IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

	)	***M. W. Douglas***
	)	*for the Applicant*
RHONDA RUSSELL and BRAD HENDERSON	)	
	)	***A. Ludwig***
	)	*for the Respondents*
(Applicants) Respondents	)	
	)	***T. J. Björnson***
- and -	)	*for The Surface Rights*
	)	*Board of Manitoba*
TUNDRA OIL & GAS LIMITED	)	
	)	*Chambers motion heard:*
(Respondent) Applicant	)	***November 21, 2019***
	)	
	)	*Decision pronounced:*
	)	***March 18, 2020***

PFUETZNER JA

[1] The respondent (Tundra) seeks leave to appeal a decision of The Surface Rights Board (the Board) varying the compensation payable by Tundra to the applicants (the landowners) for surface rights in respect of five oil well sites operated by Tundra on the landowners' property.

Background

[2] The landowners applied to the Board pursuant to *The Surface Rights Act*, CCSM c S235 (the *Act*), for a review of the compensation payable to them by Tundra under five surface leases.

[3] At the hearing before the Board, the landowners requested that the compensation be increased. They argued that the five well sites are "typical"

well sites such that compensation should be ordered based on the guideline chart set out by the Board in its previous order No. 07-2014 (the guideline chart) and adjusted for inflation. Because they are typical well sites, the landowners asserted that neither an empirical analysis nor comparable surface lease agreements should be used in determining compensation.

[4] Tundra provided the Board with an empirical analysis report for the well sites, as well as a pattern of dealings or global method report based on comparable surface lease agreements (collectively, the expert reports) prepared by a land consultant and appraiser. Tundra argued that the empirical analysis should be given significant weight in determining compensation as it indicates that lower compensation is warranted than would be suggested by the pattern of dealings or global approach.

[5] In its order, the Board agreed with the landowners that neither the empirical nor the global method should be used to calculate compensation. Rather, the Board "considered the characteristics of each site, in conjunction with the [guideline chart], as well as the matters listed under Subsection 26(1) of the [*Act*]." Ultimately, the Board ordered compensation with reference to the guideline chart and adjusted it for inflation based on the Consumer Price Index data submitted by the landowners. The Board declined to order interest or to award costs.

[6] The total increase in annual compensation awarded by the Board in respect of the five well sites was $1,600 per year.

The Motion for Leave to Appeal

[7] Tundra now seeks leave to appeal the order of the Board under section 48(1) of the *Act*, which states:

> **Grounds of appeal**
> **48(1)** An order of the board may be appealed to the Court of Appeal upon the grounds that the board
>
> (a) failed to observe a principle of natural justice;
>
> (b) acted beyond or refused to exercise its jurisdiction; or
>
> (c) made any other error of law.

[8] Section 48(4)(a) of the *Act* provides that an appeal shall be brought only "by leave of a judge of the Court of Appeal".

[9] Tundra's notice of motion sets out its proposed grounds of appeal as follows:

> 1. The Board erred by disregarding or ignoring relevant evidence.
>
> 2. The Board erred by failing to apply or misconstruing [s.] 26(1) of the [*Act*].
>
> 3. The Board erred by utilizing factors that are not relevant to the determination of annual compensation.
>
> 4. The Board erred by failing to provide adequate reasons for its award.
>
> 5. The Board erred by failing to provide [Tundra] with a fair hearing or comply with the rules of natural justice when it received and made reference to exhibits from the [landowners] that were not provided to [Tundra] prior to or at the hearing, and relied on other material or agreements not put into evidence.

Section 26(1) of the *Act*

[10] Section 26(1) of the *Act* sets out the factors that the Board is to consider in assessing compensation for surface rights. It states:

Determination of compensation

26(1) In determining the compensation to be paid for surface rights acquired by an operator, the board shall consider the following matters:

(a) the value of the land having regard to its present use before allowance of surface rights;

(b) the loss of use of the land or of an interest therein as a result of granting surface rights;

(c) the area of land that is or may be permanently or temporarily damaged by the operations of the operator;

(d) the increased costs to the owner and occupant, if any, by reason of the works and operations of the operator;

(e) the adverse effect caused by the right of entry to the remaining land by reason of severance, if any;

(f) the nuisance, inconvenience, disturbance or noise, to the owner and occupant, if any, or to the remaining land, that might be caused by, arise from or is likely to arise from or in connection with the operations of the operator, and the damage, if any, to any adjoining land of the owner, including damage to or loss of crop, pasture, fence or livestock and like or similar matters;

(g) where applicable in the opinion of the board, the application of interest payable in addition to the amount awarded as compensation; and

(h) any other relevant matter that may be peculiar to each case, including

(i) the cumulative effect, if any, of surface rights previously acquired by the operator or by other operators under a lease, agreement or right of entry existing at the time the surface rights were acquired with respect to the subject lands, and

(ii) the terms of a comparable lease agreement that a party may submit to the board for consideration.

Analysis and Decision

[11] The test for granting leave to appeal under the *Act* was articulated by Monnin JA in *EOG Resources Canada Inc v Surface Rights Board (Manitoba)*, 2003 MBCA 137 (at para 19):

> In deciding whether leave should be granted, I must consider the following: whether or not there is an arguable question of law or jurisdiction raised by EOG; whether or not the issue raised by EOG is one of importance such that it will be helpful in determining similar disputes which are apt to arise in the future; and, whether or not the point involved is a point of law alone. Unless the legal principles involved can be applied in the case before it, without the court involving itself in factual issues, leave to appeal should be refused, no matter how important the point of law is. . . .

[12] In applying the first part of the test—whether there is an arguable question of law or jurisdiction—the Court should be mindful of the standard of review that would be applied to the proposed ground of appeal. The Supreme Court of Canada, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, recently directed that appellate standards of review are to be applied by a court hearing a statutory appeal from an administrative decision maker (see para 37). As a result, on a statutory appeal, questions of law will be reviewed on a correctness standard. At the stage of granting leave to appeal, the standard of review is only relevant to the extent that it assists the Court in assessing the strength of the proposed ground of appeal.

The First Ground—The Board Disregarded or Ignored Relevant Evidence

[13] Tundra argues that the Board erred in law by disregarding the expert reports and that the Board's rationale for doing so was fundamentally flawed. While Tundra conceded in argument that choice of valuation methodology is

a question of fact (see *EOG* at paras 21-22), it argues that rejection of a methodology must be done on a principled basis.

[14] The order shows that the Board considered and rejected the methodologies set out in the expert reports put forward by Tundra. Instead, the Board determined compensation by applying the guideline chart and an inflationary adjustment factor.

[15] Choice of methodology is a question of fact. Even if I were to accept Tundra's argument that the Board must select methodology on a principled basis, this is, at best, a question of mixed fact and law. The Board provided reasons why it rejected the methodologies put forward by Tundra in favour of a different methodology. There is no arguable question of law that can be extracted from what is a highly fact-specific context. The first proposed ground of appeal does not meet the test for leave to appeal.

Second Ground—The Board Failed to Apply or Misconstrued Section 26(1) of the Act

[16] Tundra submits that the Board failed to analyse compensation in accordance with the mandatory factors set out in section 26(1) of the *Act*. Rather, it says that the Board simply relied on the guideline chart.

[17] The guideline chart is a methodology that the Board had previously developed for typical well sites in order to provide a level of certainty, cost-effectiveness and efficiency to its processes. In developing the guideline chart and the criteria to determine a typical well site, the Board considered the matters listed under section 26(1) of the *Act*, as well as other factors the Board deemed relevant, such as "location and size of well site; location, size and construction of access road; land value and use" and "comparable leases and its own knowledge and experience of farmland values and agricultural

practices".

[18] As a matter of logic, in order to determine whether any given well site is or is not "typical", the Board must consider the factors listed under section 26(1) of the *Act* as they apply to the particular site. Consistent with this, in its order, the Board states that it considered "the characteristics of each site" and "the matters listed under Subsection 26(1) of the [*Act*]."

[19] Although a failure to apply the correct legal test would be an error of law, there is no arguable case that the Board failed to analyse compensation in accordance with section 26(1) of the *Act*.

Third Ground—The Board Considered Irrelevant Factors

[20] Tundra argues that the Board erred in law by considering land values and the landowners' agricultural lease agreements in determining compensation.

[21] In my view, the initial point is wholly without merit. The very first factor set out in section 26(1)(a) of the *Act* is "the value of the land", making it not only a relevant factor, but one that the Board is required to consider.

[22] As for the agricultural lease agreements, which relate to agricultural rent that the landowners pay to other landowners in the immediate vicinity of the lands, the record is clear that the Board did not consider these documents. While the lease agreements were initially referred to in the order as documents submitted by the landowners that "were not disclosed to [Tundra] due to privacy concerns", the Board corrected its order to state: "Note that Exhibit 13, Lease Agreements, were marked as an exhibit in error. The Lease Agreements were not disclosed to [Tundra] nor were they relied on by the board in its analysis so have been removed from the Exhibit list."

[23] Even if I were to accept Tundra's argument that it would be an error of law for the Board to consider the agricultural lease agreements (which I do not), there is simply no arguable case to be made that the Board took into account the lease agreements.

Fourth Ground— Insufficient Reasons

[24] Tundra maintains that the Board failed to provide sufficient reasons, explaining: first, how and why land value impacted the determination of compensation; and, second, the basis for rejecting the empirical analysis report prepared by Tundra's expert.

[25] As I have explained, the Board properly stated that land values are relevant. As to the use it made of land values in assessing compensation, the Board merely said that "land values have risen in the region and . . . land values may be considered as a variable in determining compensation based on Subsection 26(1) of the [*Act*]." In its order, the Board explained in detail why "the empirical method is problematic in a number of respects." While the Board could have elaborated more on some aspects of its decision, when read as a whole, the order is adequate to explain why the Board decided as it did.

Fifth Ground—The Board Failed to Hold a Fair Hearing

[26] This proposed ground of appeal relates to the agricultural lease agreements referred to in the third proposed ground of appeal. Tundra asserts that the Board breached the rules of natural justice when it received and made reference to exhibits from the landowners that were not provided to Tundra.

[27] For the reasons I have previously explained, there is no merit to the argument that the Board considered the agricultural lease agreements in coming to its decision. Therefore, there is no basis to argue that the Board

breached the rules of natural justice as alleged.

Additional Ground—Reversal of the Onus of Proof

[28] In argument, Tundra proposed one additional ground of appeal not set out in its notice of motion.

[29] Tundra argues that the Board reversed the onus of proof when it awarded increased compensation to the landowners even though "[they] did not present any evidence at the hearing that would assist the Board in evaluating [their] loss of use, the increased costs resulting from the [well sites], the adverse effect to the remaining land, or the nuisance or inconvenience attributable to Tundra's operations on the [well sites]."

[30] What this argument overlooks is the fact that the Board attended and viewed all five of the well sites in person, accompanied by one of the landowners and representatives from Tundra. That, together with the Board's specialised expertise in determining surface rights compensation, provided it with the evidence it needed in order to assess the factors referred to above.

[31] Reversing the burden of proof would amount to an error of law. However, there is no arguable case that this occurred here.

Conclusion

[32] In the result, I am not persuaded that Tundra has raised an arguable question of law on which leave to appeal should be granted.

[33] The motion for leave to appeal is dismissed with costs to the landowners.

Pfuetzner JA