

File No. 1868
Board Order No. 1868-2

June 9, 2016

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 NE 1/4 OF SECTION 24, TOWNSHIP 78, RANGE 18, W6M THAT PART LYING
NORTH AND EAST OF PLAN H311 EXCEPT PLAN 23873,
PEACE RIVER DISTRICT, PID 008-746-443

THE SE 1/4 OF SECTION 25, TOWNSHIP 78, RANGE 18,
W6M PEACE RIVER DISTRICT, PID 014-738-601

(the "Lands")

BETWEEN:

ARC Resources Ltd.

(APPLICANT)

AND:

Darcy Dwayne Hommy

(RESPONDENT)

BOARD ORDER

Heard: April 26, 2016 at Dawson Creek, BC
Appearances: Rick Williams, Barrister and Solicitor, for ARC Resources Ltd
Darryl Carter, Q.C., for Darcy Dwayne Hommy

INTRODUCTION

[1] The Applicant, ARC Resources Ltd. (ARC) has a right of entry over a portion of Lands owned by the Respondent, Darcy Dwayne Hommy, for the purpose of drilling and operating a number of wells on a multi-well padsite and for an access road. The parties have been unable to agree on the compensation payable to Mr. Hommy for the loss and damage arising from the construction and operation of ten additional wells on the existing well pad already containing nine wells, where no additional area is being added to the existing padsite or access road.

[2] This is the first time the Board has had to consider the issue of compensation for additional wells on an existing padsite. ARC offers \$1,000 per well; Mr. Hommy seeks \$2,000 per well. The parties also disagree on whether Mr. Hommy should receive annual compensation for each additional well. ARC says no additional annual compensation is required; Mr. Hommy seeks annual compensation of \$1,000 per well.

ISSUE

[3] The issue is to determine the compensation payable to Mr. Hommy arising from ARC's right to enter a portion of the Lands to construct and operate ten additional wells, in all of the circumstances of this case. There are two questions: a) How much should be paid in initial compensation per additional well? And b) Should there be annual compensation, and if so, how much?

EVIDENCE AND FACTS

[4] I heard evidence from Darren Rosie, senior surface landman with ARC; Brian Fast, an assistant in Mr. Carter's law office; and Trevor Sheehan, an Agrologist. Mr. Hommy did not give evidence.

[5] The Respondent, Darcy Dwayne Hommy, owns the Lands legally described as: THE NE 1/4 OF SECTION 24, TOWNSHIP 78, RANGE 18, W6M THAT PART LYING NORTH AND EAST OF PLAN H311 EXCEPT PLAN 23873, PEACE RIVER DISTRICT and THE SE 1/4 OF SECTION 25, TOWNSHIP 78, RANGE 18, W6M PEACE RIVER DISTRICT (the Lands). When Mr. Hommy purchased the Lands in October 2012, they were subject to a surface lease allowing ARC to construct and operate four natural gas wells and an access road on the Lands. The previous owner of the Lands assigned his rights under the surface lease, including the right to receive \$8,200 in annual rent, to Mr. Hommy.

[6] Mr. Rosie's evidence is that Mr. Hommy purchased the Lands for \$90,000.

[7] In 2013, ARC approached Mr. Hommy seeking to expand the well pad in order to construct and operate additional wells. The Board granted right of entry orders to give ARC access to additional area on the Lands to construct additional wells. The parties settled the compensation payable to Mr. Hommy for this entry. As part of their settlement, the parties agreed to surrender the existing surface lease and consented to a Board Order granting ARC entry to and access over the Lands to construct and operate the access road, the existing four natural gas wells and five additional wells for a total of nine wells and associated infrastructure. The parties agreed to initial compensation of \$18,000 and annual rent of \$12,500.

[8] ARC now proposes to drill an additional ten wells on the existing pad site. The Oil and Gas Commission has granted permits for the ten wells. The Board issued a Right of

Entry Order by consent, initially to allow for the drilling of four additional wells (Order 1868-1) and on April 11, 2016, amended the right of entry order, again by consent, to allow for the drilling and operation of ten wells (Order 1868-1amd). The right of entry allowing ARC to construct and operate an additional ten wells does not increase the area of the Lands on which ARC may enter and use for their oil and gas activities.

[9] The wells are sweet gas wells. ARC personnel currently visit the pad site once a day. Once the additional 10 wells have been drilled, ARC personnel will continue to visit the pad site once a day. Other than for the initial drilling of each additional well, there will be no additional activity on the well site as a result of additional wells being installed on the area covered by the right of entry order.

[10] ARC initially offered Mr. Hommy \$2,000 per well in initial compensation for the additional wells and \$500 per well in annual compensation. Mr. Rosie's evidence is this is what ARC has been paying to avoid the arbitration process. Mr. Hommy declined this offer. Mr. Rosie's evidence is that while ARC was prepared to make that offer to avoid the arbitration process, he is aware that other oil and gas companies pay less, in the range of \$1,000 to \$2,000 per well for initial compensation and \$250 to \$500 per well in annual compensation. He did not provide copies of any actual agreements.

[11] Mr. Rosie's evidence is that he has not made other offers of \$2,000 initial and \$500 annual per well in any situations involving more than 5 additional wells or in situations where no additional land is being taken.

[12] Mr. Fast provided copies of 11 offers from Encana Corporation provided to their office in the context of negotiations for multi-well padsites that they were involved with on behalf of landowners. All of the offers relate to padsites in Alberta. The offers range from \$2,000 to \$2,500 initial compensation for each additional well, with the majority of the offers being at \$2,500 per well, and all offer \$1,000 annual compensation per well. All of the offers were made in the context of an initial taking; none relate to

compensation for additional wells on an existing padsite. The offers are all for projects involving 2-6 wells. Mr. Fast's evidence is that some of the offers relate to cultivated land and some do not. His evidence is that not all of the offers were accepted. He did not provide evidence of any actual agreements.

[13] The evidence of both Mr. Rosie and Mr. Fast is that the practice that has generally developed over the years in both B.C. and Alberta when negotiating surface leases for oil and gas activity is to compensate for the loss of rights associated with the taking, initial nuisance and disturbance and initial loss of profit in the initial larger lump sum payment, and that smaller annual payments compensate for ongoing nuisance and disturbance and loss of profits.

[14] Trevor Sheehan, an Agrologist, provided a report and his opinion as to the loss of income from the Lands as a result of ARC's entry for the padsite and access road. Making various assumptions favourable to the landowner, and no deduction for input costs, Mr. Sheehan estimates the maximum gross forage crop loss from the leased area on SE 25 comprising the well site and some of the access road at \$2,059, and from the leased area on NE 24 comprising most of the access road at \$1,032, for a total of \$3,091.

[15] In Mr. Sheehan's opinion, no additional crop loss is incurred as a result of additional wells being installed on the leased area.

[16] Mr. Hommy does not live on the Lands and does not use the Lands for any purpose.

THE LEGAL FRAMEWORK

[17] The legal framework respecting the rights and obligations associated with the entry to private land for oil and gas activities is set out in the *Petroleum and Natural Gas*

Act. In accordance with section 142 of that Act, a person may not enter, occupy or use land to carry out an oil and gas activity unless the entry, occupation and use is authorized by a surface lease with the landowner in the prescribed form or an order of the Board. The Board may make an order, pursuant to section 159 of the Act, authorizing a right of entry if it is satisfied the right of entry is required for an oil and gas activity. Section 143(2) of the Act provides that a right holder, that is the person who holds a right of entry, is liable to pay compensation to the landowner for loss or damage caused by the right of entry and, 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.

[18] Section 154 of the Act sets out, without limitation, the factors the Board may consider in determining the compensation to be paid periodically or otherwise. They are:

- (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.

[19] The Board has previously articulated a number of settled principles relating to compensation for entry under the *Petroleum and Natural Gas Act* that it has found to be

binding upon it (*ARC Petroleum Inc. v. Piper*, Order 1589-2, December 5, 2008 and *Spectra Energy Midstream Corporation v. London*, Order 1694-3, February 24, 2015). A landowner is entitled to compensation for the loss sustained and not for more than the loss sustained. The Board exceeds its jurisdiction if it awards an amount of compensation in excess of the loss sustained (*Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458).

[20] While compensation for a surface taking is for the loss sustained, loss may include intangible loss that is not capable of precise calculation such as for nuisance and disturbance and for the loss of rights.

ANALYSIS

[21] This case presents the first time the Board has had to consider the compensation payable to a landowner for a right of entry to construct and operate additional wells on an existing well site where no additional land is taken.

[22] The evidence is clear that ARC's right of entry to construct and operate an additional ten wells on the existing well site will not cause any additional tangible loss to Mr. Hommy. No additional land is taken and no additional loss of income or profit will be incurred as a result of the additional wells. Mr. Hommy is already compensated in the current rent of \$12,500 in excess of the estimated loss of income from the area used for the well site and access road. Any additional loss to Mr. Hommy arising from ARC's right of entry to construct the ten additional wells is intangible in nature. The challenge for the Board is to place a monetary value on that loss.

[23] Mr. Carter focuses on the landowner's loss of rights and submits the issue is to compensate for the loss of rights. Loss of right is one of the factors the board may consider under section 154. Certainly, when a right of entry order is granted under the *Petroleum and Natural Gas Act* the landowner has lost rights. As was said in *Dome v*

Juell [1982], B.C.J. No. 1510, the landowner has lost “his right to decide for himself whether or not he wants to see oil and gas exploration and production carried out on his land.” The loss of rights is intangible, and as the Court said in *Dome v. Juell*, “not capable of precise calculation according to some standard or other.”

[24] Mr. Williams submits Mr. Hommy has already lost and been compensated for his loss of right to quiet enjoyment. He purchased the Lands with the lease in place. He lost some additional quiet enjoyment when the lease area was expanded for which he has been compensated. Further, as Mr. Hommy does not live on the Lands, Mr. Williams submits compensation for nuisance and disturbance should be on the low side. He submits any additional nuisance and disturbance or adverse effect should be based on evidence. Mr. Hommy has not provided any evidence of the impact to him or the Lands from the additional wells.

[25] Mr. Carter submits there is an ongoing loss of rights in the circumstances of a partial taking where a landowner is forced to share his land for the purpose of an activity he might not otherwise choose to have on his land. He submits the Board needs to value the loss of rights by looking at the loss from the landowner’s perspective. In this case, I have no evidence from the landowner himself, as Mr. Hommy did not testify. I can infer from his rejection of ARC’s offer, however, that from his perspective, the offer does not adequately compensate for his loss of rights.

[26] Mr. Carter submits the landowner’s perspective may be gleaned from other agreements freely negotiated. I have no evidence of other agreements. I only have evidence of offers. I have Mr. Fast’s evidence of 11 offers from Encana relating to multi-well padsites in Alberta. Mr. Fast’s evidence is that these offers did not all result in agreement. I have no way of knowing which offers did or did not result in agreement or how the landowners in those negotiations valued their loss of rights. None of the offers relate to additional wells on existing well sites where no additional land is being taken; all arise in the context of an initial taking.

[27] Nor do I have examples of any agreements from ARC. All I have is Mr. Rosie's evidence of what other companies are paying, without evidence as to which companies or the circumstances of those payments, and of what ARC offers "to avoid the arbitration process."

[28] As unsatisfactory as it is, the evidence of both Mr. Rosie and Mr. Fast suggests, however, that despite the fact that there may be no additional tangible losses involved for additional well sites, there is certainly an expectation on the part of landowners in both B.C. and Alberta that they will be compensated for additional wells, and an expectation on the part of right holders that they will have to pay additional compensation for additional wells in order to reach agreement with landowners. The evidence suggests that the expected payments are higher in Alberta than in B.C. The evidence before me, while sparse, suggests the expectation in B.C. ranges from \$1,000 to \$2,000 for each additional well as an initial payment and from \$250 to \$500 for each additional well annually. I have no evidence respecting payments offered for additional wells where no additional land is being taken, but these amounts, when paid in the context of an initial taking, are in addition to any payments to compensate for the value of the land, the loss of profit from the land and the nuisance and inconvenience of having to farm around a well site. Whether these payments are made from the companies' perspective to avoid arbitration, or from the landowners' perspective as the value for ongoing loss of rights, the evidence suggests that for there to be a meeting of the minds in surface takings involving additional well sites, an amount per well will be paid both on an initial and annual basis, and that the payment will exceed tangible loss.

[29] Mr. Williams submits that, in this case, there is no need for an annual payment because there is no ongoing tangible loss and no ongoing intangible loss in the nature of nuisance and disturbance. I find, however, on the evidence before me that the industry practice and landowner expectation is that an amount will be paid on an annual basis for each additional well on a multi-well pad site. Further in my view, regardless of

practice and expectation, the clear wording of section 143(2)(b) of the *Petroleum and Natural Gas Act* establishes a right holder's liability to pay rent to the landowner for the duration of a right of entry, except where the right of entry relates to a flowline. Section 143(2) provides:

- 143(2) Subject to subsections 93) and (4), 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.

[30] I find a right holder has an ongoing liability to pay rent even where ongoing loss may be minimal and may only relate to intangible loss.

[31] I accept that any ongoing intangible loss associated with nuisance and disturbance in this case is minimal. Other than to drill the additional wells, there will be no increased traffic to the site. There is no evidence that there will be ongoing disturbance from noise, lights or odour. Mr. Hommy does not live on the Lands, and there is no evidence that ARC's activities personally impact or disturb him.

[32] However, I also accept that there is an ongoing loss of rights associated with a multi-well padsite. Not only has the landowner "lost the right to decide for himself whether or not to have to have oil and gas exploration and production carried out on his land", as Mr. Justice Berger said in *Dome v. Juell*, the landowner cannot terminate the lease and his rights with respect to when he may seek a rent increase are controlled by legislation. If the right holder sells his surface rights to another operator, the landowner has no right to object to the new operator taking over the lease. In cases involving multi-well padsites, the landowner also loses any right to control the amount of the oil and gas activity on a site or to say "enough is enough". There is, therefore, an ongoing loss of rights associated with the compulsory aspect of the taking. While the evidence

of both Mr. Rosie and Mr. Fast is that the general practice is to compensate for the loss of rights associated with the compulsory aspect of the taking in an initial payment, that practice does not negate any ongoing liability under the Act to pay rent for the duration of a right of entry. Compensation for the ongoing compulsory aspect of the taking will, as Justice Berger acknowledged in *Dome v. Juell*, be arbitrary.

[33] As I have no evidence of actual agreements to assist in placing a monetary value on the intangible loss associated with a right of entry to construct and operate additional wellsites where no additional land is taken, I am left with the evidence of offers for additional wells in the context of an initial taking. I find appropriate compensation for Mr. Hommy's intangible loss should be in line with what the evidence suggests is the industry standard in B.C. for additional wells. For initial compensation, the evidence suggests the standard in B.C. is \$2,000 for each additional well. This payment is to compensate for intangible loss of rights associated with the right of entry for additional oil and gas activity and for the nuisance and disturbance associated with drilling the additional wells.

[34] As for annual payments, the evidence suggests the standard in B.C. is to pay \$250-\$500 per additional well. As there will be no additional ongoing nuisance and disturbance in this case, I find ARC's liability to pay rent is met with a minimal payment of \$250 per well per year, which accords with the low end of the range before me. This payment is simply to recognize and compensate for the ongoing compulsory aspect of the entry and intangible ongoing loss of rights.

ORDER

[35] ARC Resources Ltd. must pay Darcy Dwayne Hommy \$2,000 for each well drilled pursuant to the right of entry granted by Board order 1868-1amd.

[36] ARC Resources Ltd. must pay Darcy Dwayne Hommy \$250 for each well drilled pursuant to the right of entry granted by Board Order 1868-1amd on an annual basis.

[37] ARC may offset against this award any amount paid to Mr. Hommy as partial compensation in accordance with Order 1868-1amd.

DATED: June 9, 2016

FOR THE BOARD



Cheryl Vickers, Chair