

File No. 1715
Board Order No. 1715-5

December 20, 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 6TH
MERIDIAN PEACE RIVER DISTRICT
(the Lands)

BETWEEN:

Canadian Natural Resources Limited

(APPLICANT)

AND:

Daniel Leigh Kerr

(RESPONDENT)

BOARD ORDER

Heard by written submissions

Leslie J. Mackoff and Ellen Hong, Barristers and Solicitors, for Daniel Leigh Kerr
Heidi Meldrum, Barrister and Solicitor, for Canadian Natural Resources Limited

INTRODUCTION

[1] On June 3, 2011, the Board granted Canadian Natural Resources Limited (CNRL) right of entry to a 14.83 acre area of the Lands owned by Daniel Leigh Kerr for the purpose of drilling, completing and operating a well (Order 1715-1). In accordance with this Order, CNRL paid Mr. Kerr \$10,000 as partial payment on account of compensation payable to him for the use and occupation of the Lands. On November 29, 2011, the Board ordered CNRL to pay Mr. Kerr \$40,230 as advance costs (Order 1715-2). On July 12, 2012, the Board terminated the entry order and ordered Mr. Kerr to return to CNRL any monies paid to him under the entry order and any unexpended portion of the advance costs (Order 1715-4, attached as Appendix A). The Board made Order 1715-4 understanding it was being made with Mr. Kerr's consent and on CNRL's advice that it had not made use of the Lands and would not be proceeding with any wells on the Lands. Mr. Kerr returned \$7,649.65 to CNRL on September 18, 2012 representing the unexpended portion of the advance costs.

[2] Mr. Kerr asks the Board to reconsider Order 1715-4 on the grounds that CNRL had in fact entered the Lands, and on the grounds that he did not consent to the return of the \$10,000 partial payment. Although not asking the Board to reconsider its termination of the entry order, he argues that in accordance with provisions of the *Petroleum and Natural Gas Act (PNGA)*, the earliest CNRL could have brought its application for termination was September 15, 2013. He seeks compensation for loss and damage arising from the entry, annual compensation for an additional period of two years, and seeks costs of the Board's proceedings. Mr. Kerr asks the Board to:

- delete the paragraph [2] of Order 1715-4 requiring the repayment of the \$10,000 partial compensation;
- award initial compensation to Mr. Kerr of \$28,559.00, subject to the offset of the \$10,000 already paid;
- award annual compensation to Mr. Kerr of \$16,000.00 for two years;
- award personal costs to Mr. Kerr of \$10,722.73; and
- award interest to Mr. Kerr of \$1,816.79.

[3] Mr. Kerr therefore seeks \$73,098.52 from CNRL subject to the offset of the \$10,000 partial payment already received.

[4] CNRL opposes the reconsideration maintaining the Board's understandings on which Order 1715-4 was based were correct, and asks the Board to dismiss the request for reconsideration, thereby requiring Mr. Kerr to repay the \$10,000 partial payment. CNRL maintains no compensation is payable to Mr. Kerr. CNRL seeks to recover a

greater portion of the advance costs, submitting the legal fees claimed are unreasonable. While not disputing Mr. Kerr's entitlement to personal costs, CNRL disputes the amount claimed and submits he should recover \$1,061.00 for personal costs. After offsetting Mr. Kerr's personal costs against what CNRL seeks to recover from the advance costs, CNRL seeks an award of \$16,519.35. Add this amount to the \$10,000 partial payment that CNRL seeks recovery of, and CNRL seeks \$26,519.35 from Mr. Kerr.

PRELIMINARY CONSIDERATION

[5] Neither party asks the Board to reconsider its termination of the entry order. Mr. Kerr submits however, that in accordance with section 167(1) of the *PNGA*, CNRL could not have brought its application prior to September 15, 2013. Section 167(1) of the *PNGA* provides:

167(1) A right holder who holds a right of entry under a surface lease or an order of the board may, on not less than 90 days' notice to the landowner, apply to the board for an order terminating the surface lease or order if at least 2 years have expired since the effective date of the surface lease or order.

[6] Given that neither party has taken issue with the Board's jurisdiction to entertain CNRL's application to terminate the entry order or with the Board's ability to terminate the right of entry order with the consent of both parties, I will proceed on the basis that the legislative provisions for the expiry of time and notice to the landowner must be directory rather than mandatory if the landowner consents to termination of a right of entry. Section 153 of the *PNGA* gives the Board the authority to make a consent order resolving an application at the request of the parties. I can see no reason why the Board should not accede to a request to terminate a right of entry order prior to the expiration of two years and without 90 days notice when both parties consent, thereby forcing an unwanted compulsory entry on a landowner that a company no longer requires.

ISSUES

[7] The issues arising in this application are:

- Should the Board reconsider Order 1714-4, and in particular, paragraph [2] requiring Mr. Kerr to return to CNRL monies paid in accordance with Order 1715-1?
- If yes, should all or any part of the monies paid to Mr. Kerr pursuant to Order 1715-4 should be returned to CNRL? If so, how much?
- Is Mr. Kerr entitled to annual compensation?
- Is CNRL entitled to return of a greater portion of the advance costs?
- What is an appropriate claim for Mr. Kerr's personal costs?

FACTS

[8] Mr. Kerr is the owner of the Lands. He acts through his Powers of Attorney, Patricia Bell and Danny Kerr.

[9] In or around mid 2010, CNRL advised Mr. Kerr that it sought entry to the Lands for a well site, access road, remote sump, and borrow pit. Between December 2010 and May 2011, the parties negotiated compensation for the requested use and occupation of the Lands. Mr. Kerr, through his attorneys, spent time and incurred expenses in attempting to negotiate compensation.

[10] In March 2011, CNRL applied to the Board for mediation and arbitration services requesting a right of entry order to the Lands and seeking the Board's assistance with determining the compensation payable to Mr. Kerr. The Board engaged the parties in mediation. On June 3, 2011, the mediator issued Order 1715-1 granting CNRL a right of entry to the Lands and ordering partial compensation of \$10,000.00. The mediator continued mediation in an effort at resolving the compensation payable, but on September 29, 2011, the mediator refused further mediation, thereby referring the resolution of compensation to arbitration.

[11] On November 29, 2011, the Board issued Order 1715-2 ordering CNRL to pay Mr. Kerr \$40,230.00 as advance costs.

[12] In April 2012, the Board scheduled the arbitration for September 12-14, 2012.

[13] On June 29, 2012, CNRL advised that it would not be proceeding with any wells on the Lands and had not made use of the Lands, and asked the Board to terminate the right of entry order. CNRL requested that any monies paid under the right of entry order be returned as well as any unexpended portion of the advance costs paid by CNRL. On July 5, 2012, counsel for Mr. Kerr sent the following e-mail in response to CNRL's request that the entry order be terminated:

We confirm receipt of Ms. Meldrum's letter to the Surface Rights Board, dated June 29, 2012 advising that CNRL will not be proceeding with any wells on the land or making any other use of the land. Mr. Kerr welcomes CNRL's decision.

We look forward to receiving a copy of the Board's Order indicating that CNRL's right of entry application has been terminated by request and a copy of CNRL's notice to the BC Oil and Gas Commission advising that it intends to surrender its permit

We confirm that we will issue a final bill and return to CNRL any unexpended portion of the advance costs in due course.

[14] The Board replied:

As there are no objections to the application to terminate the right of entry, the Board will proceed to process this as a Consent Order and will adjourn the arbitration hearing.

[15] On July 12, 2012, the Board issued Order 1715-4 terminating CNRL's right of entry, ordering Mr. Kerr to return to CNRL any monies paid to him in accordance with Order 1715-1, and ordering Mr. Kerr to pay to CNRL any unexpended portion of the advance costs paid to him pursuant to Order 1715-2.

[16] By letter dated July 13, 2012, counsel for Mr. Kerr advised that Mr. Kerr did not consent to paragraph [2] of Order 1715-4 requiring the repayment of monies paid. Counsel further advised it had come to their attention that CNRL had entered the Lands to conduct a survey, drill a spud hole, and install a tripod.

[17] On September 10, 2012, the Board agreed to conduct a review of Order 1715-4 "on the basis that the order was initially made on the understanding there had been NO entry, but it was later discovered there was entry for the purpose of survey, drilling a spud hole, and installing a tripod." The Board sought CNRL's confirmation of whether it had entered and used the Lands as alleged and invited submissions on whether Mr. Kerr should return any or all of the \$10,000.00 partial payment as well as submissions on costs.

[18] On or about September 18, 2012, Mr. Kerr returned \$7,649.65 to CNRL, representing the unexpended portion of the advance costs. Mr. Kerr's counsel rendered an account dated August 16, 2012 for \$30,980.09 inclusive of fees, disbursements and taxes. The balance of the advance costs was spent on fees for a consulting expert located in the United States and associated conversion costs arising in the payment and reimbursement of his retainer.

ANALYSIS

Is reconsideration of Order 1715-4 necessary?

[19] CNRL submits the basis upon which the Board originally made Order 1715-4 is correct and that there was no entry to the Lands pursuant to Order 1715-1. CNRL says it entered the Lands for the purpose of surveying and soil testing, but that this entry occurred prior to the grant of Order 1715-1 and with the landowner's permission. CNRL says that Pat Bell spoke with a CNRL representative on September 20, 2010 and granted permission for surveying, soil sampling and archaeological assessment. CNRL says surveyors entered the Lands between September 21 and 23, 2010 and conducted a survey of the proposed well site. As part of the survey, the surveyors cleared some trees and placed stakes and/or flags along the boundary lines of the well site. The surveyors placed a small wooden tripod at the well centre. CNRL advises the official survey document was finalized on September 28, 2010. CNRL says that on or about October 6, 2010, CNRL entered the Lands and conducted a soil assessment on the surveyed portion, which involved taking small soil samples for analysis. CNRL advises

the soil assessment did not involve drilling any holes. It says it did not enter the Lands following the grant of Order 1715-1.

[20] I accept that CNRL did not enter the Lands in accordance with Order 1715-1. I accept that it did enter the Lands with the landowner's permission prior to the Board granting Order 1715-1. Indeed, in order to make its application to the Oil and Gas Commission (OGC) for a well permit, it would have had to conduct a survey, take soil samples and conduct an archeological assessment.

[21] In seeking to terminate the right of entry order, CNRL advised it would "not be proceeding with any wells on the referenced land or making any other use of the referenced land". It confirmed that it had "not commenced construction or otherwise made use of the land" (emphasis added). I find CNRL had "otherwise made use of the land" as it had entered to complete the activities necessary to make its application to the OGC. While its use of the Lands was not pursuant to Order 1715-1, it had, nevertheless made use of the Lands, and the Board ought to have been alert to the fact that it would have had to make use of the Lands for at least the purposes required to initiate its application to the OGC.

[22] CNRL points to the fact that the Board issued Order 1715-4 as a consent order. CNRL submits that a review of Mr. Kerr's July 5, 2012 response does not indicate any disagreement with any portion of the termination request, including the request that monies paid pursuant to Order 1715-1 be returned.

[23] It is true that the July 5 email does not express disagreement with any part of CNRL's request. But neither does it express agreement with the request that the monies paid pursuant to Order 1715-1 be returned. It expresses that "Mr. Kerr welcomes CNRL's decision" that it will not be proceeding with any wells on the Lands. It indicates "We look forward to receiving a copy of the Board's Order indicating CNRL's right of entry application has been terminated" and confirms that "we will issue a final bill and return to CNRL any unexpended portion of the advance costs". It expresses agreement, therefore, with two of CNRL's requests, namely that the right of entry order be terminated and that the unexpended portion of the advance costs be returned, but is silent with respect to the request for the return of monies paid pursuant to Order 1715-1. In response, the Board noted there were "no objections to the application to terminate the right of entry" and advised it would proceed to process a Consent Order and adjourn the arbitration hearing. While I think the Board cannot be faulted for thinking Mr. Kerr had indeed consented to all of CNRL's requests, and for including all three of CNRL's requests in the consent Order, its response could be construed as limiting the consent order to the termination of the right of entry. Immediately upon receipt of Order 1715-4, Mr. Kerr, through his counsel, indicated his lack of consent to the repayment of monies paid pursuant to Order 1715-4. I accept that Mr. Kerr did not in fact consent to the return of monies paid pursuant to Order 1715-1.

[24] I find it is appropriate to review Order 1715-1 for two reasons. The first is that CNRL did in fact use the Lands, although that use was not pursuant to the entry Order, and the Board terminated the entry on CNRL's advice that it had not used the Lands.

The second reason is that Mr. Kerr did not, in fact, consent to paragraph [2] of Order 1715-4. Reconsideration of Order 1715-4, and in particular paragraph [2] of the order is, therefore, necessary. Reconsideration of this portion of the Order and a determination of whether all or any part of the monies paid to Mr. Kerr pursuant to Order 1715-4 should be returned to CNRL gives rise to the following issues:

- Should Mr. Kerr receive compensation for CNRL's use of the Lands?
- If so, how much?

[25] No one seeks reconsideration of paragraph [3] of Order 1715-4. The only issue that arises with respect to the repayment of the unexpended portion of the advance costs, is whether the amount that was expended is reasonable, and whether a greater portion should be refunded to CNRL.

Should Mr. Kerr receive compensation for CNRL's use of the Lands?

[26] CNRL argues that the Board does not have jurisdiction to determine compensation because the right of entry was terminated. The Board is being asked, however, to reconsider an order made at the same time it made the order to terminate the right of entry. In conducting the reconsideration, and considering the information now available to it, the Board can place itself back in time and consider the matter as if the termination order had not yet been made. If the Board had realized when it made the termination order that the request for the return of the \$10,000 partial payment had not been consented to, it would have had to consider whether all or part of the partial compensation should be returned upon terminating the right of entry.

[27] The Board has the express legislative power under section 155 of the *PNGA* to reconsider its orders. If the Board lost jurisdiction to determine compensation upon granting the termination order, then it would lose its ability to reconsider, contrary to express legislative intent. I find the Board did not lose jurisdiction to reconsider its order that Mr. Kerr return the \$10,000 partial payment to CNRL. In reconsidering that order, and determining whether Mr. Kerr may retain all or any part of the partial payment, it is effectively asking whether Mr. Kerr should receive compensation in the circumstances.

[28] CNRL further argues that the Board's authority to award compensation is limited to loss or damage arising from the right of entry. As CNRL did not enter the Lands pursuant to the right of entry, it argues there is no basis for an award of compensation.

[29] The Board's authority to determine compensation is found in section 162 of the *PNGA*. Section 162(1) provides:

162(1) Unless the parties to an application otherwise agree, if the Board or a mediator has made a right of entry order, the board by order,
(a) must determine the amount of rent, if any, or compensation to be paid to the landowner,...

[30] Section 162(2) speaks to the scope of that compensation and specifically contemplates compensation payable to a landowner arising from events prior to an

application to the board, and therefore, prior to a right of entry order having been granted. It provides:

162(2) An amount determined under subsection 1(a) may include, without limitation, compensation to the landowner relating to negotiation with the right holder before the application was made to the board.

[32] In this case, a mediator made a right of entry order and the parties did not come to an agreement respecting the amount of rent or compensation payable to the landowner. In accordance with section 162(1), therefore, the board must determine the amount to be paid. In accordance with section 162(2), the amount determined may include compensation to the landowner relating to negotiation with the right holder before the application was made to the board, and therefore before any right of entry order was granted. The use of the words “without limitation” means that the compensation to be determined is not limited to compensation relating to negotiation, but could include other loss or damage arising from the company’s request to enter the land. At the very least, prior to terminating the right of entry order, the Board could have determined, and must now determine on this reconsideration, whether an amount should be paid to Mr. Kerr relating to negotiation with CNRL before the application was ever filed with the Board.

[33] Section 167(3) of the *PNGA* sets out the Board’s authority when dealing with an application to terminate a right of entry order. Subsection 167(3)(c) speaks to the situation, as in this case, where a right of entry has not been exercised, and provides that the Board “may make an order terminating the right of entry with or without terms or conditions.” Subsection 167(4) provides that an order under subsection 167(3) which includes an order terminating a right of entry where the right of entry has not been exercised, “may include an award of money for any or all of the following amounts that have not been received at the time of the order:

- (a) rent or compensation for the right of entry that is the subject of the application;
- (b) damages in relation to the right of entry;
- (c) any other amounts owing under the surface lease or past orders of the board.”

[34] The Board clearly, therefore, has the authority to award compensation when terminating a right of entry order, even when the right of entry order has not been exercised. The legislation clearly contemplates that, even where a right of entry has not been exercised, compensation to a landowner may be payable and, an order of compensation may be made as a condition of terminating a right of entry. In providing that a landowner may receive compensation, the legislation contemplates that the landowner may experience loss or damage not only as a direct result of the exercise of the right of entry, but “in relation to the right of entry” and in negotiations with the right holder even before an application to the Board for a right of entry order is commenced. Even where a right of entry order is not obtained or acted upon, a landowner may be compensated for loss and damages arising from the activities and processes necessary to obtaining that right of entry and in advance of obtaining a right of entry. It is clearly

the intent of the legislation that a landowner should not suffer loss or damage because a company seeks to invoke its rights to enter private land for an oil and gas activity. When a company requires a right of entry for an oil and gas activity, a landowner cannot say “no”, and is forced into a process of having to deal with the company in response to its request. If later, a company decides it no longer intends to proceed with a project, the landowner should not be left out of pocket as a result of the company’s actions and decisions. If a company is going to invoke the authority of the Board to ensure its right to enter private land for an oil and gas activity, then it also invokes the authority of the Board to ensure a landowner receives compensation, not only for loss and damage arising from the right of entry itself, but also arising from negotiation with the company in advance of its entry, and for any damage in relation to its entry, whether or not a right of entry order itself is ever acted upon.

[35] I find the Board has the jurisdiction to consider whether Mr. Kerr should receive compensation in the circumstances of this case.

[36] CNRL entered the Lands to conduct a survey, take soil samples and conduct an archaeological assessment. To conduct the survey, CNRL removed some trees from the Lands. These activities were necessary in order to submit an application to the OGC. If the landowner had not granted permission to enter the Lands for these purposes, the Board would have undoubtedly granted a limited right of entry order to enable these activities to take place (see for example: *Storm Exploration Inc. v. Unruh et al*, Order 1609-1, October 23, 2008). So while CNRL did not require an entry order in the circumstances of this case to gain access to the Lands for the purpose of surveying and conducting the other assessments required by the OGC in advance of filing an application for a well permit, its ability to enter the Lands for that purpose was just as compulsory as its right to enter to construct the well itself and not something Mr. Kerr could have denied.

[37] I find CNRL should compensate Mr. Kerr for his loss and damage arising from its use and occupation of the Lands. Although CNRL’s use and occupation of the Lands was limited, Mr. Kerr nevertheless incurred loss, and that loss should be compensated.

How much compensation is payable to Mr. Kerr?

[38] Kane Sanders, RPF, estimates compensation value for the timber at \$2,197.60. I find Mr. Kerr is entitled to recover this loss from CNRL. Other than the removal of timber, there is no evidence of other physical damage to the Lands.

[39] I have evidence, however, of considerable nuisance and disturbance associated with CNRL’s request to enter the lands, in the form of time and expense incurred by Mr. Kerr’s attorneys to deal with the request and negotiate compensation, prior to CNRL filing its application with the Board. The information provided indicates Mr. Kerr’s attorneys spent approximately 75 hours of their time and incurred \$1,929.05 in long distance charges, travel expenses, and consultant fees. I find Mr. Kerr is entitled to recover these losses from CNRL. In the absence of any evidence of the actual value of

Mr. Kerr's attorneys' time, I will use \$50/hour, which is the rate the Board usually applies for landowner's time.

[40] To these actual losses, I find Mr. Kerr is entitled to an amount for the compulsory aspect of the taking. This is admittedly an arbitrary amount, incapable of precise calculation, intended to compensate the landowner for the fact that he cannot say "no" to the use of his property for an oil and gas activity (*Dome Petroleum v. Juell* [1982] B.C.J. No. 1510 (BCSC)). Mr. Kerr seeks \$500/acre for the compulsory aspect of the entry. Given that there has been minor insult to the Lands, and that the compulsory entry has been terminated early, I find a lump sum of \$2,000 to acknowledge the compulsory nature of CNRL's request to use the Lands provides adequate recognition of this factor. This amount is consistent with previous orders of the Board ordering compensation for the compulsory aspect of a limited entry for the purposes of surveying, soil sampling and archaeological assessment in advance of a company making its application to the OGC for a permit. (See for example: *Talisman Energy Inc. v. Eagle-Eye Mountain Ltd.*, Order 1653-1, September 13, 2010).

[41] Mr. Kerr seeks an additional amount to compensate for the value of the Land. I find compensation for this factor is not appropriate in the circumstances of this case. Mr. Kerr has not lost the value of the Lands and there is no evidence before me that the Lands have lost value as a result of CNRL's limited use of them. Mr. Kerr lost rights with respect to 9.42 acres of the Lands for a relatively short period of time. He did not sell the 9.42 acres to CNRL, and never lost his reversionary interest to the 9.42 acres. With the termination of the entry order, he has recovered full rights and full use of the 9.42 acres. I find an award for the compulsory aspect of the entry sufficiently acknowledges his loss of rights for a short period of time and any further payment on account of the value of the Lands is not necessary and would amount to over compensation.

[42] Mr. Kerr seeks \$6,000 for nuisance and disturbance. The award on account of the attorneys' time prior to the application to the Board already provides compensation towards initial nuisance and disturbance. The attorneys' accounting for time incurred after the application to the Board, as far as it relates to the Board's proceedings will be considered in determining the claim for costs. The attorneys' accounting of time includes 5.5 hours after the application to the Board for dealing with OGC related matters. This time is not properly compensable as costs, as it does not relate to the Board's proceedings. It is compensable as nuisance and disturbance however, as it is time the landowner's attorneys incurred in dealing generally with CNRL's request to enter and use the Lands. I award \$275 for additional nuisance and disturbance.

[43] Mr. Kerr claims an additional \$10,000 to compensate for the property's intrinsic and special value to Mr. Kerr and his family and because the well site was to be built within 400 metres of a potential future home site. As the well was never drilled and will not now be drilled, and as the future home site was never constructed, there is no basis for this claim.

[44] I calculate the compensation payable to Mr. Kerr as follows:

Landowner's attorneys' time prior to application to the Board: 75 hours @\$50/hour	\$3,750.00
Landowner's disbursements prior to application to the Board	\$1,929.05
Value of timber	\$2,197.60
Compulsory aspect of the entry	\$2,000.00
Additional nuisance and disturbance	\$275.00
Total	\$10,151.65

[45] Given that Mr. Kerr received \$10,000 on account of compensation payable in June 2011, I find interest is not payable on the above award.

Is Mr. Kerr entitled to annual compensation?

[46] Mr. Kerr seeks annual compensation for an additional period of two years on the grounds that, under section 167(1) of the *PNGA*, CNRL could not bring its application prior to September 15, 2013. Given that the Board terminated the right of entry order with the consent of both parties, and that no party has taken issue with the termination of the entry order, I find annual compensation is not necessary. CNRL did not enter the Lands pursuant to the entry order, and the Board terminated the entry order by consent on July 12, 2012. Upon termination of the entry order, there was no ongoing loss to Mr. Kerr arising from the entry to be compensated in an annual payment.

Is CNRL entitled to return of a greater portion of the advance costs?

[47] CNRL submits the account rendered by Mr. Kerr's counsel is not reasonable. The account claims legal fees of \$25,704.00 plus HST for a total of \$28,959.61 up to the termination of the entry order, and an additional \$1,804.00 for legal fees plus HST for a total of \$2,020.48 after its termination. CNRL asks the Board to fix Mr. Kerr's legal fees at \$15,000 and seeks to recover \$17,580.35 of the advance costs in addition to the \$7,649.65 already returned.

[48] As to the reasonableness of counsel's bill, CNRL submits there was unnecessary duplication of work between Ms. Hong as junior counsel, and Mr. Mackoff as senior counsel. It submits the time researching experts (26 hours) was excessive, particularly given that Mr. Kerr only retained one expert. It submits there was duplication of work with other files and inappropriate time spent in discussion with the Farmer's Advocates Office (FAO). Mr. Kerr's counsel, in turn, submits the costs of legal representation in the circumstances are not unreasonable. They submit there was no duplication of work and that Ms. Hong performed the vast majority of the work resulting in a lower cost. They submit the time researching experts was not unreasonable, there was no duplication of work with other files, and discussion with the FAO ultimately served to reduce counsel's billable hours.

[49] My review of counsel's account reveals minimal duplication of work between Ms. Hong and Mr. Mackoff. When junior counsel is working under the supervision and

direction of senior counsel, some duplication of work is inevitable and not unreasonable, and ultimately results in less cost to the client than if senior counsel was working without the assistance of a junior.

[50] One of the bases for granting the award of advance costs in the first place was to ensure Mr. Kerr would have the means to seek out and retain experts. I cannot say that the spectrum of experts consulted, including appraisers, realtors, a toxicologist and an econometrician, is inappropriate. Of course, the Board will not now have the opportunity to determine whether the expert retained by Mr. Kerr contributed to the litigation or advanced Mr. Kerr's case. Nor will it have the opportunity to assess the merits of Mr. Kerr's claim for compensation and the contribution of counsel to the advancement of that claim. While the time spent researching experts seems high, having granted Mr. Kerr the ability through an award of advance costs to seek necessary evidence to support a claim before the Board, I am unwilling to require that the funds expended in seeking out experts be refunded now that CNRL has decided not to proceed. If the arbitration had proceeded with a number of experts ultimately found not to have contributed significantly to the advancement of a legitimate claim, perhaps the outcome would be different. But in the circumstances of this case, now that CNRL has decided it no longer requires entry to the Lands, I find Mr. Kerr should not be left out of pocket from his preparations for the arbitration.

[51] I accept that counsel's use of the FAO as a resource likely served to reduce legal costs by eliminating the need for counsel to conduct research into matters upon which the FAO could easily provide information.

[52] I note further that the time entries for the various activities conducted by counsel do not seem excessive or overstated.

[53] In granting advance costs to Mr. Kerr, the Board concluded that the legislature must have intended the Board to be able to ensure the effective participation of landowners in its processes. As noted in that decision (Order 1715-2):

[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.

[54] CNRL's decision not to proceed with the project and make use of their right of entry, means Mr. Kerr's claim will not be advanced or tested. Having given him the means to do that, however, the Board's ability to ensure his effective participation would

be for naught if, in the absence of making any determination on the merits of his claim, he is required to pay back costs incurred to advance his claim.

[55] I accept that counsel's account up to the termination of the entry order is reasonable. However, I agree with CNRL's submission that given the termination order of June 12, 2012 required Mr. Kerr to return any unexpended portion of the advance costs, legal fees incurred after that date cannot be paid from the award for advance costs. I will consider these fees as part of Mr. Kerr's claim for costs.

[56] I find that the remittance to CNRL for the unexpended portion of the advance costs should be increased by \$2,020.48, being that portion of counsel's account incurred after the date of Order 1715-4.

What is an appropriate claim for Mr. Kerr's costs?

[57] Mr. Kerr's attorneys' accounting of time in connection with the application to the Board amounts to approximately 27 hours. I reduce this claim by 2 hours for the mediation teleconference on September 28, 2011 that the attorneys did not attend. I award Mr. Kerr personal costs in the amount of \$1,250 calculated as 25 hours at \$50/hour.

[58] The attorneys claim telephone charges in the amount of \$18.04. I allow this claim.

[59] To this amount, I allow recompense of counsel's account for time incurred after the termination order not specifically related to research into termination of the right of entry order or compensation. Counsel should have conducted research of this nature prior to providing Mr. Kerr's consent to the termination, potentially obviating the need for this reconsideration. I allow \$784 in legal fees after the termination order plus HST of 94.08 for a total of \$878.08.

[60] I award costs to Mr. Kerr in the amount of \$2,146.12.

CONCLUSION

[61] I find it appropriate to reconsider the Board's Order that Mr. Kerr refund the \$10,000.00 partial payment to CNRL. I conclude Mr. Kerr is entitled to compensation of \$10,151.65. As he has already received \$10,000.00, CNRL owes him the balance of \$151.65.

[62] I conclude CNRL is entitled to repayment of an additional \$2,020.48 from the award of advance costs.

[63] Mr. Kerr is entitled to recover costs from CNRL in the amount of \$2,146.12.

[64] The balance owing from CNRL to Mr. Kerr, therefore, is \$277.29 ($\$151.65 + \$2,146.12 - \$2,020.48 = \277.29).

[65] Each party shall bear their own costs of this application for reconsideration and costs.

ORDER

[66] The Board deletes paragraph [2] of Order 1715-4 dated July 12, 2012.

[67] The Board orders that Canadian Natural Resource Limited shall forthwith pay to Daniel Leigh Kerr the sum of \$277.29.

DATED: December 20, 2012

FOR THE BOARD



Cheryl Vickers, Chair

APPENDIX "A"
to Board Order 1715-5

File No. 1715
Board Order No. 1715-4

July 12, 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 6TH
MERIDIAN PEACE RIVER DISTRICT
(the Lands)**

BETWEEN:

Canadian Natural Resources Limited

(APPLICANT)

AND:

Daniel Leigh Kerr

(RESPONDENT)

BOARD ORDER

On the application of the Applicant, Canadian Natural Resource Limited (CNRL), and with the consent of the Respondent, Daniel Leigh Kerr, the Board terminates its Order 1715-1 dated June 3, 2011 granting CNRL the right of entry to and access across the portions of the Lands described as SOUTH EAST ¼ OF SECTION 33 TOWNSHIP 81 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT, as shown on the individual ownership plan attached as Appendix "A" attached to Order 1715-1. CNRL advises that it has not made use of the Lands and will not be proceeding with any wells on the Lands.

ORDER

The Surface Rights Board orders as follows:

1. CNRL's right of entry to and access across the portions of the Lands described as SOUTH EAST ¼ OF SECTION 33 TOWNSHIP 81 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT is terminated.
2. Daniel Leigh Kerr shall forthwith return to CNRL any monies paid to him in accordance with Board Order 1715-1.
3. Daniel Leigh Kerr shall pay to CNRL any unexpended portion of the advance costs paid to him pursuant to Board Order 1715-2.

DATED: July 12, 2102

FOR THE BOARD



Cheryl Vickers
Chair