

File No. 1715  
Board Order No. 1715-3

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June 6, 2012

**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 6<sup>TH</sup>  
MERIDIAN PEACE RIVER DISTRICT  
(the Lands)

BETWEEN:

Canadian Natural Resources Limited

(APPLICANT)

AND:

Daniel Leigh Kerr

(RESPONDENT)

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**BOARD ORDER**

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Heard: By written submissions last received May 18, 2012  
Appearances: Heidi Meldrum, Barrister and Solicitor, for the Applicant  
Leslie J. Mackoff, Barrister and Solicitor, for the Respondent  
Panel: Simmi K. Sandhu

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## INTRODUCTION

[1] The Landowner, Daniel Kerr, applies to the Board for pre-arbitration production of documents from Canadian National Resources Limited (CNRL) pursuant to Rule 12(5)(e) of the Board's Rules of Practice and Procedure. The arbitration is to determine the appropriate compensation pursuant to section 158 of the *Petroleum and Natural Gas Act* (the Act) for the right of entry by CNRL to Lands owned by Mr. Kerr. On June 3, 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 and an order for partial compensation. The arbitration has been scheduled for September 12-14, 2012.

[2] Mr. Kerr seeks the following documents from CNRL:

- a) A complete list of all chemicals that are commonly used in the construction and operation of a well;
- b) A complete list of all chemicals CNRL uses to frack;
- c) All epidemiological studies conducted by CNRL with respect to the health effects of gas wells;
- d) All studies and data on which they rely with respect to the health implications of the chemicals it uses, which CNRL possesses;
- e) Data concerning the amount of chemicals used;
- f) Data concerning recovery of chemicals;
- g) The method of accounting for chemicals not recovered;
- h) All documents pertaining to studies undertaken with respect to contamination issues, including of soil, air and water;
- i) Data regarding all spills or blowouts at all well sites operated by CNRL;
- j) Whether the spills have been reported to the appropriate authorities;
- k) Data regarding contamination of soil, air and water around a well site after a spill or blowout;
- l) CNRL's plan/protocol in the event of a spill or blowout;
- m) Information about how the well itself will be constructed, including what materials will be used to construct the well, the composition of drilling fluids, and how the well will be plugged;
- n) Information about the depth and horizontal dimensions of the well;
- o) How long CNRL anticipates that the well will be in active production;
- p) A complete list of all chemicals CNRL may use to frack any wells on the Lands;

- q) All studies and data CNRL possesses with respect to the effect of air emissions from fracking on human and animal health;
- r) Information on how CNRL intends to dispose of wastewater from fracking;
- s) Data and information on what chemicals and liquids CNRL intends to put into the remote sump;
- t) Information on the intended size of the remote sump, including volume, width and depth;
- u) Data and information about how the remote sump will be constructed, including materials used;
- v) Information on how CNRL will ensure that structural integrity of the remote sump is maintained to prevent future spills;
- w) Information on prices CNRL has paid since 2010 for borrow pit materials;
- x) Information on the size of the borrow pit once material has been extracted; and
- y) Information with respect to the intended use of the gravel to be used from the borrow pit.

[3] Mr. Kerr says these documents and information are relevant to the determination of the appropriate compensation payable by CNRL and, in particular, to determine the degree of risk posed to Mr. Kerr and the Lands by chemicals used in the extraction process and in CNRL's operations. Mr. Kerr intends to show that the current value of the Lands is adversely affected by the growing body of information that shows that drilling and fracking of a well poses serious risks to human health and the environment, and that "whether or not these risks will materialize as actual damages suffered is irrelevant."

[4] CNRL submits the requested information is not relevant to the issue before the Board, namely to determine compensation for loss or damage caused by the right of entry. CNRL says the documents requested do not directly relate to any of the factors set out in section 154(1) and that the risks referred to are speculative and not actual.

## LEGISLATIVE AUTHORITY

[5] Section 34(3)(b) of the *Administrative Tribunals Act* sets out the Board's authority for a pre-hearing order for production information or documents as follows:

- 34(3) ...at any time before or during a hearing, but before a decision, the tribunal may make an order requiring a person
- (a)...
  - (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

[6] Rule 12(5)(e) states the Board may “require a party to produce to the Board or another party, or allow the Board or another party access to, any documents or other information which may be material and relevant to an issue”.

[7] The B.C. Supreme Court in *Assessor of Area #01 v. Lehigh Portland Cement Limited, et al* (2010 BCSC 193) in considering the scope of section 34(3) of the *Administrative Tribunals Act* held that a tribunal has the power to control its own processes and make rules respecting practice and procedure to facilitate the just and timely resolution of matters before it and that the powers set out in the Rules in that instance (similar wording to Rule 12(5)(e)) are consistent with this mandate. Therefore, in determining this application, I will apply the test set out in Rule 12(5)(e) of the Rules.

## ISSUE

[8] The issue is whether all or any of the documents and information requested by Mr. Kerr may be material and relevant to an issue in the arbitration and if so, whether they should be produced by CNRL.

## ANALYSIS

[9] Mr. Kerr agrees the issue in the arbitration is to determine appropriate compensation for the right of entry order, not the nature of the development, the level of risk involved in the development, or the potential for harm to human health or the environment. However, he says information as to the nature of the development, the level of risk involved, or the potential for harm to human health or the environment has a direct impact on property value, which is one of the factors to consider when awarding compensation pursuant to section 154 of the *Act*. In particular, the requested information relates to:

- a) “a person’s loss of a right or profit with respect to the land” (sec. 154(1)(c)) as an impact on property value,
- b) “temporary and permanent damage from the right of entry” (section 154(1)(d)) as there is evidence chemicals used damage the environment,
- c) “compensation for severance” (section 154(1)(e)) as the injection of fracking chemicals could render land unusable beyond the wellsite,
- d) “compensation for nuisance and disturbance from the right of entry” (section 154(1)(f)) as the size and depth of the well, chemicals that might be used to frack, wastewater disposal, and data regarding contamination after a spill or blowout correlates to the actual activities at the wellsite which affects the nuisance and disturbance to Mr. Kerr in terms of the number of consultants and experts that will be brought to the site, the amount of traffic to be expected on the Lands, the resulting wear and tear on the Lands, and personal safety concerns.

e) “other factors the board considers applicable” (section 154(1)(k)).

[10] Further, it is submitted that the standard practices and protocols implemented by CNRL for drilling or fracking wells is relevant and material to the landowner’s right to compensation that extends to the loss or damage “reasonably foreseeable” as result of the entry.

[11] CNRL says the concerns raised by Mr. Kerr are potential and hypothetical rather than actual damages and the ability to address health and safety concerns lies within the jurisdiction of the Oil and Gas Commission, not the Board. CNRL relies on the Board’s decision in *Encana v. Merrick*, SRB Decision 1697-4, which denied an almost identical request for documents beyond information or documents related to the company’s use of the specific site and to spills, blowouts, and contamination that had actually occurred on the site. CNRL has not yet made any use of the Kerr Lands and, therefore, CNRL says they have no site specific information to disclose.

[12] Section 143(2) of the *Act* provides that.. “a right holder is liable  
(a) to pay compensation to the landowner for loss or damage caused by the right of entry, and  
(b) except where the right of entry relates to a right of way for a flow line, to pay rent to the landowner for the duration of the right of entry.”

[13] In determining the amount to be paid, the Board may consider factors set out in section 154(1). To the extent that CNRL’s right of entry of the Lands to construct and operate a wellsite causes loss or damage, the landowner is entitled to compensation for that loss. The landowner is not entitled to compensation beyond the actual or reasonably probable foreseeable loss sustained and if the Board awards compensation that exceeds the loss sustained, the Board has exceeded its jurisdiction (*Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458).

[14] Therefore, to the extent that CNRL’s use and occupation of the Lands pursuant to the right of entry causes loss or damage to Mr. Kerr, he is entitled to be compensated for that loss or damage. However, CNRL has not yet made use of the Lands or right of entry and no actual loss or damage has occurred.

[15] Mr. Kerr raises concerns that go beyond actual loss or damage to potential or possible risks and impact on property values, human health and the environment. These risks have not been demonstrated to result in any actual loss or injury, nor have they been demonstrated to be “reasonably foreseeable”. In fact, Mr. Kerr admits that whether or not these risks will materialize as actual damages suffered is irrelevant; rather, he says potential purchasers, informed of these risks, would be disinclined to pay the same price for a property on which a well or multiple wells have been fracked. However, it has not been shown how the information and documentary evidence requested, which relate to standard practices, environmental risks, and health concerns are relevant and material to what a potential purchaser will pay. Whether the presence

of wellsites on a property is likely to affect that property's market value should be evident from looking at the market evidence relating to the sales of similar properties with wellsites and comparing that evidence to the market evidence relating to the sales of similar properties without wellsites. Likely, a potential purchaser would have access to and investigate information publicly available on the operations of a particular wellsite of a property they are looking to buy, as well as information that a potential vendor has in his/her possession.

[16] As stated by C. Vickers, Chair of the Board, in the *Merrick* decision, *supra.*, “..concern for safety and health in the absence of actual or reasonably probable loss or damage, is not compensable”. I am not satisfied that the majority of the documents and information requested relate to actual or reasonably probable loss or damage.

[17] Most, if not all, of the documents and information requested are not related specifically to CNRL's activities on the Lands or the effect of the wellsite on the Lands because CNRL has not yet made use of any of the Lands. However, the information regarding the intended use of the Lands is site specific, and a landowner cannot know what damage or loss may be reasonably foreseeable if they do not know what are the intended uses of the site. Therefore, although this information refers to the intended use of the wellsite, sump and borrow pit, to the extent CNRL has information on the intended uses, I find it may be relevant and material to a loss or damage to the landowner or the Lands that is “reasonably foreseeable or probable”, and should be produced.

## ORDER

[18] The Board orders CNRL to produce to Mr. Kerr within three weeks of the date of this Order, the following information or documents in its possession and control:

- a) Information about how the well itself will be constructed, including what materials will be used to construct the well, the composition of drilling fluids, and how the well will be plugged;
- b) Information about the depth and horizontal dimensions of the well;
- c) How long CNRL anticipates that the well will be in active production;
- d) A complete list of all chemicals CNRL may use to frack any wells on the Lands;
- e) Data and information on what chemicals and liquids CNRL intends to put into the remote sump;
- f) The intended size of the remote sump, including volume, width and depth;
- g) Data and information about how the remote sump will be constructed, including materials used;
- h) Information on the size of the borrow pit once material has been extracted; and

- i) Information with respect to the intended use of the gravel to be used from the borrow pit.

DATED: June 6, 2012

FOR THE BOARD

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the bottom.

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Simmi K. Sandhu, Member