

**November 6, 2014**

**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 WEST  $\frac{1}{4}$  OF SECTION 26 TOWNSHIP 83 RANGE 17 WEST OF  
THE 6<sup>TH</sup> MERIDIAN PEACE RIVER DISTRICT  
(The "Lands")

BETWEEN:

Marty Kjos and Miriam Kjos

(APPLICANTS)

AND:

Penn West Petroleum Ltd.

(RESPONDENT)

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**BOARD ORDER**

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Heard by written submissions.

## **INTRODUCTION**

[1] The Applicants, Marty and Miriam Kjos, own lands near Fort St. John legally described as the South West ¼ Section 36, Township 83, Range 17, West of the Sixth Meridian, Peace River District (the Lands). On February 13, 1984, previous owners of the Lands entered a surface lease with Petro Canada Inc. giving Petro Canada Inc. the right of entry to and use of a portion of the Lands for a well site and access road (the Lease). The Lease was registered against the title to the Lands. In 1991, the Lease was assigned to the Respondent, Penn West Petroleum Ltd. (Penn West), and the assignment was registered against the title to the Lands.

[2] The Lease is for a term of 25 years, with a right of extension including the following clause:

The right provided herein shall expire unless exercised by the Lessee by notice in writing given to the Lessor before the commencement of the last SIX (6) MONTHS of the said TWENTY-FIVE (25) YEAR term.

[3] Penn West did not provide notice in writing to Mr. and Mrs. Kjos six months prior to the end of the first 25 year term as contemplated by the clause above. Penn West continued to make annual rental payments to Mr. and Mrs. Kjos, and Mr. and Mrs. Kjos continued to accept the rental payments.

[4] On April 14, 2014, Mr. and Mrs. Kjos applied to the Board using the Board's Form 1A – Right of Entry, Terms and Compensation. They submit that the Lease expired on February 13, 2009 and that Penn West refuses to negotiate a new lease. Penn West submits the lease is valid. It is my understanding that this dispute arose from the parties' disagreement as to how rent review should be handled. Mr. and Mrs. Kjos say the Lease expired and a new lease is required, Presumably, they wish to negotiate a revised annual rent in the context of a new lease. Penn West says any revised annual rent can be negotiated and dealt with as part of a rent review.

## **ISSUE**

[5] The parties frame the issue as whether a lease exists. On reflection, having reviewed both parties' submissions and the relevant provisions of the *Petroleum and Natural Gas Act*, I find the issue of whether or not the Lease continues to exist or is valid and enforceable is no longer relevant. The issue is whether Penn West continues to have a valid right of entry for the use and occupation of the

Lands. If the answer to that question is no, and if Penn West continues to require use of the Lands for an oil and gas activity, then a new right of entry would be required either by way of a new surface lease between the parties or an order of the Board. If the answer to that question is yes, no new surface lease or order of the Board is required.

[6] For the reasons that follow, I find that Penn West continues to have a valid right of entry. Any entitlement to revision to the annual rent falls under the provisions of the *Petroleum and Natural Gas Act* for rent review.

### **ANALYSIS**

[7] In accordance with section 142 of the *Petroleum and Natural Gas Act*, a person may not enter, occupy or use land to carry out an oil and gas or related activity unless the entry, occupation or use is authorized by a surface lease with the landowner or an order of the Board. Once authorized, by either a surface lease or order of the Board, a person's right to enter, occupy and use land to carry out an oil and gas or related activity becomes a "right of entry" in accordance with the legislated definition of "right of entry" provided in section 141(1) of the *Petroleum and Natural Gas Act*. A "right of entry" is subject to legislative provisions that may or may not accord with originally agreed upon terms in a surface lease.

[8] Section 143(1) of the *Petroleum and Natural Gas Act* legislates the "termination date" for a "right of entry". The "termination date" relevant to the circumstances of this case is "the date on which the commission has issued, under the *Oil and Gas Activities Act*, a certificate of restoration for the land. The "commission" is the Oil and Gas Commission.

[9] The Oil and Gas Commission has not issued a certificate of restoration with respect to Penn West's well on the Lands. Penn West's "right of entry" to use and occupy the Lands for its well and access road has, therefore, not terminated. As Penn West continues to have a "right of entry", no new surface lease or order of the Board is required to legitimize Penn West's access to and use of the Lands for a well and access road. The "right of entry" remains regardless of the terms in the Lease respecting expiry and renewal.

[10] Section 143(3) provides that if the term of a surface lease or Board order ends before the legislated termination date, the rental provisions continue to apply until the termination date unless the parties otherwise agree or the Board otherwise orders.

[11] Mr. and Mrs. Kjos argue that section 143 of the *Petroleum and Natural Gas Act* does not operate to validate the lease. They argue section 143(3) does not

resurrect an expired lease, but only ensures the payment of rent in the absence of an agreement between the parties or order of the Board. Section 143 of the *Petroleum and Natural Gas Act* may or may not resurrect an expired lease – I make no finding in that regard. It does not have to. What it does, however, is ensure that a “right of entry” continues regardless of the terms of a lease or Board order until the Oil and Gas Commission issues a certificate of restoration. As long as the “right of entry” continues, there is no need to negotiate a new lease.

[12] The parties made submissions respecting the interpretation of contracts, and the application of the doctrines of estoppel, waiver and laches. As I find the answer to the question of whether the parties need a new lease is answered by the provisions of the *Petroleum and Natural Gas Act*, there is no need to address these submissions.

### **CONCLUSION**

[13] Penn West has a continuing “right of entry” within the meaning of the *Petroleum and Natural Gas Act*. Despite the provisions of the Lease, there is no need for a new lease or Board Order to legitimize Penn West’s access to and use of the Lands. The provisions of the *Petroleum and Natural Gas Act* respecting rent review apply to the rent payable for the continuing “right of entry”

DATED: November 6, 2014

FOR THE BOARD



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Cheryl Vickers, Chair