

File No.  
Board Order # 1700/17-1

---

May 24, 2011

**SURFACE RIGHTS BOARD**

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS  
ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF  
THE NORTH WEST  $\frac{1}{4}$  OF SECTION 23 TOWNSHIP 77 RANGE 17 WEST OF  
THE 6<sup>TH</sup> MERIDIAN PEACE RIVER DISTRICT;  
THE NORTH EAST  $\frac{1}{4}$  OF SECTION 27 TOWNSHIP 77 RANGE 17 WEST OF  
THE 6<sup>TH</sup> MERIDIAN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

Murphy Oil Company Ltd.

(APPLICANT)

AND:

Douglas Robert Jerome, Robert Earl Jerome,  
Pearl Jerome, and Toni Ethel Jerome

(RESPONDENTS)

---

**BOARD ORDER**

---

Heard: By written submissions closing May 9, 2011

Appearances: Rick Williams, Barrister and Solicitor, for the Applicant  
Douglas R. Jerome, for the Respondents

Panel: Cheryl Vickers

## **INTRODUCTION AND ISSUE**

[1] The Applicant, Murphy Oil Company Limited (Murphy Oil), has applied to the Board for mediation and arbitration respecting right of entry to the Lands for the purpose of constructing and operating additional wellsites on areas previously leased by the landowners to Murphy Oil for the construction and operation of wellsites.

[2] The Respondent landowners, Douglas Robert Jerome, Robert Earl Jerome, Pearl Jerome, and Toni Ethel Jerome, submit the Board does not have jurisdiction to make a right of entry order in these circumstances. They argue that the *Surface Lease Regulation*, BC Reg. 497/74, requiring that all surface leases contain a clause providing that no area covered by a surface lease be used for purposes other than those set out in the lease unless the grantor of the lease consents in writing to another use, operates to remove jurisdiction from the Board to authorize entry in circumstances where a company wants to add additional wells to an existing wellsite area covered by a surface lease. Murphy Oil argues that the *Petroleum and Natural Gas Act* gives the Board jurisdiction to authorize entry in these circumstances, and that the *Surface Lease Regulation* does not operate to remove that jurisdiction.

[3] The issue is whether the Board has jurisdiction to make a right of entry order when land is required for the purpose of constructing additional wellsites on an area of land subject to an existing surface lease.

## **FACTS**

[4] Robert Earl Jerome, Pearl Jerome and Douglas Robert Jerome are the owners of NW ¼ 23-77-17 W6M. On August 28, 2008, they signed a lease with Murphy Oil "...for the drilling and operation of a single well, a substitute well, riser valve sites or a permanent access road if required by the Company" on an area of NW ¼ 23-77-17 W6M comprising 4.33 acres. On February 9, 2009, they signed a lease with Murphy Oil "...for drilling and operation of a single well or a substitute well if required by the Company" on an area of NW ¼ 23-77-17

comprising 8.70 acres including the originally leased 4.33 acres. On February 19, 2009, they signed an amendment to the February 19, 2009 lease for wells B through F of 14-23-77-17.

[5] Murphy Oil seeks access to 9.59 acres of NW ¼ 23-77-17 W6M, inclusive of the already leased 8.70 acres to drill, operate and maintain four additional wells to be known as G14-23, H14-23, I14-23 and J14-23. The Oil and Gas Commission (OGC) has issued a permit to Murphy Oil for the development of these wellsites.

[6] Murphy Oil and the landowners have not agreed on terms of access to NW ¼ 23-77-17 W6M to construct and operate the four additional wells or on the compensation payable to the landowners arising from the access to construct and operate the four additional wells.

[7] Douglas Robert Jerome and Toni Ethel Jerome are the owners of NE ¼ 27-77-27 W6M. On August 22, 2009, they signed a lease with Murphy Oil "...for the drilling and operation of a single well (and associated production equipment and facilities) or a substitute well if required by the Company" on an area of NE ¼ 27-77-17 W6M. On the same date, the parties signed a Schedule "B" consenting to a second well (A16-27-77-17).

[8] Murphy Oil seeks access to 8.6 acres of NE ¼ 27-77-17 W6M inclusive of the area already leased by them to drill, operate and maintain four additional wells to be known as B16-27, C16-27, D16-27 and E16-27. The OGC has issued a permit to Murphy Oil for the development of these wellsites.

[9] Murphy Oil and the landowners have not agreed on terms of access to NE ¼ 27-77-17 W6M to construct and operate the four additional wells or on the compensation payable to the landowners arising from the access to construct and operate the four additional wells.

## **ANALYSIS**

[10] Section 142 of the *Petroleum and Natural Gas Act* provides that a person may not enter, occupy or use privately owned land to carry out an "oil and gas activity" unless the entry, occupation or use is authorized under a surface lease with the landowner containing the prescribed content, or an order of the Board. "Oil and gas activity" is a defined term that includes the exploration for, development and production of natural gas, or in other words, the drilling, construction and operation of natural gas wells. Section 158 of the *Petroleum and Natural Gas Act* provides that a person who requires a right of entry may apply to the Board for mediation and arbitration if the person and the landowner are unable to agree on the terms of a surface lease. Section 159(1) provides that

the Board or a designated mediator may make an order authorizing a right of entry if the Board or mediator is satisfied that an order authorizing the right of entry is required for a purpose described in section 142.

[11] The *Surface Lease Regulation* prescribes content to be included in every surface lease. One of the prescribed terms is that:

“no surface area covered by the lease shall be used for purposes other than those set out in the lease unless the grantor of the lease consents in writing to such other use”.

[12] The landowners submit that this provision of the *Regulation* constrains the Board from permitting other uses in a leased area that have not been consented to by the lessor. They submit it is the intent of the legislation and *Regulation* to provide the lessor with the ability to have quiet enjoyment of their land without granting unrestrained expansion to the lessee beyond that anticipated when signing the initial lease. For the reasons set out below, I disagree that is the intent of the *Surface Lease Regulation* and find the *Surface Lease Regulation* does not operate to remove the jurisdiction of the Board to entertain applications for right of entry orders to land that is already subject to a surface lease or to make an order authorizing right of entry if satisfied that right of entry is required for an oil and gas activity.

[13] At common law, the owner of a mineral interest is the holder of a dominant estate as regards the surface of the land with the implied right to make such use of the surface as reasonably necessary for the exploration and production of the minerals (*Chambers v. British Columbia (Mediation and Arbitration Board)* [1979] B.C.J. No. 1480. As described by Todd in *The Law of Expropriation and Compensation in Canada*, Second Edition (Carswell 1992, at page 435), at common law, the owner of subsurface resources had the right to enter upon, use and disturb the surface of land owned by another, without compensation, in order to extract and remove the subsurface resource. The enactment of the *Petroleum and Natural Gas Act* does not detract from the right of a subsurface owner to the surface of privately owned land to access their subsurface resource, but requires that in order to exercise the right of entry, the person requiring entry must either enter a surface lease with the owner of the land or obtain the authority of the Board. In either event, the person who enters land for an oil and gas purpose is liable to compensate the owner of the land for loss and damage. As described in *Chambers, supra*, “(w)hat the *Petroleum and Natural Gas Act* tries to accomplish is a workable method whereby the owner of the petroleum and natural gas rights may gain access to explore for the product, at the same time the interest of the owner of the surface rights is taken into consideration”. Other than to provide a right to compensation for loss, and a process for obtaining entry to private land to develop subsurface resources, the *Petroleum and Natural Gas Act* does not

remove the subsurface owner's right to access the surface of privately owned land to develop their resource.

[14] The compulsory aspect of entry to the surface of private land for the development of subsurface resources is acknowledged by the legislation. Section 154 of the *Petroleum and Natural Gas Act* provides that among other things, the Board may consider "the compulsory aspect of the entry" in determining the amount to be paid as compensation for entry to private land. In reviewing Board decisions, the Court has acknowledged a landowner's loss of the right to decide for themselves whether or not they want to see oil and gas exploration carried out on their land (see for example *Dome Petroleum Ltd. v. Juell* [1982] B.C.J. No. 1510).

[15] The *Surface Lease Regulation* must be read in the context of this legislative scheme. The *Regulation* prescribes that certain terms must be included in every surface lease, including the term set out above. The terms of a surface lease govern the respective rights and obligations of the parties to the lease for the activities set out in the lease. The effect of the prescribed term in issue is to ensure that access to the surface, under the terms of that surface lease, shall only be for the purpose set out. In other words, the surface lease does not give a lessee authority to enter the land for any purpose, but only for the purpose described in the lease. If a lessee wants to enter the land for another purpose under the terms of that lease, that is on payment of the compensation set out in that lease and subject to other terms of access agreed in the lease, the lessee must have the consent of the landowner. If the landowner withholds consent, however, then the lessee, as a person requiring access to the surface of land for an oil and gas activity, is back to "square one" under the legislation and must either negotiate a surface lease for the required entry or seek the authority of the Board. The intent ascribed to the *Regulation* by the landowners is not in keeping with the context of the legislative scheme to provide a process for access where required for defined oil and gas activities, involving a compulsory aspect, with compensation to the landowner for loss arising.

[16] The *Surface Lease Regulation*, as a piece of subordinate legislation, cannot operate to amend the legislative scheme providing: 1) that a person may not enter private land for oil and gas activities without either a surface lease or an order of the Board, 2) the right of a person requiring entry to apply to the Board if the person and landowner are unable to agree to the terms of a surface lease, or 3) the authority of the Board to order right of entry if it is satisfied that the right of entry is required for an oil and gas activity.

[17] The purpose of the *Surface Lease Regulation* is not to limit the authority of the Board or change the rights of subsurface and surface owners, but is rather to prohibit a company from changing their use of the land under the terms of the existing lease without agreement or renegotiation. If a company wants to change

or expand their use of the land under the terms of the existing lease the landowner must agree. Alternatively, the company must renegotiate the lease with new terms to cover the changed or expanded use, enter a new surface lease with terms covering the changed or expanded use, or seek the authority of the Board for entry and the assistance of the Board in mediation and arbitration in determining the terms of access and compensation payable.

[18] The Board recently considered this same issue in *ARC Petroleum Inc. v. Miller* (MAB Order 1633-1). In that case, the landowners similarly argued that the Board did not have jurisdiction to entertain the company's applications for mediation and arbitration respecting right of entry to lands covered by an existing surface lease for the purposes of drilling additional wells because of the operation of the *Surface Lease Regulation*. In determining it had jurisdiction the Board said:

“...the fact that there is an existing surface lease does not preclude the Board's jurisdiction or a company's ability to apply to the Board under the *PNGA*. The Board is not granting a surface lease or amendment to a surface lease, but rather is determining whether a right of entry should be granted and mediating and adjudicating on the appropriate compensation. Even after a right of entry order is granted, the parties can still negotiate and enter into a surface lease, or written amendments to an existing lease, and are encouraged to do so. If a surface lease or written amendments to an existing lease are entered into, the *Regulation* would apply. The *Regulation* itself does not preclude the Board's authority under the *PNGA*. Rather the *Regulation* governs the requirements when a surface lease is entered into.”

[19] I agree with the Board's reasons and conclusions in *ARC v. Miller, supra*.

[20] The mandate of the Board was recently considered in *Vause v. British Columbia (Mediation and Arbitration Board)*, 2009 BCSC 916 where the Court said:

The Board's mandate under the *Petroleum and Natural Gas Act* is to resolve by mediation and arbitration, disputes between landowners and persons who require entry to private land to explore for, develop, or produce petroleum or natural gas.... The premise of this legislation is that persons may not enter private land to explore, develop or produce petroleum or natural gas without negotiating a subsurface [sic] lease with the landowner. Where a consensual agreement with the landowner cannot be negotiated, the developer is required to obtain an authorization for entry, occupation or use of the land by applying for mediation and arbitration (s. 9) [now s.142]. There is also an expectation that the developer will pay compensation to the landowner for any damage or loss

caused by the entry and occupation of the land and possibly rent during the period of occupation.

[21] In this case, a consensual agreement with the landowners for access to the Lands for the development of the approved wells has not been negotiated. Consequently, Murphy Oil applies to the Board for mediation and arbitration and to obtain the authority of the Board to enter the Lands for the stated purpose. The applications are clearly within the scope of the Board's authority set out in the *Petroleum and Natural Gas Act* and as described in *Vause, supra*. Murphy Oil is not asking the Board to interpret or amend the terms of existing surface leases. It is asking the Board to authorize entry to Lands for specific oil and gas activities, namely the drilling of four wells at 14-23 and four wells at 16-27, because it has not been able to negotiate a surface lease with the landowners respecting the terms of access for those specific activities.

### **CONCLUSION**

[22] I conclude the Surface Rights Board has jurisdiction to entertain Murphy Oil's applications for mediation and arbitration made under section 158 of the *Petroleum and Natural Gas Act*. The applications will be referred to a mediator for the purpose of assisting the parties with resolution. Either the Board, or the mediator, has jurisdiction to make an entry order to the Lands if the Board, or mediator, is satisfied entry to the Lands is required for an oil and gas activity.

DATED: May 24, 2011

FOR THE BOARD



Cheryl Vickers,  
Chair