

File No. 1919
Board Order No. 1919-1

February 7, 2018

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 ½ OF SECTION 19 TOWNSHIP 88 RANGE 19 WEST OF THE 6TH
MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

BLACK WILLOW BISON INCORPORATED

(APPLICANT)

AND:

CANADIAN NATURAL RESOURCES LIMITED

(RESPONDENT)

BOARD ORDER

Heard: By written submissions
Submissions from: Darron K. Naffin, Barrister and Solicitor, on behalf of Canadian
Natural Resources Limited dated September 11, 2017, October
30, 2017 and January 26, 2018
Black Willow Bison Incorporated dated October 16, 2017

INTRODUCTION AND ISSUE

[1] Black Willow Bison Incorporated (Black Willow) is the registered owner of land legally described as: The South ½ of Section 19 Township 88 Range 19 West of the 6th Meridian Peace River District (the Lands). Canadian Natural Resources Limited (CNRL) conducts an oil and gas activity on the Lands. The previous operator of the oil and gas activity signed a surface lease with a previous owner of the Lands granting the previous operator surface rights to the Lands (the Surface Lease). The Surface Lease was not registered in the Land Title Office.

[2] Black Willow filed an application with the Board under section 158 of the *Petroleum and Natural Gas Act* (the *Act*) for mediation and arbitration services. Black Willow says that CNRL refuses to engage with them to legalize its occupation of the land. Black Willow disputes that the Surface Lease grants CNRL a valid right of entry.

[3] CNRL submits Black Willow does not have standing to bring the application and the Board does not have jurisdiction to hear it.

[4] The parties agreed that the issue for this jurisdictional challenge brought by CNRL is: In an application under section 158 and 159 of the *Petroleum and Natural Gas Act*, does the Board have jurisdiction to determine if an existing unregistered surface lease is valid so as to provide a proper right of entry?

[5] Both parties provided written submissions. I did not find Black Willow's submissions helpful. But for the reasons that follow, neither have I found CNRL's submissions to be persuasive. I am satisfied that the Board has the jurisdiction to determine the threshold

issue to Black Willow's application: namely whether the existing surface lease already provides CNRL with an effective right of entry.

ANALYSIS

[6] The Board's jurisdiction is defined by its enabling legislation, the *Petroleum and Natural Gas Act*. The Board may interpret its legislation in order to determine whether an application before it falls within its mandate and seeks a remedy the Board is authorized to provide. The legislation must be interpreted in accordance with the modern rule of statutory interpretation that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (SCC)).

[7] The scheme of Part 17 of the *Act* is to provide a forum and framework for the resolution of disputes between landowners and persons requiring access to the surface of private land for oil and gas activities about right of entry to the land and the compensation payable to the landowner for loss or damage caused by the right of entry.

[8] Division 1 of Part 17 of the *Act* is an Interpretation section setting out the definitions of various terms used in Part 17. Division 2 deals with the authority to enter private land for an oil and gas activity and the liability of a right holder to pay compensation for loss or damage caused by a right of entry. Division 3 establishes the Board and Division 4 deals with the Board's operations. Section 147 sets out the Board's jurisdiction as follows:

- 147 The Board has jurisdiction in relation to any or all of the following:
- (a) an application under Division 5 by a person who requires a right of entry or by a landowner;
 - (b) an application under Division 6 for mediation and arbitration;
 - (c) an order for payment of costs or advance costs under Division 7;
 - (d) any other matter in respect of which the board has jurisdiction under this or another Act.

[9] Division 5 deals with the Board's authority to grant rights of entry. Division 6 deals with Board orders relating to rights of entry and the Board's authority to hear disputes respecting alleged damage to land or loss to landowners or occupants of land subject to a right of entry, disputes respecting the operation of or compliance with a term of a surface lease, and disputes about review of rent payable under a surface lease. Division 7 deals with costs.

[10] The basic premise of the legislative scheme is found at section 142 of the *Act* which provides that persons may not enter, occupy or use land to carry out an oil and gas activity or a related activity, or to comply with an order of the Oil and Gas Commission (OGC) unless the entry, occupation and use is authorized by a surface lease with the landowner or an order of the Board. I reproduce section 142 in full below:

- 142 Subject to section 39 of the *Oil and Gas Activities Act*, a person may not enter, occupy or use land
- (a) to carry out an oil and gas activity,
 - (b) to carry out a related activity, or
 - (c) to comply with an order of the commission,
- unless the entry, occupation or use is authorized under
- (d) a surface lease with the landowner in the form prescribed, if any, or containing the prescribed content, if any, or
 - (e) an order of the board.

[11] Sections 158 and 159 of the *Act* are within Division 5 entitled Authority to Enter Land. Pursuant to section 147(a) of the *Act*, the Board has jurisdiction in relation to an application under Division 5 by a person who requires a "right of entry" or by a "landowner".

[12] Section 158 *Act* provides:

Application for mediation and arbitration

158 A person who requires a right of entry or the landowner may apply to the board for mediation and arbitration if the person and the landowner are unable to agree on the terms of a surface lease.

[13] Section 159 of the *Act* provides that in an application under section 158, the Board or a mediator “may make an order authorizing a right of entry, subject to the terms and conditions specified in the order” if the Board or mediator “is satisfied that an order authorizing the right of entry is required for a purpose described in section 142(a) to (c).” Section 159 then goes on to deal with the mediator’s continued authority to assist the parties in resolving issues when a right of entry order is made, discretionary and mandatory conditions of a right of entry order, and procedural obligations on the right holder when a right of entry order is granted.

[14] CNRL submits that Black Willow is not a “landowner” capable of bringing an application under section 158 and that CNRL does not require a “right of entry”. Both of these terms are defined at section 141(1) of the *Act* as follows:

“**landowner**” means the owner of land that is subject to a right of entry or a proposed right of entry

“**right of entry**” means an authorization under section 142(d) or (e) to enter, occupy or use land for a purpose described in section 142(a) to (c)

[15] Section 141(1) also provides a definition of “owner” as follows:

“**owner**” in relation to land, means either of the following:

- (a) a person registered in the land title office as the registered owner of the land or as its purchaser under an agreement for sale;
- (b) a person to whom a disposition of the land has been issued under the *Land Act*,

but does not include the government.

[16] To summarize the combined effect of the provisions and definitions referred to above, a person may not enter land to conduct oil and gas activities unless the entry is authorized under a surface lease agreed with the landowner or an order of the Board. Either the person requiring the right of entry or the landowner may apply to the Board under section 158 if they are unable to agree on the terms of a surface lease. The landowner may be the registered owner of the land, or the person to whom a disposition of the land has been made under the *Land Act*, where the land is subject to a right of entry or a proposed right of entry.

[17] CNRL submits that sections 158 and 159 do not authorize the Board to make a determination on the validity of an existing surface lease. With reference to section 158, CNRL submits it is not a person who requires a right of entry because it already has the right to enter the Lands pursuant to the Surface Lease. It says CNRL and the owner of the land (or its predecessor) have already agreed on the terms of a surface lease so no issue falls within the scope of section 158 for the Board to mediate or arbitrate.

[18] Whether CNRL already has the right to enter the Lands for its oil and gas activity, however, is precisely the issue in this case. Whether the Board will be satisfied a right of entry order is required, is the issue raised by Black Willow and an issue squarely within the jurisdiction of the Board to consider under section 159.

[19] CNRL submits that section 159 does not specifically reference, or even remotely suggest, that the Board has the authority to make a determination on the validity of a surface lease. It says CNRL has not made, and does not intend to make, an application to the Board for a right of entry order in relation to the Lands because it says it is already authorized to enter the Lands under the Surface Lease. Again, this is the issue that is squarely raised by Black Willow's application. Determining whether a right of entry is required is a matter within the jurisdiction of the Board.

[20] CNRL says Black Willow's application is conflicted. As noted above, a "landowner" is "the owner of land that is subject to a right of entry or a proposed right of entry". Black Willow cannot be suggesting it is the owner of land that is subject to a right of entry. If the land is subject to a right of entry there is no purpose for invoking the Board's jurisdiction under section 159 to consider whether a right of entry is required. CNRL submits that if Black Willow is relying on the fact that it is the owner of land that is subject to a proposed right of entry to establish its standing to bring the application, the Board should dismiss the application on the basis that no right of entry has been proposed. CNRL says is not proposing a right of entry; it says it already has the right to and does enter the Lands to conduct its oil and gas activity.

[21] A “landowner” is the registered owner of the land. Section 158 clearly gives the registered owner of the land that is subject to a proposed right of entry the right to seek the assistance of the Board if the registered owner of the land and the person requiring the right of entry cannot agree to the terms of a surface lease. CNRL says that is not the situation here because it and the previous owner of the Lands already agreed to the terms of a surface lease. It says the Lands are not subject to a proposed right of entry.

[22] Black Willow, however, takes the position that the Surface Lease negotiated with the previous owner of the land does not provide an effective right of entry to the Lands in the circumstances. In effect, Black Willow is saying that if CNRL proposes to continue to enter the Lands to conduct its oil and gas activities, it must have a right of entry either in the form of a surface lease with Black Willow as the current registered landowner or an order of the Board. Viewed in this light, the Lands are subject to a proposed right of entry. Black Willow is the registered owner of the land that is subject to a proposed right of entry.

[23] CNRL submits that the issue of the validity of a lease is properly dealt with by the Courts in British Columbia, which is an indication that the Board is not authorized to make such a determination under section 158 or 159 of the *Act*. CNRL submits that if the Board were to undertake the exercise of determining the validity of the Surface Lease, it would be required to assess much more than the terms of the lease itself, including the provisions of other enactments and the common law on issues that extend beyond its expertise. It provides the case of *Vancouver City Savings Credit Union v. Alda Wholesale Ltd.*, 2000 BCSC 411 as an example of the Court’s jurisdiction respecting interests in real property and the effect of registration.

[24] I agree that determining whether the Surface Lease provides CNRL with an effective right of entry will involve considering legislation and law that is not necessarily within the expertise of the Board and that does not typically arise in the resolution of disputes before the Board. The fact that the Board may have to consider law of more

general application in the resolution of a particular dispute, however, does not necessarily remove the dispute from the Board's jurisdiction if the Board must consider such law to interpret the terms and provisions of its enabling legislation. Of course, any such interpretation is subject to judicial review.

[25] In an application under section 158 and 159 of the *Act*, the Board must determine whether it "is satisfied that an order authorizing the right of entry is required". In the context of this application, resolution of that issue will involve considering whether the rights granted in the Surface Lease effectively bind Black Willow and CNRL so as to provide CNRL with a "right of entry" in light of the fact the Surface Lease is not registered and in all of the other circumstances that may be established by the evidence when the application is heard on its merits. This inquiry will likely require the Board to consider legislation beyond the *Act* itself and common law respecting knowledge of unregistered interests as part of the exercise of statutory interpretation of its enabling legislation.

[26] CNRL submits that the landowner is asking the Board to interfere in a private commercial matter between the parties and that there are other more appropriate forums in which Black Willow can pursue its complaint. The Board's authority to authorize right of entry to private land for oil and gas activities and to impose the terms and conditions of that entry including the amount of rent payable to a landowner essentially is an intervention in what would otherwise be a private commercial matter between the operator of an oil and gas installation and the owner of the surface of land required for that activity. The Board's authority under Division 6 of the *Act* to review rent payable under a surface lease and even to amend the terms of a surface lease also provides it with authority to interfere in what would otherwise be private commercial arrangements between private parties. The legislation clearly places certain disputes involving private commercial agreements within the jurisdiction of the Board.

[27] CNRL submits that to interpret section 158 of the *Act* as authorizing a landowner to bring, and the Board to hear, an application for a right of entry every time a landowner

disputes the validity of a surface lease, would result in a significant burden and expense to both the Board and operators. It submits the correct forum to challenge such private agreements is in the courts. If CNRL is correct in this submission, then landowners are faced with the significant burden and expense of disputing an operator's right to enter their land for oil and gas activities by being required to initiate court proceedings.

[28] The *Act* was amended in 2010 to specifically provide landowners with the right to bring an application to the Board for mediation and arbitration when the landowner and the person requiring right of entry to the land for an oil and gas activity could not agree on the terms of a surface lease. Prior to the enactment of section 158, only the person requiring a right of entry could invoke the Board's jurisdiction to consider whether a right of entry order was required. In amending the legislation, the legislature must have intended to allow landowners the same access to the Board for the resolution of disputes respecting the right to enter land for oil and gas activities as companies engaged in oil and gas activities. It cannot have been the intention of the legislature that only a company engaged in oil and gas activities is able to engage the dispute resolution services of the Board to authorize its entry to private land, determine terms and conditions of entry, and the compensation and rent payable to landowners. It must have been the intent of the legislature to also provide landowners who dispute that an operator of an oil and gas activity on their land has an effective right of entry with the same access to dispute resolution respecting the right to enter private land and the compensation payable.

[29] Whether CNRL requires a right of entry is a matter within the jurisdiction of the Board under sections 158 and 159 of the *Act*. Considering that issue in the context of this case will involve determining whether the existing unregistered surface lease provides CNRL with an effective right of entry. If the Board determines that it does, Black Willow's application will necessarily be dismissed. If it determines that it does not, however, and that "an order authorizing right of entry is required", it will have to determine the terms of the order including the compensation or rent that may be payable to the landowner. These are issues within the jurisdiction of the Board.

CONCLUSION

[30] I find Black Willow is the landowner of land that is subject to a proposed right of entry within the meaning of the *Act* and is entitled to bring the application under section 158. The Board has jurisdiction to hear the application and determine whether CNRL requires a “right of entry”.

DATED: February 7, 2018

FOR THE BOARD



Cheryl Vickers, Chair