispute as to the different sizes of equipment used and the Board accepted Mr. Telford's evidence on this point. The Board also concluded that, since the access road was in the middle of the property, there were more tangible impacts than opined by Mr. Telford (who wrote his report on the basis of the road being on a boundary). And Mr. Salustro claimed increased compensation for water damage but the Board found there was insufficient evidence on this point.

- [32] The Board concluded that the following compensation was appropriate for tangible impacts: \$521.13 (Reference No. 1); \$517.78 (Reference No. 2); \$529.32 (Reference No. 3); Nil (Reference No. 4); and \$182.65 (Reference No. 5).

### Intangible impacts

- [33] Intangible impacts were noted by the Board to include traffic, noise, dust and other disturbances arising from a right holder's operations on a landowner's land. It is also intended to compensate for a landowner's time and effort in ongoing dealings with a right holder and others such as surveyors and contractors (para. 59).
- [34] The Board recorded that the petitioner acknowledged some compensation ought to be paid to Mr. Salustro for intangible impacts. Mr. Telford, the petitioner's expert, opined that it would take eight hours per year for Mr. Salustro to deal with all nuisance and disturbance from the petitioner's operations, or about 40 minutes per month. According to Mr. Salustro the petitioner's operations had increased since 2005 and something more than the estimate of Mr. Telford was appropriate.
- [35] The Board concluded as follows:
64. Mr. Telford's estimate of 40 minutes per month on average does not seem reasonable to me. Mr. Salustro gave evidence that he lives in Dawson Creek. Leaving aside all other nuisance and disturbance that Mr. Salustro may have suffered, I would think that for him to oversee the operator's visits alone would have taken on average more than 40 minutes per month. There is no question that he has suffered other nuisance and disturbance as he expressed frustration in his testimony when describing Progress' activities using his Lands. I have not taken into account any nuisance arising from the water damage he mentioned as it is not clear this was an issue at the effective dates.
- [36] The Board decided that Mr. Salustro should be compensated for at least two hours per month. A rate of \$50 per hour was used because the Board applied it on numerous other occasions and there was no evidence to suggest that the rate should be higher. The Board agreed with the petitioner that only 50% should be awarded for Reference No. 5 and no compensation was warranted for Reference No. 4.
- [37] The result was compensation for intangible impacts as follows: \$1200.00 (Reference No. 1); \$1200.00 (Reference No. 2); \$1200.00 (Reference No. 3); Nil (Reference No. 4) the seas; and \$600.00 (Reference No. 5).

**Section 154(i) - other leases**

- [38] The Board noted that this factor was to compensate a landowner for loss of a right of profit or use relating to land. A previous decision of the Board concluded that an award for annual compensation in this area would necessarily have to be based on evidence of probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified (Piper, at para 51).
- [39] Mr. Salustro provided a chart of 13 comparable leases with six different operators. The chart included leases with different acreages and different annual rents based on different rents per acre. The annual rent range was from \$3,940 to \$14,998 with rent per acre ranging from \$900 to \$1,399. The petitioner challenged these comparables on a number of grounds including being drawn from the Helm decision and they involved different effective dates and different distances from the subject leases. The Board concluded that there was insufficient evidence to determine whether the comparables provided by Mr. Salustro were comparable to the property and they were not relied on.
- [40] The petitioner submitted two leases to the Board and these were discussed by its witness, Mr. Adkins. He used a 12-mile radius to identify comparables and the range of compensation used was \$1,163 to \$566 per acre. Mr. Salustro challenged these comparables as being too narrow, he said his land was less swampy and it was in the ALR (and the petitioners' comparables were not).
- [41] The Board's conclusion was:
79. Even leaving aside the Helm comparable lease 5 at \$1,031 (which is closer in time and distance than lease 7 to the subject leases), Yorke/Progress lease at \$1,075 and York/Bonavista lease at \$1,400 and considering only Progress' comparables, the \$1,200 rate that Mr. Salustro is claiming is not that far off from Progress' comparable 1 at \$1,163, and it is not that unreasonable considering the quality of Mr. Salustro's Lands is much better (agricultural, ALR vs. swampy, non-ALR) and also there may be other monetary or non-monetary value associated with comparable 1 by virtue of that landowner being employed by Progress to do other work.

**Section 154(2) - change of value of money and of land**

- [42] As noted by the Board, s. 154(2) of the Act requires it to consider "any change in the value of money and of land since the date the surface lease or order was originally or last granted" (para. 80, citing s. 154(2) of the Act).
- [43] With respect to change in the value of money the Board accepted Mr. Telford's evidence including his application of the Consumer Price Index.

[44] On the issue of any change in the value of land Mr. Telford's evidence was that there were very few sales in the subject area and there was insufficient data concerning any general value trends of similar lands. Mr. Salustro questioned why Mr. Telford did not refer to a sale about 60 years ago but he did not otherwise provide any evidence or analysis for the port to consider. The Board concluded there was no evidence from either party to determine whether there should be a change to compensation based on a change in the value of land.

### Determination of global sum

[45] The Board concluded its decision by considering whether there should be a change in the compensation paid by the petitioner to Mr. Salustro.

[46] The petitioner's submission was that there should be a reduction in compensation or, alternatively, there was no basis for any increase in compensation. The Board disagreed. It noted that: "

88 [a]though Mr. Salustro did not neatly articulate his evidence and submissions in terms of the section 154 factors, as perhaps Mr. Telford and Progress' counsel did, he did provide evidence in his own way which forms the basis of the support for an increase in compensation under the various section 154 factors "

[47] As above, the result was a direction that compensation in the form of rent was to be paid by the petitioner to Mr. Salustro as follows (with the previous amounts in brackets):

Reference No. 1: \$7,990 (\$3,500),

Reference No. 2: \$6,152 (\$3,300),

Reference No. 3: \$4,687 (\$2,700),

Reference No. 4: \$265 (\$250), and

Reference No. 5: \$1,524 (\$1,000).

[48] The order of the Board was to amend the leases at issue, for the petitioner to reflect the increased rents and any differences since the effective dates.

### Analysis

[49] According to the petitioner the Board made the following errors:

- (a) it erred in law by misstating and reversing the applicable evidentiary onus under section 154(1) of the Act;
- (b) it erred in jurisdiction and/or mixed fact and law by awarding compensation in an amount that exceeded Mr. Salustro's loss and in the absence of, and contrary to, the evidence. According to the petitioner there was no evidence that Mr. Salustro farmed or intended to farm the property;

- (c) it erred in jurisdiction and/or mixed fact and law in awarding compensation for nuisance and disturbance with respect to tangible and intangible impacts;
- (d) it erred in law and/or mixed fact and law in awarding an increased global compensation Progress comparable 1 in the absence of a pattern of dealings.

[50] As will be seen the petitioner raised other issues in its argument.

[51] There is also something of an issue with respect to the standard of review and I will address that issue first. I will then proceed with the above issues in turn.

### **Standard of review**

[52] Section 148 of the Act states that a number of provisions of the Administrative Tribunals Act, SBC 2004, c. 45 ("ATA") apply to the Board, including s. 59.

[53] The Act does not include a privative clause and, therefore, under section 59 of the ATA, the standard of review is as follows:

### **Standard of review if tribunal's enabling Act has no privative clause**

59(1) In a judicial review the proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
- (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the decision
  - (a) is exercised arbitrarily or in bad faith,
  - (b) is exercised for an improper purpose,
  - (c) is based entirely or predominantly on irrelevant factors, or
  - (d) fails to take statutory requirements into account.
- (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

- [54] As a result of the ATA, the common law jurisprudence on judicial review is not generally applicable to, in this case, the Board. For example, the Supreme Court of Canada's leading decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 may be of assistance in interpreting the meaning to be given to such concepts as reasonableness and correctness but its overall framework for judicial review has been supplanted by the ATA in British Columbia. The original intention of the ATA was to simplify judicial review but previous decisions have pointed out that this has not been completely accomplished (*J.J. v. School District No. 43 (Coquitlam)*, 2013 BCCA 67 at para. 23).
- [55] The first step in a judicial review is to determine the nature of the question in order to determine the appropriate standard of review. Previous common law decisions have described a question of law as an issue of what is the correct legal test, a question of fact as one about what actually took place and a question of mixed fact and law as one involving the application of a legal standard to a set of facts (*McIntosh v. Metro Aluminum Products Ltd.*, 2012 BCSC 345 at para 26; *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748 at para. 35; and *Housen v. Nikolaisen*, 2002 SCC 33 at para. 27). However, again, these definitions have to be considered in light of the statutory requirements in the ATA.
- [56] The law of judicial review has developed as well. For example, the petitioner characterizes a number of issues in the Board's decision as being jurisdictional (and requiring a standard of correctness). However, the Supreme Court of Canada has recently identified true jurisdictional questions as narrow and exceptional. It also has questioned whether a category of jurisdiction exists and is necessary for identifying the appropriate standard of review (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 37 and 39).
- [57] It nonetheless remains the case that petitioners attempt to characterize issues as jurisdictional or legal while respondents attempt to characterize the same issues as questions of fact. The objectives of the parties are to place the decision being impugned or defended within a broad or narrow review in order to, respectively, facilitate or restrict a challenge. Then issues of mixed law and fact add another level of complication.
- [58] In British Columbia, under s. 59(1) of the ATA "all questions except those respecting the exercise of discretion, findings of fact and the application of common law rules of natural justice and procedural fairness" (emphasis added) are subject to a standard of correctness. Sub-sections 59(2), (3) and (4) then discuss the standards of review for findings of fact and discretionary decisions.
- [59] There is no reference to "jurisdictional questions" in the ATA. "Discretionary" decisions under the ATA would seem to be analogous to decisions described as jurisdictional at common law but the intent appears to be that the former is a broader category than the latter. Discretionary decisions are reviewed on the basis of patently unreasonableness under s. 59(3) and that standard is particularized in s. 59(4).

- [60] As well, the ATA does not expressly describe the standard of review for issues of mixed law and fact. A previous decision of the Court of Appeal has adopted the approach in *Dunsmuir* which said:
- [27] In the administrative law context, a similar idea was expressed by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53:
- [53] Where the question is one of fact, discretion or policy, deference will usually apply automatically. We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.
- [28] The same sort of test applies to the standard of review prescribed for discretionary decisions in the *Administrative Tribunals Act*. If there is a readily extricable finding of fact or law underlying the discretionary decision, that finding will be reviewed on the standard applicable to issues of fact or law, as the case may be. On the other hand, if the issues of fact or law are inextricably intertwined with issues of discretion, the review must take place on the standard applicable to discretionary decisions.

**Morgan-Hung v. British Columbia (Human Rights Tribunal), 2011 BCCA 122 at paras. 27-28**

- [61] The court also set out a two-part test for analyzing an impugned finding of fact under the ATA (*Morgan-Hung* at para. 31; also *J.J. v. Coquitlam School District No. 43* at paras. 29-30). First, there is the analysis under s. 59(2) of the ATA. If an error is found under that provision then, second, it is necessary to analyze the effect of the error on the exercise of discretion under ss. 59(3) and (4). If an error of fact in a decision has a significant effect on the decision at issue (or is inextricably intertwined with an issue of law) the decision is subject to the standard of review for discretionary decisions under ss. 59(3) and (4). In addition, under s. 59(2), a decision based on an issue of fact can be set aside if there is no evidence to support it or it is otherwise unreasonable.
- [62] With this as background, I turn to the specific issues raised by the petitioner.

**Evidentiary onus**

- [63] According to the petitioner, the Board misapprehended the applicable legal principles before it by reversing the evidentiary onus under the Act. That onus is on the landowner, in this case Mr. Salustro, to show probable and reasonably foreseeable loss. However, according to the petitioner, the Board erred when it imposed a burden on the petitioner to disprove any alleged losses.
- [64] As to the standard of review for this issue, it is not an issue of fact. I find that where the onus of proof lies is an issue of law and, under s. 59(1) of the ATA, reviewable on a correctness standard. Having said that, the first question for consideration is whether the Board did reverse the evidentiary onus as alleged by the petitioner.

- [65] It is not in dispute that the factors to be applied by the Board are in s. 154 of the Act. This provision is set out above. I note that it states, in part, "[i]n determining an amount to be paid periodically or otherwise on an application under this part, the Board may consider, without limitation" the factors (a) to (l). This provision does not expressly state the onus on an application; for example, it does not state "on an application by a landowner." On its face, it would appear that it is open to a right holder, such as the petitioner, to apply under section 154 for a determination of compensation.
- [66] In this case it is self-evident that Mr. Salustro is the party who filed the review application under s. 166 of the Act and it is well-established that a party making an application has the onus of proof (subject to any reverse onus requirements). On this basis I accept that the onus before the Board in this case was on Mr. Salustro to establish his ongoing prospective losses and to establish that any increase is warranted (*Velander v. Imperial Oil Resources Limited*, SRB Order 1726-2 (December 11, 2012) at para. 42). As the Board articulated in its decision (citing the *Piper* decision), an award for compensation for loss of profit is based on actual ongoing losses and impacts as well as probable and reasonably foreseeable ongoing and recurring loss or damage that can be reasonably quantified (paras. 15, 31).
- [67] The petitioner relies in particular on a sentence in paragraph 30 of the Board's decision in support of its submission that the Board reversed the onus of proof. I reproduce paragraph 30 in its entirety again and I have italicized the sentence challenged by the petitioner:
30. At this juncture, I would like to address Progress' repeated submission that there is no basis for any increase in the annual compensation payable to Mr. Salustro. It points to Mr. Salustro's evidence that there was "no market for hay" and that it is not a reasonable *[sic]* foreseeable use that he would put the Lands into hay production anytime soon. Mr. Salustro's evidence was that he stopped growing hay in 1997 because, among other reasons I mentioned above, there was "no market for hay" at that time. It was not Mr. Salustro's evidence that there was "no market for hay" at the time he entered into the subject leases or at the effective dates. His evidence was that he has worked the Lands and other parcels he owns in the area for about 45 years, and the Lands are "good lands" with "farm qualification", are under the ALR, and are centrally located. When comparing the Helm lands [*Helm v. Progress Energy Ltd.* SRB Order 1634-1, December 2, 2010], he said "I feel my land is in the middle of Vancouver." So, it is not reasonably foreseeable that he would not put the Lands into hay or other crop production in the future. If that is not the case, then why is Progress offering any compensation at all?

[Underlining in original]

- [68] Assuming for a moment that the petitioner is correct in its submission on the onus of proof, the above sentence is in the Board's decision with respect to loss of a right or profit under s. 154(1)(c). There is no basis for concluding that this sentence applies to the other parts of the Board's decision. I also note the difficulty with double negatives in the impugned sentence since they do not assist with the objective of clarity in decision-making. However, use of double negatives in a sentence is not, by itself, a ground for judicial review.
- [69] Shorn of the double negatives, the impugned sentence can be restated as: "[s]o, it is reasonably foreseeable that he [Mr. Salustro] would put the lands into hay or other crop production in the future." The plain meaning is that the Board was considering the evidence of Mr. Salustro and concluding that it was reasonably foreseeable that he would put the property in hay in the future. This is not reversing the onus of proof under the Act but interpreting Mr. Salustro's evidence in the context of previous decisions of the Board. The onus was on him to prove that future use was reasonably foreseeable and the Board found in his favour.
- [70] It follows that I do not agree with the petitioner that the sentence at issue means, as suggested in its argument, that the Board awarded compensation to Mr. Salustro "for foreseeable or future loss of profit based on [the petitioner's] failure to show that it is not reasonably foreseeable that Mr. Salustro would not put the Lands into hay or other crop production in the future."
- [71] There is perhaps a need also to consider the question posed by the Board at the end of paragraph 30: "If that is not the case, then why is Progress offering any compensation at all?" The Board apparently considered the fact that the petitioner was offering compensation for loss as relevant to the issue of whether it was reasonably foreseeable that Mr. Salustro would farm in the future.
- [72] On the record, the petitioner's evidence on the issue of future loss was that some compensation was payable (on the final issue of what the global amount should be, as discussed below, the petitioner took the alternate positions of no compensation or some compensation). Its expert, Mr. Telford, testified that Mr. Salustro was entitled to some compensation on the issue of future loss thus leading to the petitioner's alternate position that some compensation should be paid. In fact, the Board adopted Mr. Telford's opinions on awarding compensation on some issues.
- [73] As above the Board considered the evidence of Mr. Salustro and then made the comment about "why is Progress offering any compensation at all?" I conclude it was open to the Board to focus on the evidence of the petitioner to the effect that some compensation was payable and state that this evidence was consistent with the conclusion that it was reasonably foreseeable that Mr. Salustro would farm in the future. This was not a reversal of the evidentiary onus but a comment on the logic of Mr. Salustro's evidence being consistent with one position of the petitioner.

[74] I can find no error on the part of the Board on the issue of evidentiary onus.

### **Evidence and conclusions by the Board on loss and compensation**

[75] As will be seen, there are sub-issues here but, according to the petitioner, the Board erred in jurisdiction and/or mixed fact and law by awarding compensation in an amount that exceeded Mr. Salustro's loss. Further, the Board's decision on compensation was in the absence of and contrary to the evidence because there was no evidence that Mr. Salustro farmed, or intended to farm, the property. There is some overlap between this issue and the above issue as to the Board's approach to the evidentiary onus.

[76] Applying the analysis required by the ATA, whether the facts supported a conclusion that Mr. Salustro would farm in the future is an issue of fact subject to the high-deference standard of s. 59(2), as long as the factual issue does not have a significant effect on the decision or it can be readily extricated from the legal issue. There is some reason to consider it an issue of mixed law and fact since it can be characterized as an application of section 154(1)(c) of the Act. There is also a basis for finding it is a question of fact in the sense of describing what happened which would attract the higher level of deference described in s. 59(2) of the ATA. And it may be a discretionary decision under section 59(3) and (4) of the ATA if it could be said that the fact as found was important to the making of a discretionary order (Morgan-Hung at para. 31).

[77] With respect to the calculation of Mr. Salustro's loss this would seem to be a question of fact. The Board considered the following evidence, summarized by me:

- (a) The expert evidence of Mr. Telford (on behalf of the petitioner) and his conclusion that the physical use of the property is for hay production and livestock grazing, and the highest and best use is for agricultural production. (para. 16). (As discussed below, Mr. Telford also testified that the property had not recently been farmed).
- (b) Mr. Telford also testified that the average gross loss of use would be \$200.00 and the net return would be hundred and \$140.00 per acre. Further, the loss of profit would be \$140.00 per acre if the property was utilized for hay. (para. 23).
- (c) Mr. Salustro disagreed with Mr. Telford's data and interpretations. His evidence was that the lands came under the ALR, they were good quality cultivation lands and much better than the comparables used by the petitioner. Mr. Salustro testified that he grew "lots of hay" on the property at about 4.0 tonnes per acre. (para. 24).
- (d) The Board found Mr. Salustro to be a genuine and credible witness and it accepted that he grew about 4.0 tons of hay per acre on the property. He did not provide any evidence on the rate that should be applied and the Board used Mr. Telford's rate of \$100 per tonne. On this basis the probable gross loss was \$400 per acre. (para. 25).

- [78] Considering the above summary of the evidence before the Board I am unable to agree with the petitioner that there was no evidence on which the Board could calculate Mr. Salustro's loss. In my view there was evidence (including the evidence of the petitioner) and the decision cannot be considered otherwise unreasonable.
- [79] A related matter is that the petitioner submits that the Board erred when it concluded that compensation at the rate of \$400 per acre was appropriate. I conclude that this is also an issue of fact and the Board had some evidence to support its conclusion. In fact, part of the calculation was the figure of \$100 per tonne from Mr. Telford. The Board accepted Mr. Salustro's estimate of a loss of 4.0 tonnes of hay per acre. The petitioner obviously disagrees with this calculation but the Board was entitled to make the judgment it did on this factual issue and the decision is supported by the evidence.
- [80] As a further issue, the petitioner submits that there was no evidence that Mr. Salustro farmed, or intended to farm the property at the times material to his application for an increase in rents.
- [81] The core of the Board's reasoning on this issue is in paragraph 30 and I reproduce it once more:
30. At this juncture, I would like to address Progress' repeated submission that there is no basis for any increase in the annual compensation payable to Mr. Salustro. It points to Mr. Salustro's evidence that there was "no market for hay" and that it is not a reasonable [sic] foreseeable use that he would put the Lands into hay production anytime soon. Mr. Salustro's evidence was that he stopped growing hay in 1997 because, among other reasons I mentioned above, there was "no market for hay" at that time. It was not Mr. Salustro's evidence that there was "no market for hay" at the time he entered into the subject leases or at the effective dates. His evidence was that he has worked the Lands and other parcels he owns in the area for about 45 years, and the Lands are "good lands" with "farm qualification", are under the ALR, and are centrally located. When comparing the Helm lands [Helm v. Progress Energy Ltd. SRB Order 1634-1, December 2, 2010], he said "I feel my land is in the middle of Vancouver." So, it is not reasonably foreseeable that he would not put the lands into hay or other crop production in the future. If that is not the case, then why is Progress offering any compensation at all?
- [Emphasis added, underlining in original]
- [82] Clearly, the Board concluded that it was reasonably foreseeable that Mr. Salustro would put the property into hay production in the future. On the basis of previous decisions such as Piper it was open to the Board to conclude that it was reasonably probable and foreseeable that Mr. Salustro would farm in the future Piper at para. 51). Previous decisions of the Board are not binding on me but there is no submission that Piper is wrongly decided or otherwise is inapplicable.

- [83] It is also clear that Mr. Salustro was not farming the Property at the material times. What is the evidence supporting the Board's conclusion that it was reasonably probable and foreseeable that Mr. Salustro would put the property into hay production in the future?
- [84] As recorded by the Board, Mr. Salustro testified that there was "no market for hay" and that it was not reasonably foreseeable that he would put the property into hay production anytime soon. Specifically, there was no market for hay in 1997 and there still was no market at the time of the hearing before the Board in May 2013. This is consistent with Mr. Telford's opinion that, based on photographs and a physical inspection, the property had not been used recently for agriculture (para. 16). Of concern is that this evidence is counter to the Board's conclusion that agricultural use of the property was reasonably probable and foreseeable.
- [85] The Board also relied on Mr. Salustro's evidence that there was no market for hay when he entered into the original leases or on the effective dates. There is no discussion in the Board's decision of estoppel or otherwise any explanation as to how past decisions about the property should affect the issues before the Board in May 2013. In any event the Board is entitled and, indeed, required to make (in appropriate circumstances) decisions that differ from past decisions. As well, apparently the parcels making up the property are "good lands" with ALR qualification and they are centrally located. However, that speaks to the potential rather than the foreseeability of farming. Finally, whether farming is reasonably probable and foreseeable must surely be an objective test. The subjective intention of a landowner is a relevant factor but other evidence is required.
- [86] I accept that I should accord deference to the "field sensitivity" of the Board's experience in the disputes that come before it (Dunsmuir at paras. 48-49). However, the Board also operates in the context of a system of administrative justice where reviews of its decisions are governed by the ATA. Under s. 59(2) I should not set aside a factual decision of the Board unless there is no evidence to support it or the decision is otherwise unreasonable in light of all of the evidence except as discussed above. And, under Morgan-Hung, an error of fact that has a significant effect on the exercise of discretion becomes a discretionary decision and can be set aside under s. 59(4) of the ATA.
- [87] I have difficulty finding evidence to support the Board's decision on the issue of whether it was reasonably probable and foreseeable that Mr. Salustro would farm the property. The evidence of Mr. Salustro as to the current use of the property is that it is not currently being farmed and Mr. Telford's evidence is the same. This is not evidence of reasonably probable and foreseeability. And, with respect, it is not at all clear that evidence of the property being "good" (including being in the ALR) is relevant to the issue of whether it was reasonably foreseeable Mr. Salustro would farm the property.

- [88] Finally, the apparent conclusion in the sentence with the double negative in paragraph 30 that it was foreseeable that Mr. Salustro would put the property into hay production does not follow from his statement that he felt his land was centrally located or in the ALR. If that sentence was intended to mean that reasonable foreseeability could be supported by any evidence that is not the legal test.
- [89] On the basis of s. 59(2) of the ATA, I conclude that the Board's decision on the issue of whether it was reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the future is unreasonable in light of all of the evidence. Indeed some of the evidence cited in support of the Board's conclusion supports the opposite conclusion. Alternatively, this is an issue of importance to the Board's determination of loss and, ultimately, the issue of compensation. To this extent it is a discretionary decision and it is based predominately on irrelevant factors as described in s. 59(4)(c) of the ATA.

### **Tangible benefits**

- [90] As noted by the Board, tangible impacts include extra time, turns, inputs and potential crop yield reductions as a result of dealing with farming around an obstruction such as, in this case, the petitioner's operations on Mr. Salustro's land (para. 47).
- [91] The Board found there were tangible impacts. The "considerable detail" of the petitioner's expert, Mr. Telford, was reviewed as was his application of 20% loss in crops. Mr. Telford also pointed out that the valve or riser site for Reference No. 4 is located in Reference No. 1 and any impact is part of Reference No. 1. The Board agreed with the submissions made on behalf of Mr. Salustro to the extent of agreeing that the access road in the middle of the property would add additional tangible impacts (para. 48). The Board declined to make any decision on Mr. Salustro's complaint of water damage to the property because there was a lack of evidence.
- [92] In terms of a calculation, the Board noted that the "whole exercise of determining annual compensation involves estimations to a large degree " In order "to keep the calculation simple", the Board doubled Mr. Telford's estimate because the field surrounding Reference No. 2 was split in two with the access road. This was "not a precise amount" but it "was not an unreasonable amount as there will be additional headlands and additional turns requiring more time and effort" (para. 53).

- [93] The Board's decision on compensation for tangible impacts was:

Reference No. 1: \$521.13

Reference No. 2: \$517.78

Reference No. 3: \$529.32

Reference No. 4: Nil

**Reference No. 5: \$182.65**

- [94] Assuming that it is reasonably probable and foreseeable that Mr. Salustro would bring the property into hay production in the future it is not at all clear how there can be tangible impacts. That is, what tangible impacts could there be for farming that is foreseeable but not actually taking place?
- [95] I find that the Board made an error of fact with a significant impact in its decision on tangible impacts; it is set aside on that basis.

**Intangible impacts**

- [96] The petitioner acknowledges that the Board correctly stated that intangible impacts include traffic, noise, dust, and other disturbances arising from the operations on the property. Further, intangible impacts include the landowner's time and effort involved in ongoing dealings with the operator and others. I conclude that intangible impacts can occur in the absence of farming activity.
- [97] The problem, according to the petitioner, is that there was no evidence before the Board that Mr. Salustro visited the property at any point prior or subsequent to the effective dates. He lives away from the property and he provided no specific evidence about the amount of time he spent dealing with the petitioner or others. The petitioner seeks the setting aside of the Board's decision on this issue on the basis of an error of jurisdiction and/or mixed error of law and fact. As above, the ATA standards of review applies.
- [98] As a first point, in its decision the Board noted that the petitioner acknowledged that some compensation ought to be paid to Mr. Salustro for the intangible impacts of its operations. The petitioner does not say in its judicial review application this was misstated by the Board and the record does not suggest this was an alternate position.
- [99] In my view, it is not an error for the Board to proceed on the basis of entitlement to compensation for intangible impacts when that entitlement was conceded by, in this case, the petitioner. Further, on the record, there is no evidence that the petitioner raised the issue of Mr. Salustro not spending time dealing with the petitioner. It is the Board who has original jurisdiction over matters such as these, including the opportunity to hear the examination and cross-examination of evidence.
- [100] A judicial review proceeding is not the place to raise factual issues (J.J. v. Coquitlam School District No. 43 at para. 28) or issues involving the application of policy to the facts for the first time. Again, the Board proceeded on the basis of the petitioner agreeing to some compensation for intangible loss. In my view, the fact that the petitioner changed its position in a subsequent judicial review application does not create a reviewable error on the part of the Board.

- [101] In any event, Mr. Telford, the petitioner's expert, estimated that it would take eight hours per year for Mr. Salustro to deal with all nuisance and disturbance from the petitioner's operations. This worked out to about 40 minutes per month. For his part, Mr. Salustro testified that the petitioner had become more active than when they started in 2005 and he said, "I gave them rights; they took over more than the rights I gave them." He referred to the petitioner's use of existing roads on the property to survey other leases. The Board concluded that these activities would have caused nuisance and disturbance for Mr. Salustro.
- [102] The Board concluded that Mr. Telford's estimate of 40 minutes per month on average did not seem reasonable. The Board also said this:
64. Mr. Salustro gave evidence that he lives in Dawson Creek. Leaving aside all other nuisance and disturbance that Mr. Salustro may have suffered, I would think that for him to oversee the operator's visits alone would have taken on average more than 40 minutes per month.
- [103] It is clear that the Board was aware of Mr. Salustro's residence away from the property. It is also clear that the Board considered the time he took dealing with the petitioner.
- [104] I can find no error on the part of the Board on the issue of intangible impacts.

### Use of comparable 1/pattern of dealing

- [105] The petitioner acknowledges that the Board, in the section of its decision on "Determination of a global sum", correctly stated that it may consider the terms of surface leases and agreements as one factor in making a compensation determination. On this issue the petitioner's position was that there should be a reduction in compensation to Mr. Salustro or, alternatively, there was no basis for any increase in compensation (para. 88).
- [106] The problem, as described by the petitioner, is that rather than considering other leases as one factor, the Board used a per acre compensation from one lease, that being \$1,163 per acre as in "Progress' comparable 1." The result was an increase in the compensation payable to Mr. Salustro. However, according to the petitioner, the Board employed a pattern of dealings approach in the absence of evidence of an established rate or pattern of compensation. Alternatively, the Board exercised its discretion under s. 154 of the Act based on erroneous findings for loss of profits and intangible and tangible nuisance.
- [107] I can find no basis for finding that the Board made its determination on this issue on the basis of a pattern of dealings approach.
- [108] As noted by the petitioner, there were few reliable comparables in this case for a number of reasons including that much of the land surrounding the property is crown land. The primary reasoning of the Board is in the following:

93. As I have said before, in determining compensation, particularly when there is inadequate or imperfect comparables, the Board is faced with the challenge of arriving at an appropriate amount that is fair and equitable in all the circumstances of the particular case. This involves assessing the evidence and the unique circumstances of each case, and invariably exercising judgment and discretion to determine the proper amount, without compromising fairness and equity. That is what I have attempted to do here.

[109] The petitioner challenges this approach by saying the Board relied on erroneous findings for loss of profits and intangible and tangible nuisance. By definition this challenge is addressed by my decisions above in which I disagree with the petitioner's characterizations of the Board's decisions in these areas.

[110] I deny the petitioner's application for review of the Board's decision on the issue of the use of Progress Comparable 1/pattern of dealing.

## Conclusion

[111] The Board's decision on the issue as to whether it was reasonably probable and foreseeable that Mr. Salustro would use the property for hay production in the future is set aside.

[112] This was an issue of fact and the Board's decision was unreasonable in light of all of the evidence under s. 59(2) of the ATA. Alternately, the effect of the factual determination was significant to the discretionary aspect of the decision and it was based predominately on irrelevant factors under s. 59(4) of the ATA.

[113] This issue is referred back to the Board for reconsideration on the basis of this judgment.

[114] With respect to the issue of tangible impacts, the Board's decision is also set aside on the basis of it being an unreasonable finding that such impacts occur in the absence of actual farming activity. This issue is referred back to the Board for reconsideration with the issue of any probable and foreseeable farming by Mr. Salustro.

[115] The issue of a global amount of compensation may be reconsidered by the Board if it decides it is appropriate in light of any reasonably probable and foreseeable use of the property and any tangible impacts.

[116] All other claims by the petitioner are dismissed.

"Steeves, J."

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