File Nos. 1786, 1787, 1788, 1789, 1790
Board Order No. 1786-90-1

February 27, 2013

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

DISTRICT LOT 3185 PEACE RIVER DISTRICT EXCEPT PLAN 29177
DISTRICT LOT 3187 PEACE RIVER DISTRICT
DISTRICT LOT 3188 PEACE RIVER DISTRICT EXCEPT PLAN 29177

(The "Lands")

BETWEEN:

Wilderness Ranch Ltd

(APPLICANT)

AND:

Progress Energy Canada Ltd.

(RESPONDENT)

BOARD ORDER

Heard: by way of written submissions closing February 11, 2013
Submissions by: Robert Yorke, for Wilderness Ranch Ltd.
Daron Naffin, for Progress Energy Canada Ltd.

INTRODUCTION

[1] On September 28, 2012, Richard Yorke of Wilderness Ranch Ltd. ("Wilderness") applied to the Board for a review of the rental provisions of five leases held by Progress Energy Canada Ltd. ("Progress") on its lands.

[2] Progress says that Wilderness has not provided notice to Progress as required by the *Petroleum and Natural Gas Act*, RSBC, 1996, c. 361 (the "*Act*"). In the applications filed with the Board, the date of the notice to negotiate (Form 2) is stated to be "on or about October 22, 2010".

[3] In Information Sheets, the Board has advised the public that a landowner or an operator may commence rent renegotiation by completing the Board's Form 2 and sending it by registered mail to the other party. The landowner and operator should then hold discussions between themselves in an attempt to mutually agree on new rent provisions. If they are not successful, either party may apply to the Board for mediation and arbitration 60 days after receipt of the Form 2.

[4] Progress says that Wilderness failed to comply with this process and must commence the process in order to proceed with the applications for review.

FACTS

[5] On October 22, 2010, Mr. Yorke emailed Darren Rosie, land agent for Progress to arrange an in person meeting for October 25 or 26, 2010. Another email is provided that is undated that also requests an in person meeting for these dates but additionally, references the outstanding rent reviews.

[6] On October 25, 2010, Mr. Yorke and Progress' land agent met to discuss changes to the annual compensation provisions of the surface leases and agreement was not reached. In the next few months, Mr. Yorke and Mr. Rosie discussed a proposed pipeline on Wilderness' lands as well as the rent reviews. In a November 8, 2010 email, Mr. Rosie wrote to Mr. Yorke sending an offer for the Progress pipeline that they wanted to build along with an offer for the five outstanding rent reviews. No agreement was reached. On September 26, 2012, Mr. Yorke attended the offices of Progress to ask for contact information. He subsequently spoke to Christopher Adkins of Progress, and the next day, he filed the rent review applications with the Board.

ISSUE

[7] The issue is whether effective notice to renegotiate may be deemed to have been provided by Wilderness although a Form 2 or other written notification was not completed.

SUBMISSIONS

[8] Progress says that as a Form 2 has not been completed or served in respect of this dispute, there has been no notice as required by the *Act* and there can be no date from which an order varying the rental provisions of the surface lease can be effective. Section 166(4) requires that the variation of the rental provisions is effective from the "anniversary of the effective date of the surface lease or order immediately preceding the date of the notice under section 165(2)". Therefore, the filing and service of the Form 2 is a necessary step (Board's Information Sheets #2 and 11; *Nelson et al. v. Imperial Oil Resources Ltd*, Order 1763-1; *McDonald v. Penn West Petroleum Ltd.*, Order 1742-1).

[9] Progress submits that the October, 2010 communications between Mr. Yorke and Progress' land agent are not effective notice under the *Act*, and that ignorance of the required steps to pursue a rental renegotiation and/or review by the Board is not a valid excuse for failing to abide by the legislative requirements. In addition, informal communications cannot, themselves, satisfy the requirements for notice although in limited circumstances, the Board may deem certain communications to constitute effective notice to renegotiate, particularly if the communication in question is accepted and acted upon by the parties as notice (*Merrick v. Encana Corporation*, Order 1618-1; *Prime West Energy Inc. v. Bloor*, Order 322ARR). However, Progress says those circumstances do not exist here. There is no written communication between Mr. Yorke and Progress expressing a desire to renegotiate and there is no evidence that Progress accepted emails or the October, 2010 meeting as sufficient notice of renegotiation.

[10] Progress requests that the process be stayed pending receipt of a completed Form 2 from Wilderness, which date will determine the effective date for any variation of rental provisions ultimately ordered by the Board. Progress also suggests that the 60 day notice period provided for in section 166 be waived.

[11] Mr. Yorke requests the Board to "grandfather" Wilderness' negotiations with Progress. He states that he spoke to Mr. Rosie in August, 2010 as he had received an email from Mr. Rosie on August 16 regarding a change of pipeline plan. He informed Mr. Rosie in September, 2010 about the rent reviews and

wanted them settled before agreeing to a new pipeline. Mr. Yorke advised that at no time was he advised that Mr. Rosie was not working or representing Progress.

[12] Mr. Yorke says that the negotiations started in September 2010 and that Form 2 notice is not required as the current legislation did not commence until January 11, 2011. [The current legislation actually came into force on October 4, 2010]. These negotiations were ongoing for approximately 5 months before the current legislation came into effect. He provides emails between himself and Mr. Rosie referencing the outstanding rent reviews from 2010. Mr. Rosie provides an email confirming that the first time they discussed the rent reviews was on October 25, 2010 when they met. Mr. Yorke submits that the Board can grandfather those prior negotiations and that section 166 does not apply as they were negotiating in 2010, prior to the new legislation coming into effect. Progress had full knowledge of the negotiations in September, 2010 and participated in them through Mr. Rosie and Leanne Dell of Progress, who forwarded information to Mr. Rosie.

[13] In response, Progress submits that Wilderness is required to complete, file, and serve a Form 2 in order to commence the rent review process and establish the effective date of review. Progress says the *Act* does not include any express "grandfathering" provision relating to former rules but rather Rule 2(2) of the Board's Rules of Practice and Procedure state that "(u)nless otherwise ordered, these Rules apply to all applications before the Board whether commenced before or after January 10, 2011". In any event, Progress says former versions of the rules also include a Form 2 requirement and provision of notice (section 165(2)) is significant as it triggers a 60 day negotiation period (sec. 166(1)) and sets the effective date for the purposes of rent review (sec. 166(4)).

DECISION

[14] The *Act* provides a legislative mechanism for the periodic review of rental provisions of surface leases between landowners and oil and gas companies. The Board has the ability to mediate and then, arbitrate the rental review if their renegotiations are not successful.

[15] Section 165(2) states that either party "may serve notice on the other party, in the form and manner established by the rules of the board, requiring a negotiation of an amendment to the rental provisions in the surface lease or order." The Board has prescribed Form 2 in its Rules.

[16] The effective date of the variation of the rental provisions is tied to the date of the notice. The *Act* provides that notice may not be served before the 4th anniversary of the later of the effective date of the surface lease or order, or the effective date of the most recent amendment to the rental provisions or order. An amendment of the rental provisions is effective from the anniversary of the

effective date of the lease or order immediately preceding the date of the notice (section 165(7), section 166(4)). Therefore, the notice triggers the calculation of the effective date of any amendments. The date of the notice also triggers the calculation of the 60 day period for filing an application to the Board.

[17] In order for the rental review mechanism to commence, notice requiring negotiation of an amendment to the rental provisions must be made. Wilderness says that the discussions between Mr. Yorke and Mr. Rosie in 2010, verbal and by email, constitute adequate notice. Section 165(2) refers to notice in a form established by the Board's rules, however, the use of the word "may" in the section is permissive rather than mandatory. This does not support Progress' submission that the service and filing of the prescribed notice is a necessary requirement. Rather, service of a notice, preferably prescribed, is a necessary step as without notice, there can be no calculation of the effective date of the amendment of the rental provisions. The use of the Form 2 and the process outlined by the Board precludes any dispute as to the when notice was provided.

[18] Although notice in the prescribed form (Form 2) is preferable, past decisions have contemplated limited situations where another type of notice was held to be sufficient. Mr. Yorke says the in person meeting with Mr. Rosie was adequate notice. However, verbal notice, of it self, is unreliable because there could arise disagreement between the parties as to the details of the discussion. Rather, notice should be in writing and clearly indicate an intention to negotiate an amendment of the rental provisions of the lease or order. Therefore, in *Merrick, supra* and *Prime West, supra,* the Board accepted an email and letter, respectively, from the landowners requesting a rent review as notice for purposes of the *Act*. In the present case, there are emails that reference rent renegotiations between the parties that have commenced. The earliest clear reference to the renegotiation is an email from Mr. Yorke to Mr. Rosie scheduling their in person meeting for either October 25 or 26, 2010 and referencing rent reviews. However, this email is undated and it is not clear to me when exactly it was sent. There also seems to be a very similar email dated October 22, 2010, which does not reference the rent reviews.

[19] However, a review of all of the communications available reveals that as of early November, 2010, the parties had entered into discussions to renegotiate the rental provisions and offers were being made. The November 8, 2010 email from Mr. Rosie clearly references an offer on the rent reviews sent to Mr. Yorke. Mr. Rosie, at the time, was acting as agent for Progress. The parties were acting on notice Mr. Yorke provided sometime in October, 2010 indicating his intention to negotiate the rent reviews. However, the email from Mr. Yorke setting up the October 25, 2010 meeting and referencing the rent reviews is undated. Therefore, I am unable to rely upon that email as adequate notice. Based on all of the circumstances, I find that notice of renegotiation had certainly been provided by November 8, 2010 (the date of Mr. Rosie' email offer) with the

parties acting on the notice by entering into the exchange of offers on the rental review.

[20] Although I have made a finding that notice pursuant to section 165(2) had been effectively provided as of November 8, 2010, I will deal with Mr. Yorke's argument regarding the "grandfathering" of the previous notice provisions. Rule 2(2) applies in that the Rules apply to all applications whether commenced before or after January 10, 2011. Also, the former version of the rules included a Form 2 notice requirement, therefore, Wilderness' argument is moot.

CONCLUSION

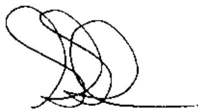
[21] The effective date of the notice provided pursuant to section 165(2) and for purposes of these applications is November 8, 2010.

ORDER

[22] The Board orders that Notice pursuant to section 165(2) of the *Petroleum and Natural Gas Act* was effectively provided as of November 8, 2010. Pursuant to section 166(4) of the *Petroleum and Natural Gas Act*, any order of the Board in these proceedings varying the rent payable under the surface leases in issue will be effective as of the anniversary date of each respective lease immediately preceding November 8, 2010.

DATED: February 27, 2013

FOR THE BOARD



Simmi K. Sandhu
Vice Chair