File No. 1825
Board Order No. 1825-1

February 25, 2015

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 SOUTH EAST ¼ OF SECTION 16 TOWNSHIP 80 RANGE 16 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTIRCT EXCEPT THE MOST SOUTHERLY 14 FEET IN PARALLEL WIDTH THEREOF AND PLAN 33350
(The "Lands")

BETWEEN:

DAVID RAYMOND MILLER

(Applicant)

AND:

ARC RESOURCES LTD.

(Respondent)

BOARD ORDER

Heard: October 23, 2014 and February 4, 2015 at Dawson Creek, BC
Appearances: David Miller and Elvin Gowman, for the Applicant
Rick Williams, Barrister and Solicitor, for the Respondent

INTRODUCTION AND ISSUE

[1] The Applicant, David Raymond Miller (David Miller), is the owner of the Lands legally described as: THE SOUTH EAST ¼ OF SECTION 16 TOWNSHIP 80 RANGE 16 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT EXCEPT THE MOST SOUTHERLY 14 FEET IN PARALLEL WIDTH THEREOF AND PLAN 33350 (the Lands). In June, 2009, David Miller and Storm Exploration Inc. (Storm) entered a surface lease granting Storm the use of 6.95 acres of the Lands to drill and operate a single well and for an access road (the Lease). The parties agreed to initial compensation of $13,600 and annual rent of $5,200. In August 2010, the Respondent, ARC Resources Ltd. (ARC), purchased the well from Storm and the Lease was assigned to ARC. David Miller seeks an increase to the annual rent payable under the Lease in accordance with the provisions for rent review set out in the *Petroleum and Natural Gas Act*. The effective date of this review is June 27, 2013.

[2] The purpose of a rental payment is to address the immediate and ongoing impact to the landowner and to the land of an operator's activity on private land (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). The rental payment is to compensate for actual or reasonably probable loss or damage caused by an operator's continuing use of land.

[3] The onus is on the applicant, in this case David Miller, to establish his ongoing prospective loss and to establish that an increase to the rental payment is warranted to compensate for ongoing losses (*Progress Energy Canada Ltd. v. Salustro* 2014 BCSC 960). The Board must base its finding with respect to loss

on the evidence before it. The burden of providing evidence to substantiate loss rests with the applicant.

[4] The issue, therefore, is to determine whether the evidence substantiates that the annual rent payable under the Lease should be revised to reflect the actual and ongoing loss to Mr. Miller arising from ARC's continued use and occupation of the Lands.

[5] David Miller seeks rent of $1,600/acre. ARC submits the evidence does not support the current rent and that the annual rent should be decreased.

FACTS

[6] The Lands are good agricultural land with Class 2 soil. A portion of the Lands is not within the Agricultural Land Reserve (ALR).

[7] David Miller does not reside on the Lands. He rents the Lands to his brother, Richard Miller, to grow crops as part of Richard Miller's farming operations. Richard Miller has farmed in the area for over thirty years. He has rented the Lands for quite a few years and has done so since before the Lease was in place. He currently pays $23 per acre per year to rent the Lands for agricultural purposes. Richard Miller rotates annually a canola crop with a cereal crop. David and Richard Miller arrange the rental of the Lands on an annual basis.

[8] David Miller's principle use of the Land is for recreational purposes. He enjoys hiking, quading, snowshoeing, and enjoying the wildlife that uses the Lands as part of their natural habitat. He also uses the Lands for water sales from a dugout constructed by ARC, at ARC's expense. The terms of the Lease required the company to install a dugout if the well was a "producer". There was a dispute between the parties with respect to ARC's obligation to build the dugout as the well had not been brought into production, but ARC nevertheless constructed the dugout in the location requested by David Miller and to his

specifications. David Miller has averaged about $40,000 per year in water sales from the dugout since 2011.

[9] The well on the lease area is shut in. ARC does not have any plans to bring the well into production. ARC personnel access the site once a year to inspect for the purpose of providing a suspended well report to the Oil and Gas Commission (OGC). This annual inspection takes up to two hours. The site is also accessed in spring or summer by ARC's weed contractor. The weed spraying may take a half day to a day.

[10] The Lease creates a severed area between the berm and the treed area and between the road and the treed area at the northeast edge of the lease, and severs some corners into which farm equipment cannot reach. Mr. Sheehan estimated the severance at .38 acres; Richard Miller estimated it at ½ acre. I accept that up to approximately ½ acre of the Lands is severed by the Lease and cannot be used for agricultural purposes. The total area of the Lands occupied by ARC and severed for agricultural purposes as result of the Lease is, therefore, 7.45 acres.

[11] The access road is constructed along the edge of the tree line where the land drops approximately 150 feet into a ravine.

[12] The well site area is surrounded by a berm.

EVIDENCE AND ANALYSIS

[13] Section 154 of the *Petroleum and Natural Gas Act* sets out the factors the Board may consider in determining the initial compensation or annual rent payable for the use and occupation of private land. Those factors are as follows:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;

(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[14] Not all of the above factors will be relevant in every case or in the determination of annual compensation as opposed to initial compensation for an entry. There are no factors or criteria established by regulation.

[15] Section 154(2) of the *Petroleum and Natural Gas Act* further provides that in determining an amount to be paid on a rent review application, the Board must consider any change in the value of money and of land since the date the surface lease was originally granted or last renewed.

[16] I heard evidence from David Miller and Richard Miller with respect to the use of the Lands and the impact of the Lease on the use of the Lands. I also heard evidence from Joseph Breti and Emil Arndt, both of whom own land in the area. I heard evidence from Trevor Sheehan, a Professional Agrologist, and from Darren Rosie, ARC's Senior Surface Landman. I consider the evidence as it relates to the factors set out in the *Petroleum and Natural Gas Act* below.

Value of the land and change in the value of the land

[17] I heard some evidence about increasing land values in the area. None of that evidence is specific to the Lands. The chart provided by David Miller prepared by Aspen Grove Property Services suggests an average annual increase to the value of land of around 3%. No one spoke to this evidence to provide context such as the criteria for selection of sales used to indicate median

price per acre from 2009 to 2014, or to relate the conclusions to the value of the Lands or any change in the value of the Lands.

[18] David Miller and Emil Arndt gave evidence that there had been a "huge increase" in the price of land over a number of years and provided examples of recent sales compared to purchase prices going back as far as the 1970's. This evidence does not assist with a consideration of any change in the value of the Lands or of land generally from 2009 to 2013.

[19] I accept that the Lands have esthetic and recreational value to David Miller and comprise good agricultural land.

[20] Mr. Rosie's evidence was that compensation for the value of the Lands and compulsory aspect of the taking was included in the initial lease payment of $13,600.

Loss of rights

[21] David Miller gave evidence that the access road goes through land that is outside of the ALR and blocks him from subdividing a bench area to the north east of the lease and land to the east of the road that is outside of the ALR. He did not provide any evidence of plans to subdivide the Lands or to support a finding that subdivision of the Lands would be either possible or probable but for the presence of the Lease. He did not provide evidence to value any alleged loss from an inability to subdivide portions of the Lands.

[22] I accept that Mr. Miller has lost rights with respect to quiet enjoyment of the Lands. The impact of this loss is discussed in relation to the evidence of nuisance and disturbance.

Loss of Profit

[23] Mr. Sheehan estimated loss of profit due to crop loss from the lease and severed areas at $1,685.42. Mr. Sheehan's evidence was that his estimate assumes above average yields and above average quality crops.

[24] David Miller does not experience crop loss as a result of the Lease. David Miller's actual loss of profit from the lease is minimal and equates to the loss of rent at $23/acre, or $171.35 (7.45 acres x $23 = $171.35). Prior to the Lease, Miller Creek Farms Ltd. rented the entire field. Now Richard Miller rents what is left of the field and the loss to David Miller is the loss of rent from the leased area and the severed area. There is no evidence that the farm land rental rate was reduced as a result of the presence of the Lease.

[25] The Lease includes a condition that the renter receive a one time payment for crop loss of $2,400 as compensation for loss of use of the 6.95 acre lease area and 1.54 acres of farmed road allowance area impacted by access road construction. The Lease, therefore, has already provided compensation for the renter's crop loss from the lease area.

Temporary and Permanent damage

[26] In his material filed in advance of the arbitration, David Miller expressed a concern that the berms altered the natural drainage of the area. Mr. Rosie's evidence was that this was the first time ARC had been made aware of a concern about drainage. Mr. Rosie and a construction foreman visited the site in September 2014 and did not observe any significant drainage issues off lease although they did observe evidence that there had been pooling in a small area. In an effort at addressing David Miller's concern, and to avoid any pooling of water, ARC opened the berm in a couple of spots to facilitate drainage. David Miller contacted the OGC to inquire about whether water draining off the leased area into the field complied with regulations. The OGC investigated and

determined that no water had gone off site and that there had been no violation of any regulation. Mr. Rosie's evidence was that going forward water will have to be checked and tested if it is going to travel off the leased area. I find the evidence does not support a significant likelihood that there will be significant ongoing damage to the land off the lease area as a result of drainage issues that necessitates compensation in the annual rent.

Nuisance and Disturbance

[27] Most of the evidence related to nuisance and disturbance or adverse affects from the presence of the Lease.

[28] David Miller's evidence was that the presence of the berm makes the Lands and the lease area attractive to hunters and other trespassers who use the site for target practice. Trespassing snowmobilers use the berm as a jump. Trespassers occasionally leave garbage on the lease. The presence of hunters and other trespassers interferes with wildlife in the area.

[29] ARC has installed a gate on the access road to try and deter trespassers, but David Miller's evidence was that the gate has been installed in the wrong place and that vehicles can still get around it. Mr. Breti's evidence was that he has seen the gate left open and unlocked.

[30] I accept that the presence of the access road and bermed lease area may make the Lands more accessible and attractive to trespassers than they might otherwise be, and that the unauthorized use of the site facilitated by the presence of the Lease is a nuisance and disturbance that interferes with David Miller's quiet enjoyment of the Lands. These are intangible losses that are incapable of precise calculation in monetary terms.

[31] Mr. Rosie provided a compensation worksheet that he said had been given to him by Jesse Berube of Storm. He was told that this was the compensation

worksheet used by Storm in negotiating the initial payment and annual rent under the Lease with David Miller and reflected Jesse Berube's judgment of what was fair in the circumstances. The worksheet indicates an annual amount for nuisance and disturbance at $2,200. David Miller's evidence was that he does not remember negotiating with Jesse Berube, although Jesse Berube witnessed David Miller's signature on the lease. In any event, Mr. Rosie's evidence as to the allocation of $2,200 for nuisance and disturbance is hearsay and I cannot say it reflects the parties' agreement as to what fair compensation for nuisance and disturbance was when the Lease was negotiated.

[32] Mr. Rosie's evidence was that if he were approaching this situation afresh, he would offer $1,000 for nuisance and disturbance given the Lease is not on a home quarter, it is on the edge of the field causing less disruption than if it were in the middle of the field, and is a shut in well with less activity than a producing well. ARC provided examples of other leases with the compensation worksheets showing a range of compensation for nuisance and disturbance from $1,000 to $2,262.50. Various decisions of the Board provided in the materials show a range of awards for intangible losses of $600 to $1,200.

[33] With respect to more tangible nuisance, the evidence was that ARC has generally done a good job at controlling weeds on the lease area other than in 2012 when weed spraying was not done. Mr. Rosie's evidence was that ARC hired a weed contractor in 2013 to address weed issues at all of ARC's sites. Both David and Richard Miller indicated there were some weed issues on the berm and field edges. Richard Miller estimated additional spraying costs of $200 annually (4 hours at $50/hour) to deal with the weeds missed between the reach of the field sprayer and the lease area spraying. Mr. Rosie's evidence was that ARC would include areas outside of the lease area in its spraying program with the landowner's permission. I accept that there is some nuisance and disturbance to the landowner in additional weed control as a result of the Lease.

[34] I also accept that the presence of the Lease causes adverse affects and losses to the use of the Lands outside of the lease area for agricultural purposes. These losses are difficult to quantify. I heard evidence from both Richard Miller and Mr. Sheehan estimating loss arising from farming around the lease area. While their estimates quantifying the loss vary, they both agree that there is loss incurred in additional time and equipment costs involved in farming against the lease area, and additional input costs due to overlapping adjacent to the lease area.

[35] Trevor Sheehan estimated farming losses using GIS mapping software and applying various assumptions about equipment size, number of operations, and crop rotation, and using average yield and price data. Mr. Sheehan estimated gross revenue at $420/acre. He deducted $120/acre for input costs (seed, fertilizer, chemicals, etc.) and $70/acre for equipment costs, to estimate net revenue at $230/acre. Mr. Sheehan estimated farming losses attributable to additional input costs incurred farming around the lease area at $464.46.

[36] Richard Miller estimated farming losses associated with the Lease at $2,550 as follows:

a) Overlap of fertilizer around the well site and in a small area to the south east, 1 acre x $150 = $150
b) Extra compaction reducing yield around the well site, 2.5 acres x $100 = $250
c) Extra equipment time working around the well site, 6 passes per year at ½ hour per pass, 3 hours x $250/hour = $750
d) Poor yields resulting from wet seeding, one acre x $200 = $200
e) Extra care and attention working near the berm, 6 passes along berm length and approximately 200 turns against the berm = $1,000
f) Extra spraying, 4 hours x $50/hour = 200.00

[37] His estimate assumes gross annual revenue of $400/per acre.

[38] With respect to item d), I heard evidence about how the presence of the berm resulted in additional crop loss because it allows for snow drifts to accumulate with the result that parts of the field are not dry when it is time to seed, and are seeded wet. Richard Miller estimated that approximately one acre of the field is often seeded wet resulting in poorer yields. His estimate of $200 is based on gross crop revenue, rather than net revenue, and assumes as much as a 50% reduction in yield for a one acre area annually. Mr. Rosie provided photographs taken in July 2014 showing the crop seeded to the edge of the lease with little evidence of reduced yield. Richard Miller agreed the snow conditions fluctuate from year to year. I nevertheless accept that the berm is likely to cause parts of the field to dry at a slower rate and that in some years wet seeding may result in a lower yield in those areas.

[39] With respect to item e), Richard Miller's evidence is that extra care must be taken with farm equipment when making turns against the berm in order to avoid running into the berm and damaging the equipment. His evidence was that the $1,000 estimated loss for extra care and attention working near the berm was to compensate for risk and did not reflect a calculation of actual time. His evidence was that it does not take additional time to make turns against the berm as you are not going fast in making a turn in any event. His evidence was that the berm is "like a brick wall" and that if you misjudge a turn there could be a lot of damage to the farm equipment. He said $1,000 doesn't go very far if you have to have equipment repaired or if there is down time. He did not provide evidence of actual damage to equipment as a result of the berm, or actual downtime to equipment as a result of the berm.

[40] As indicated above, compensation is for actual loss, not for risk. The inclusion of $1,000 for risk of damage is inappropriate as it does not compensate for actual loss. If the $1,000 for risk is removed, Richard Miller's estimate of actual farm losses attributable to the presence of the Lease is $1,550.

[41] The Millers were highly critical of Mr. Sheehan's estimates because they were based on assumptions. Although he made assumptions about equipment size, and crop rotation, yield and quality, many of the inputs to the software respecting cost, price and yield are supported by reported information relative to the Peace River Region of Alberta, and favoured the landowner. I find Mr. Sheehan's estimates are likely on the low side, however, as they do not account for additional time involved in farming around the Lease, and do not account for lost yield due to wet seeding.

[42] On the other hand, Richard Miller's estimates while based on his experience are not supported with any empirical data. The estimates as they relate to additional crop loss are also based on gross revenue and do not account for input costs. As such, I find his estimates are likely on the high side.

[43] With respect to Richard Miller's item b), his estimate is based on ¼ of the crop being lost due to compaction. Mr. Sheehan's evidence was that he did not observe any significant compaction. Even if ¼ of the crop is lost due to compaction, that loss should be based on net revenue, not gross revenue.

[44] With respect to Richard Miller's item c), Mr. Sheehan's evidence was that $250/hour for equipment was a custom rate as if someone was hired to work the field. On the other hand, his method of just using additional equipment costs attributable to inefficiencies and wear and tear applied to the overlap area does not account for additional time involved in farming around the lease area. I accept Richard Miller's estimate of three hours in time for working around the lease area but would multiply that by an hourly rate of $50, which is the same rate applied to time for spraying.

[45] I accept that care must be taken when farming against the berm to avoid damaging farm equipment, and that the presence of the berm causes some stress to the operator of farm equipment. I accept that Richard Miller incurs additional time and expenses due to overlap associated with the additional

headlands created by the Lease. Other than in additional time and expense related to additional overlaps however, the evidence does not support that the berm itself has caused or is likely to cause significant additional loss to the farming operation on an ongoing basis.

[46] Considering the evidence as a whole, acknowledging the difficulties in estimating loss from the adverse effect of the Lease on the use of the Lands outside of the lease area, but endeavoring to only account for actual loss as opposed to risk or speculative loss, I find loss attributed to farming around the lease area is in the range of $615 - $750. Mr. Sheehan's estimate of $465 plus $150 for time equals $615. Richard Miller's estimate adjusting the equipment time to $150, removing the $1,000 risk item, and removing the spraying costs (which I account for above in the discussion on weeds) equals $750. I find the evidence supports likely ongoing loss to the farm operation resulting from the presence of the Lease at $700 a year.

[47] While loss to the farming operation is not David Miller's actual loss, but reflects the loss to the farming operation, I accept that accounting for the adverse effect of the Lease on the use of the Lands outside of the lease area, regardless of who actually incurs that loss, is an appropriate consideration in determining compensation payable in the form of rent under a surface lease.

Other Leases

[48] Both parties provided some other leases. David Miller relied in particular on a recent renewal of rent payable under a surface lease between ARC and Loiselle Ranches Ltd. (Loiselle Ranches) of 5.14 acres, not far away, also with Class 2 soil. He calculated the per acre rent at $1,600. The evidence does not include a breakdown of how the annual rent of $8,000 payable under this lease was determined. The access road associated with this lease cuts the field in half. The well site is tear-dropped but it contains a flare stack. Mr. Rosie's evidence was that there is more activity on this lease and that the lease creates a greater

severance and causes more farming disruption than the Lease on the Lands. The lease on the Loiselle Ranches land does not include a term requiring the company to build a dugout.

[49] The various leases indicate variations in lease payments. Most of the leases do not include a breakdown of the compensation paid for different types of losses. I find the evidence of other leases does not substantiate a pattern of dealings either with respect to overall compensation or for any particular types of loss.

Other factors

[50] The revenue from water sales represents a significant collateral benefit to David Miller as a result of the Lease. David Miller's evidence was that he likely would not have agreed to the Lease without the provision for a dugout. ARC constructed the dugout at its expense in accordance with the term in the lease requiring construction of a dugout if the well was a "producer" agreed between Storm and David Miller when the Lease was signed. ARC's construction of the dugout enables David Miller to receive additional revenue from the Lands that he would not receive without the dugout. Arguably, the benefit David Miller is likely to receive from water sales will more than offset any ongoing loss to him caused by the Lease.

Determining Total Compensation

[51] As indicated above a rental payment under a surface lease is intended to compensate a landowner for ongoing prospective losses (*Dalgliesh, supra*). In an application for rent review, any revised rent is payable for the period following the effective date, not for past losses. In determining a revised annual rent with reference to actual loss and on consideration of the relevant factors, an analysis of probable future use of the land and probable future losses must be undertaken (*Canadian Natural Resources Ltd. v. Bennett, et al*, 2008 ABQB 19).

[52] Mr. Miller submits he should receive the same amount that Loiselle Ranches receives for similar land, or $1,600 per acre. On the basis of 7.45 acres, he claims annual rent of $11,920. To justify this claim the evidence must support that David Miller is likely to incur loss of $11,920 as a result of the Lease. ARC argues that the evidence does not support an increase to the rent and that it does not demonstrate that David Miller incurs loss equivalent to the current rental payment. ARC submits the Board should consider reducing the annual rent.

[53] Mr. Miller's argument that he should receive the same rent as Loiselle Ranches treats surface lease rent as if it is a market negotiation with the result that the rents agreed by the parties to other leases indicate a market rate for the rental of land for oil and gas activities. They do not. The only way Mr. Miller can expect to receive the same amount as that paid to Loiselle Ranches is if the evidence demonstrates that Mr. Miller can be expected to incur loss equating to that amount, or if the evidence demonstrates that the amount paid reflects a pattern of dealings.

[54] More than one lease is required to demonstrate a pattern of dealings. The other leases in evidence do not support a conclusion that the amount paid to Loiselle Ranches reflects a pattern of dealings.

[55] The fact that Loiselle Ranches and ARC agreed to a certain lease payment to compensate Loiselle Ranches for its anticipated ongoing loss arising from the lease on its lands does not mean Mr. Miller will experience the same loss or entitle any other landowner necessarily to the same payment.

[56] Compensation for loss is just that – compensation for loss (*Western Industrial Clay Products Ltd v. Mediation and Arbitration Board*, 2001 BCSC 1458). Compensation is not remuneration. Rent payable under a surface lease is not intended to remunerate the landowner for an operator's use of their land. Nor does it remunerate for risk associated with an operator's activities. It simply compensates for actual and ongoing loss. While landowners and companies

may negotiate benefits beyond actual loss in order to preserve relationship or secure an agreement, the Board exceeds its jurisdiction if it awards more than the loss likely to be incurred (*Western Clay, supra*).

[57] So what is the evidence of David Miller's loss? He has lost profit in the amount of $171.35 based on the loss of the rental of 7.45 acres for agricultural purposes. I accept the estimate of loss attributable to extra weed spraying at $200. I estimate the loss attributable to the adverse effects to the use of the Lands outside of the lease area at $700.00.

[58] Beyond these losses that are somewhat capable of calculation, David Miller's losses are intangible such as the loss of quiet enjoyment with the resultant nuisance and disturbance. This loss is difficult if not incapable of evaluating in monetary terms. Once the tangible losses are accounted for, the current rent of $5,200 leaves an excess of $4,100 for intangible losses. $4,100 for intangible loss seems excessive in light of the evidence before me of the range paid for nuisance and disturbance. Compensation at the high end of the range would be $2,200.

CONCLUSION

[59] The evidence does not substantiate that David Miller will incur ongoing losses of $5,200 annually as a result of the Lease. The most the evidence substantiates for David Miller's prospective ongoing loss is about $3,200.

[60] ARC submitted that the Board should consider reducing the rent in light of the evidence. As the Board exceeds its jurisdiction if it awards an amount in excess of the loss sustained, I am left in the uncomfortable position of having to reduce the rent. The evidence of loss simply does not support an increase, let alone the amount currently paid. I find annual rent should be revised to $3,200 to compensate David Miller for his anticipated ongoing prospective loss arising from the Lease.

ORDER

[61] ARC Resources Ltd. shall pay David Raymond Miller annual rent of $3,200 for its continued use and occupation of the Lands for the rent review period commencing June 27, 2013. ARC may offset any overpayment since June 27, 2013 against rent payable going forward.

DATED: February 25, 2015

FOR THE BOARD

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Cheryl Vickers, Chair