File No. 1715
Board Order No. 1715-2

November 29, 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

SOUTH EAST ¼ OF SECTION 33 TOWNSHIP 81 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(the Lands)

BETWEEN:

Canadian Natural Resources Limited

(APPLICANT)

AND:

Daniel Leigh Kerr

(RESPONDENT)

BOARD ORDER

Heard:	By written submissions closing November 8, 2011
Appearances:	Heidi Meldrum, Barrister and Solicitor, for the Applicant
	Leslie J. Mackoff, Barrister and Solicitor, for the Respondent
Panel:	Cheryl Vickers

INTRODUCTION AND ISSUE

[1] This is an application by Daniel Leigh Kerr, for advance costs pursuant to section 169 of the *Petroleum and Natural Gas Act* (the *Act*). Mr. Kerr is the Respondent landowner in an application by Canadian Natural Resources Ltd. (CNRL) for mediation and arbitration, pursuant to section 158 of the *Act*, respecting right of entry to the Lands owned by the Mr. Kerr, and the terms of entry including compensation.

[2] The parties commenced negotiating the compensation payable for access to and use of the Lands for the purpose of constructing and operating a wellsite in November 2010. CNRL filed its application with the Board in March 2011. The Board issued an Order granting CNRL the right to enter, occupy and use portions of the Lands to construct and operate a wellsite on June 3, 2011. The Order included an order for partial compensation and the Board continued efforts to mediate the final compensation payable. In September 2011, the Board determined settlement was unlikely and refused further mediation. The Board must conduct an arbitration to determine the compensation payable. Dates for arbitration are not yet scheduled.

[3] Mr. Kerr has retained counsel. He intends to present epidemiological evidence and obtain the opinions of an environmental expert and an appraiser. The purpose of the expert evidence is to support a claim for compensation for the effects on the landowner and the Lands of CNRL's activity on the Lands. Mr. Kerr claims compensation of $51,000 for the right of entry itself and $10,122 in annual rent. To advance this claim at the arbitration, Mr. Kerr estimates he will incur costs for legal fees, expert fees, disbursements, and taxes totaling $40,320.

[4] I am told that Mr. Kerr is a pensioner who resides in a care facility and that he has a modest income that barely covers his expenses. He acts through Powers of Attorney.

[5] Mr. Kerr submits the Board should exercise its discretion to order CNRL to pay him advance costs of $40,320. CNRL submits the application for advance costs should be denied and that the Board should determine the issue of costs at the conclusion of the arbitration.

[6] The issue is whether the Board should exercise its discretion to make an order that CNRL pay advance costs to Mr. Kerr.

THE LEGISLATION

[7] Section 169 enables the Board, on application, to order an operator to pay all or part of the amount the Board anticipates will be the landholder's actual costs awarded by the Board as follows:

> 169 (1) Subject to any regulations, the board may, on application, order the operator to pay to the landholder, as advance costs, all or part of the amount that the board anticipates will be the landholder's actual costs awarded by the board under section 170.

[8] There are no regulations with respect to costs or advance costs. "Operator" and "landholder" are defined terms; there is no dispute that CNRL is an "operator" or that Mr. Kerr is a "landholder" within the meaning of section 169.

[9] Section 170 provides that the Board may order a party to pay all or part of the actual costs incurred by another party in connection with an application. It goes on to provide that if actual costs are awarded to a landholder who has received an amount as advance costs that exceeds the amount awarded, the operator may deduct the difference from any amount of rent or compensation payable and, if rent or compensation has been paid, the Board may order the landholder to pay the excess to the operator. "Actual costs" are defined in section 168 as follows:

> 168 In this Division
> "actual costs" includes, without limitation, the following:
>
> (a) actual reasonable legal fees and disbursements;
> (b) actual reasonable fees and disbursements of a professional agent or expert witness;
> (c) other actual reasonable expenses incurred by a party in connection with a board proceeding;
> (d) an amount on account of the reasonable time spent by a party in preparing for an attending a board proceeding.

ANALYSIS

[10] This is the Board's first opportunity to consider its discretion under section 169 of the *Act* in a contested application. In determining this application, I must consider the intent of the legislature in giving the Board discretion to award advance costs and the factors that the Board will consider in making such awards.

[11] The words of an enactment must be interpreted in accordance with the oft quoted principle enunciated by Professor Driedger and repeatedly cited by our courts as the preferred approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously

with the scheme of the Act, the object of the Act, and the intention of Parliament." (*Bell Express Vu Limited Partnership v. R.* 2002 SCC 42).

[12] The *Act* provides a scheme to enable the holder of subsurface resources to gain access to the surface of private land to explore for and develop that resource, and a mechanism to determine the compensation payable to a landowner as a result. The *Act* amends the common law giving the owner of subsurface resources the right to access the surface of private land to exploit their resource by requiring that a landowner must be compensated for their loss and any damage to the land arising from the entry. Recent amendments to the *Act* further expand rights to compensation to neighbours and occupiers of land subject to an entry in certain circumstances. The courts have recognized the compulsory nature of access to private land for the development of sub-surface resources (see for example *Dome Petroleum Ltd. v. Juell* [1982] B.C.J. No. 1510 (BCSC)), and the *Act* identifies the compulsory aspect of entry as one of the factors that the Board may consider in determining appropriate compensation when the parties are unable to agree (section 154 (1)(a)).

[13] It is in this context, that the Legislature saw fit to recently amend the provisions of the *Act* to include, among other revisions, sections 168 to 170 giving the Board the discretion to make orders for advance costs and defining the scope of what may be covered in an award of costs.

[14] Further context for the legislative provisions may be found in the history of Board proceedings and the Board's costs awards. With respect to the Board's proceedings generally, landowners often have difficulty providing the evidentiary basis to support requested compensation for alleged loss or damage. It is not uncommon for a landowner to represent him or herself before the Board, and the Board does not often hear expert evidence in support of a compensation claim by a landowner. On the other hand, it is common that an operator is represented by counsel and the Board will frequently hear expert evidence called by the operator to support the operator's view of appropriate compensation. The Board often struggles with the quality of the evidence before it.

[15] As to costs, the Board's Rules contemplate that a landowner will be compensated for his or her costs associated with the Board's mediation process in an application respecting right of entry and associated compensation. This presumption in favour of a landowner recuperating mediation costs acknowledges the compulsory nature of the proceedings and departs from the traditional notion that costs follow the event. The presumption does not necessarily flow through to arbitration proceedings, nor does it necessarily apply to other types of applications before the Board. The Board's Rules also set out the factors the Board will consider in making an award of costs. Many of these factors cannot apply to an award of advance costs as they are factors that cannot be assessed until the completion of a proceeding.

[16] Prior to the enactment of sections 169-170, the Board's costs awards often took a restrictive view of what could be recovered as costs (see for example *Spectra Energy*

Midstream Corporation v. Vause, et al (2008) Board Order 1589-2), and fell short of recompensing a party for actual costs incurred. Section 168 provides an inclusive and expansive definition of "actual costs" that enables a cost award to more fully recompense a party for the cost of participating in the Board's process.

[17] The legislation does not provide at test for awarding advance costs or set out the factors the Board should consider. An award is left to the Board's discretion. The common law, in the absence of a statutory scheme for advance costs, supports an award of advance costs only in "rare and exceptional cases", involving impecuniosity, a meritorious case, and special circumstances "where necessary to avoid unfairness or injustice" (*British Columbia(Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue*), 2007 SCC 2, [2007] 1 S.C.R. 38). The bar for meeting the common law test, in particular the requirements of impecuniosity and special circumstances are extremely high. CNRL argues it is this test that must be met in an application under section 169.

[18] The Legislature must have realized, however, in enacting section 169, that the common law test could virtually never be met in proceedings before the Board. The Supreme Court of Canada's "impecuniosity test" requires that the party seeking advance costs "genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were made" (*Okanagan; Little Sisters*). An applicant must "satisfy a court that all funding options have been exhausted". It contemplates that an applicant must have explored the possibility of obtaining a loan, thereby incurring debt, and having counsel act on a contingency fee as two possible funding options.

[19] Section 169 authorizes the Board to exercise its discretion to order advance costs to a landholder. A landholder is an owner of land or occupant who is a party to a Board proceeding. An owner of land will generally have the option of mortgaging the land to raise funds to advance their claim. While there certainly could be circumstances where a landholder could be found to be impecunious to the extent that there is no way they could participate in the Board's proceedings without financial assistance, the legislation expressly grants the discretion to award advance costs in circumstances where parties generally will have some financial wherewithal, and where it will often be impossible to demonstrate there is "no other realistic option".

[20] The Legislature must have also realized that the Supreme Court of Canada's "special circumstances test" would also rarely, if ever, be met in the context of Board proceedings. The Board must essentially determine the amount of compensation payable to a landholder arising from a right of entry. There is no question that the issue of compensation is important to the individual landholder and company involved. Nor do I doubt that the issues of compensation in one case are not important to other landholders and companies who are engaged in negotiations respecting the compensation payable as a result of a right of entry, or to landholders generally who see themselves as affected by oil and gas activity. But at the end of the day, each case

will depend on the circumstances of that case and the evidence before the Board to substantiate the alleged loss or damage and the amount claimed. Public interest or public importance alone is not enough to characterize proceedings as "special enough" to warrant advance costs when applying the common law test (*Little Sisters*). The Board does not even have the jurisdiction to consider constitutional questions (section 148 of the *Act* and section 44 of the *Administrative Tribunals Act*) so there will never be a case where constitutional rights and the broader public interest concerned with those rights is in issue. It is hard to conceive of a Surface Rights Board case, even one that advances novel arguments, that would have the "special circumstances" contemplated by the Supreme Court of Canada in *Okanagan* or *Little Sisters*.

[21] If the Legislature had intended that in the exercise of its discretion to award advance costs the Board would use the common law test developed by the Supreme Court of Canada then there would have been little, if any, purpose to giving the Board that discretion. The Legislature must, therefore, have intended that Board could move away from the common law test and be more flexible in exercise of its discretion. It must have intended that the Board could exercise its discretion in the particular context of the cases before it that would rarely, if ever, meet the exceptionally high bar for an award at common law intended to apply outside of a statutory dispute resolution context. The Legislature must be presumed to have been aware of the Board's particular statutory mandate, the context of its proceedings and the common law, and must have enacted the cost provisions for a reason with the intention that the Board would find circumstances to exercise its discretion to award advance costs. The Legislature must have intended to give the Board the discretion to award costs in its particular context, and must have intended the threshold for advance costs to be lower that the common law test set out by the Supreme Court of Canada

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[22] All of which takes me back to the particular legislative context and the Board's particular experience.

[23] An entry order is a compulsory taking. While a landowner is entitled to be compensated, in the absence of an agreement with the operator, the landowner has no choice but to engage in the Board's processes to advance a claim. Landowners are frequently unable to support a claim because they present little or no evidentiary support, or because they cannot establish the legal basis for a claim beyond those commonly recognized in law. A landowner is disadvantaged in the absence of effective legal assistance with advancing the evidence and arguments to support alleged loss or damage. The right to compensation provided by the legislation cannot be effectively explored, tested or advanced if one party to the dispute does not have proper representation. The Board's ability to effectively adjudicate a claim for loss or damage is compromised if one side of the dispute is not effectively represented.

[24] In this context, the intent of the Legislature in enacting section 169 must have been to give the Board a tool to ensure that both sides of a dispute before it would be able to effectively participate in its processes and have the ability to engage the professional

resources necessary to advance the evidence and legal arguments necessary to support a claim.

[25] I find support for this intent in the language of the legislation itself which clearly distinguishes between the rights of the parties before the Board when it comes to advance costs. For example, it is interesting to note that the Legislature did not see fit to give the Board discretion to make an order for advance costs in favour of an operator, but only in favour of a landholder. This circumscription to the Board's discretion to award advance costs only to a landholder and not to an operator acknowledges, generally speaking, that in Board proceedings one of the players, namely the landowner, is often disadvantaged through the lack of legal representation or expert assistance and gives the Board a tool to address that disadvantage. Further, the legislation contemplates that the Board may refuse to proceed with an application from an operator if an award for advance costs is not paid. In advance of an entry order being made, the discretion to refuse to proceed with an application for failure to pay advance costs is not only a significant "stick" to effect compliance, but offers something to counter-balance the compulsory aspect of the proceedings from a landowner's perspective.

[26] The Legislature further distinguishes between the respective rights of landholders and operators in the provisions contemplating the situation where a landholder might receive an award for advance costs that is different from the amount of costs ultimately awarded. It is interesting to note that where the Board determines a landholder is entitled to actual costs in excess of an award of advance costs that the landholder is entitled to receive the difference, but that if an award of advance costs exceeds actual costs awarded, the operator may deduct the difference from compensation owing or, if compensation has been paid, the Board may order the landholder to pay back the difference. The Board clearly has discretion to ensure a landholder's costs are covered even where the landholder may not, strictly speaking, be entitled to an award of costs at the end of the day. This discretion reinforces the use of costs as a tool to ensure the Board can effectively adjudicate the issues before it by ensuring landholders have the means to properly advance a case, whether they are ultimately successful or not. I will leave the circumstances in which the Board might invoke that discretion to the appropriate case, but note for the purposes of this application, that the discretion is there, lending support to a legislative intent that the costs provisions are intended to be used by the Board to ensure effective participation of landholders.

[27] Further, the definition of "actual costs" itself lends support to a legislative intent that the costs provisions are intended to be used to ensure effective participation in that through an award of costs a party may be "made whole". In using the term "actual costs" and in providing an inclusive and "without limitation" definition of that term expressly expanding the scope of costs that may be awarded, the legislature must have been alert to the limited costs awards made and the potential financial burden of Board proceedings, and must have intended that the vehicle of costs could be used, where appropriate, to make a party whole.

[28] I conclude that in exercising its discretion to make an award of advance costs under section 169, the Board is not constrained by the common law test, but may exercise its discretion to give effect to a legislative intent to facilitate effective landowner participation in Board proceedings, ultimately assisting the Board in the effective adjudication of compensation issues. Effective adjudication of compensation issues ultimately benefits all stakeholders to the Board's processes. Compensation awards made with the benefit of fulsome consideration of evidence and legal argument to support alleged loss and damage are more likely to provide guidance to stakeholders to assist with resolution of compensation issues.

[29] Without limiting the factors that the Board may find relevant to exercising its discretion to award advance costs in any particular case, the factors that I find compelling in this case include the compulsory nature of the application, Mr. Kerr's personal and financial circumstances, the fact that Mr. Kerr seeks to advance novel arguments the Board has not had the opportunity to consider to advance his claim for compensation, the apparent need for expert evidence to support his case, the fact that Mr. Kerr has not received any amount on account of his costs incurred in participating in the Board's mediation process, and that there is no suggestion that an award of advance costs would pose an unfair burden on CNRL.

[30] These proceedings arise from CNRL's application for mediation and arbitration respecting right of entry to Mr. Kerr's Lands and the compensation payable as a result. Mr. Kerr is an involuntary participant in the Board's process. He is *prima facie* entitled to his costs of the mediation process, which to my knowledge have not been paid. The parties have not agreed on compensation owing and the Board must adjudicate. I am told that Mr. Kerr's is a pensioner who resides in a care facility and that he has a modest income that barely covers his expenses. I do not know whether he could finance his participation in these proceedings by way of mortgaging the Lands or by some other means. In any event, as discussed above, I do not think it is necessary that a landowner must incur debt or prove impecuniosity, at least as that test is set out by the common law. Mr. Kerr's modest income alone would not provide the financial means to effectively participate in an arbitration. Mr. Kerr's Powers of Attorney should not be expected to finance Mr. Kerr's participation in the Board's proceedings.

[31] I am told that Mr. Kerr's claim requires expert evidence and that his claim may advance arguments not previously considered by the Board. I have little doubt that Mr. Kerr will benefit from representation by counsel and counsel's advice and assistance with respect to both the evidentiary and legal support for alleged loss or damage, or that the Board will benefit from the opportunity to consider expert evidence in support of a claim.

[32] CNRL argues that the Board should not depart from its normal practice of determining costs at the end of the process. Until recently, the Board has not had the legislative authority to consider an award of advance costs and departing from "normal practice" was not an option. The new legislation expressly gives the Board the discretion to depart from its "normal practice" in part to address the hardship that flows

from it. In this case, if the Board does not exercise its discretion to award advance costs, there is some likelihood that Mr. Kerr may not be able to effectively participate in the process at all, or without hardship. I am satisfied, in all of the circumstances of this case, that the Board should exercise its discretion to make an award of advance costs.

[33] As to the amount of advance costs, section 169 contemplates that such an award may equate to all or part of the amount the Board anticipates will be the landowner's actual costs under section 170. I cannot know at this point whether Mr. Kerr will ultimately be awarded costs under section 170, but I can assume that Mr. Kerr is at the very least entitled to costs of the mediation process, and that entitlement under section 170 is not necessarily dependent on success in the cause. The Board's discretion under section 170 must be exercised not only in light of the circumstances of each case but also being mindful of the statutory scheme and the apparent legislative intent to ensure landholders may effectively participate in the Board's proceedings.

[34] The estimated costs for Mr. Kerr's participation in the arbitration for counsel fees, expert witnesses, disbursements and taxes, all of which are contemplated in the definition of "actual costs" are not unreasonable and do not account for costs of the mediation process already incurred. I find the Board should exercise its discretion to grant an award of advance costs in the amount of $40,320.00.

ORDER

[35] The Board orders Canadian Natural Resources Ltd to pay forthwith to Daniel Leigh Kerr the amount of $40,230.00 as advance costs pursuant to section 169 of the *Petroleum and Natural Gas Act.*

DATED: November 29, 2011

FOR THE BOARD

Cheryl Vickers, Chair