

File No. 1935
Board Order No. 1935-1

May 29, 2017

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
SECTION 25 TOWNSHIP 86 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE
RIVER DISTRICT, EXCEPT THE SOUTH AND EAST 80 FEET
(The "Lands")

BETWEEN:

Wendy Harrington and
Ben Harrington

(APPLICANTS)

AND:

Procyon Energy Corp.

(RESPONDENT)

BOARD ORDER

Heard: by way of written submissions
Appearances: Wendy Harrington and Ben Harrington, for the Applicants
Ron McKellar and Rae Brietzke, for the Respondent

INTRODUCTION AND ISSUE

[1] This is a reconsideration pursuant to section 155 of the *Petroleum and Natural Gas Act* of my decision letter of April 5, 2017 that Procyon Energy Corp. (Procyon Energy) had not properly acquired rights under a 1990 surface lease registered against the Title to the Lands owned by Wendy Harrington and Ben Harrington, and that the Board would issue a right of entry order granting Procyon Energy surface rights in order to operate and maintain the well site and access road on the Lands. I found the surface lease had not been properly assigned to Procyon Energy by ConnocoPhillips Canada Resources Corp. (Connoco Phillips).

[2] Following that decision, and prior to issuing the right of entry order, the Board received new information from Procyon Energy respecting the assignment of the 1990 surface lease and relevant to the issue of the validity of the lease. I exercised the Board's discretion to reconsider its decision in light of the new information and set out a process for further submissions from the parties.

[3] The defect in the assignment of the 1990 lease from Connoco Phillips to Procyon has been corrected to effectively assign the surface lease to Procyon Energy. Regardless of the effective assignment of the lease to Procyon Energy, however, the Harrington's submit the lease was terminated by them and is no longer in effect to grant Procyon the necessary surface rights. Procyon Energy disagrees the lease was effectively terminated.

[4] The issue, therefore, is whether the 1990 lease was effectively terminated. The Harringtons' initial application for a right of entry order raised the issue of the validity of the lease. I did not deal with that issue in my decision of April 5, 2017 as it was not

necessary to do so at the time. With the defect in the assignment having been corrected, however, the issue of the validity of the lease is now front and centre.

BACKGROUND FACTS

[5] Wendy Harrington and Ben Harrington are the current owners of the Lands legally described as: Section 25 Township 86 Range 17 West of the 6th Meridian Peace River District, except the south and east 80 feet (the Lands).

[6] On August 24, 1978, the former owner of the Lands, Weldon Shoaf, entered into a surface lease with North Star Resources Ltd. (the 1978 Lease). North Star Resources Ltd. then constructed a well site and access road on the Lands. On August 24, 1990, Mr. Shoaf entered into a new surface lease with Poco Petroleums Ltd., the then operator of the well site (the 1990 Lease). The 1990 Lease expressly supersedes the 1978 Lease. The 1990 Lease was registered against the Title to the Lands.

[7] At some point, Conocco Phillips succeeded Poco Petroleums Ltd. and took over operation of the well site. In 2009, Conoco Phillips assigned its interest in the well site to Procyon Energy, however, it erroneously assigned the 1978 Lease, not the 1990 lease registered on Title. That error has been corrected by way of an Assignment dated April 5, 2017 effective September 15, 2008. Procyon Energy is the lessee under the 1990 Lease and is the operator of the well site on the Lands.

[8] The Harringtons purchased the Lands in 2016 subject to the 1990 Lease. On June 10, 2016, the Harringtons wrote to Procyon Energy advising them that they were now the owners of the Lands and that the rental payments due under the lease registered as PF2527 will be due on each anniversary date payable to Ben Harrington. Charge PF2527 on the Title to the Lands is the 1990 Lease. The letter goes on to note that the lease is overdue for negotiation and seeks a rent increase to \$5,500.

[9] On June 20, 2016, Rae Brietzke, Consulting Land Analyst with Procyon Energy wrote to the Harringtons acknowledging receipt of their June 10, 2016 letter and asking for a copy of the lease assignment.

[10] On October 1, 2016, the Harringtons wrote again to Procyon Energy. The Harringtons introduce the letter as “a follow up Overdue Notice to the June 10, 2016 demand for lease payment” and “a follow up for a rent review which is overdue for renegotiation. The letter goes on to advise that Procyon Energy “is in default of the surface lease” and says: “Please be aware that Procyon will default on, and forfeit the surface lease, and have no further rights if full payment as per the existing agreement is not received within 90 days of the lease anniversary.”

[11] On October 26, 2016, Ron McKellar, President of Procyon Energy, wrote to the Harringtons offering to increase the annual rent payable under the 1990 Lease to \$4,100 effective August 24, 2016. Ben Harrington signed the rent renewal agreement. Wendy Harrington does not agree with the rent renewal and feels Ben was pressured into signing.

[12] On November 21 and again on November 22, 2016, Mr. Harrington phoned Procyon Energy and spoke to Mr. McKellar. Mr. Harrington told Mr. McKellar partial payment was not acceptable and that full payment was expected immediately or he would terminate the lease.

[13] On November 23, 2016, Ms. Brietzke sent an email to Mr. Harrington acknowledging receipt of Mr. Harrington’s letter accepting rentals of \$4,100 and advising that Procyon was unable to pay any of their rental obligations in full and that they had been sending lessors full rental over a period of three months. Ms. Brietzke advised they would send a cheque in the amount of \$1,366.00 by the end of November, another cheque for the same amount by the end of December, and a final payment of \$1,368 at the end of January.

[14] On November 30, 2016 and December 22, 2016 Procyon Energy sent cheques of \$1,366 each to the Harringtons, but these cheques were not made out correctly. Procyon Energy discovered the error, although it had not been brought to their attention

by the Harringtons, and on January 25, 2017 sent a cheque to Ben and Wendy Harrington in the amount of \$4,100. I understand the cheque was not cashed.

[15] On March 9, 2017 the Harringtons wrote to Procyon Energy purporting to terminate both the 1978 Lease and the 1990 Lease “due to non-payment as per the terms of payment included in the lease agreements, and in the demand for payment letters dated June 10, 2016, and October 3, 2016.”

SUBMISSIONS

[16] The Harringtons submit that they have effectively exercised their option to terminate the 1990 Lease and that the 1990 Lease is terminated. They ask the Board to issue a right of entry order including a security deposit to cover costs and damages.

[17] Procyon Energy submits the 1990 Lease has not been effectively terminated and that a right of entry order is not necessary.

ANALYSIS

Has the 1990 Lease been effectively terminated?

[18] The 1990 Lease contains a termination clause for non-payment under the terms of the lease at clause 2(a) as follows:

If the Lessee fails or neglects to pay rentals or to make payments pursuant to the terms of this Lease and such default continues for a period of Ninety (90) days after demand in writing therefore by the Lessor, the Lessor may at the Lessor's option terminate this Lease.

[19] The Harringtons submit their letter of October 1, 2016 was a demand letter and that the default in payment of rent continued for 90 days after. They submit their letter of March 9, 2017 effectively terminated the lease. Procyon submits that cheques were sent on November 30 and December 22, 2016 within the 90 day demand period, although the cheques had been made out incorrectly. Upon discovery of their mistake,

Procyon sent a cheque for \$4,100 on January 25, 2017. Procyon submits it has been acting in good faith and making every effort to meet its obligations.

[20] The termination clause provides that the Lessor may terminate the Lease upon the happening of three events:

- i) the Lessee must be in default of a payment owing under the lease,
- ii) the Lessor must make a demand in writing for payment, and
- iii) the default must continue for 90 days after the demand in writing.

[21] Procyon defaulted on the rental payment owing under the 1990 Lease as of August 24, 2016. The amount owing as of August 24, 2016 was \$1,850.

[22] I find the letter of October 1, 2016 was a demand letter as required by clause 2(a) of the 1990 Lease. The letter says:

At this time, and as per the Petroleum and Natural Gas Act, Procyon is in default of the surface lease. We have been notified by Ron McKellar on September 26, 2016 that no payment will be made as a full payment will not be forthcoming. Other payment methods are not covered under the existing agreement and therefore are not acceptable. Please be aware that Procyon will default on, and forfeit the surface lease, and have no surface rights if full payment as per the existing agreement is not received within 90 days of the lease anniversary.

[23] Although it is somewhat inarticulately worded, I find it to be sufficiently clear that Procyon ought to have understood it to be a proper demand for the payment that was owing as of August 24, 2016. In accordance with clause 2(a) of the lease, the option to terminate could be exercised if the default continued 90 days after the written demand for payment. The default period within in which Procyon Energy could make payment was 90 days from October 1, 2016 which was December 30, 2016.

[24] Ben Harrington accepted Procyon Energy's October 26, 2016 offer to increase the rent to \$4,100. On November 21 and 22, 2016 he spoke with Mr. McKellar on the telephone advising that partial payment was not acceptable and reiterating that the lease would be terminated if full payment was not made.

[25] Procyon did not make payment of the \$1,850 owing as of August 24, 2016 or the revised rent of \$4,100 by December 30, 2016. It attempted to make partial payments against the new rent of \$4,100 with cheques sent on November 30 and December 22, 2016, but the cheques were not made out correctly. As of December 30, 2016, therefore, the default continued.

[26] On January 25, 2017 Procyon Energy sent a cheque for \$4,100.00 payable to Ben and Wendy Harrington. The Harrington's did not cash this cheque and by letter dated March 9, 2017 exercised their option to terminate the 1990 Lease. As the default had continued for a period of 90 days following demand for payment, I find the Harrington's were entitled to exercise their option to terminate and were not obliged to accept the cheque tendered after the default period had expired. Additionally, the cheque tendered on January 25, 2017 was not made payable to Ben Harrington as instructed by the Harrington's letter of June 10, 2016. I find the Harringtons' letter of March 9, 2017 effectively terminated the 1990 Lease.

[27] I understand that Procyon is experiencing financial difficulties. Financial difficulties do not relieve a rights holder from its obligations under a surface lease. The lease contained a termination clause, the criteria for exercising the Lessor's option to terminate the lease occurred, and I find the Harringtons did effectively terminate the 1990 Lease on March 7, 2016.

[28] I accept that Procyon has made good faith efforts to meet its obligations. In particular, it sent a cheque for \$4,100 to the Harringtons on January 25, 2017. But its good faith efforts came too late to save it from the Harrington's proper exercise of the termination clause in the lease.

Should the Board issue a Right of Entry Order?

[29] As the lease was effectively terminated by the Harringtons on March 9, 2017, and as Procyon Energy needs surface rights to carry out its obligations with respect to the well site and access road on the Lands, I find a right of entry order should be issued.

[30] The order below includes provisions for partial payment against compensation that may be owed to the Harringtons for the right of entry and for a security deposit in accordance with section 160 of the *Petroleum and Natural Gas Act*. The Board retains jurisdiction to determine compensation and annual rent owing to the Harringtons in the event the parties are unable to agree.

ORDER

The Surface Rights Board Orders:

1. Upon payment of the amounts set out in paragraphs 2 and 3, Procyon Energy Corp. shall have the right of entry to and access across the portions of the Lands legally described as:

SECTION 25 TOWNSHIP 86 RANGE 17 WEST OF THE 6TH MERIDIAN
PEACE RIVER DISTRICT, EXCEPT THE SOUTH AND EAST 80 FEET

as outlined in red on the copy of Survey Plan 25274 attached to this Order as Schedule "A" for the purpose of operating and maintaining a well site and access road as permitted or required by the Oil and Gas Commission.

2. Procyon Energy Corp. shall pay to Ben Harrington the sum of \$4,100.00 as partial payment towards any compensation owing to both Ben and Wendy Harrington jointly.
3. Procyon Energy Corp. shall deliver to the Surface Rights Board security in the amount of \$10,000 by cheque made payable to the Minister of Finance. All or part of the security deposit may be returned to Procyon Energy Corp. or paid to Ben and Wendy Harrington upon agreement of the parties or as ordered by the Board.
4. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

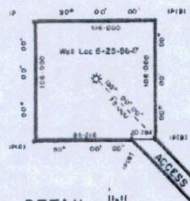
DATED: May 29, 2017

FOR THE BOARD



Cheryl Vickers, Chair

SCHEDULE "A" 1935-1



DETAIL A
Scale 1:2,500

SEC 25

TP 86 RGE 17

See Detail 'A'

Wet Loc 6-25-86-17

LS 5 LS 6
LS 4 LS 3

PO BOX 8800 ALBUQUERQUE

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LITTLE LONGSTAFF & ASSOCIATES 3916 10TH AVENUE, FORT ST JOHN, B.C. V1V 2P6

DEPOSITED IN THE LAND REGISTRY OFFICE AT PRINCE GEORGE,
B.C. THIS DAY OF 19

REGISTER

① CUL
 ② STANDMET 100W BAY POST
 ③ CAR GARDED HIGH BAY POST
 ④ STANDARD WGN POST
 ⑤ BURNED
 REFERENCE POSTS SET AT ALL SURVEY POSTS UNLESS OTHERWISE NOTED.
 ALL DISTANCES AS SHOWN IN METERS UNLESS OTHERWISE NOTED.
 BEARING IS ASTRONOMIC, REFERRED TO CENTRAL MERIDIAN OF TP 86 RGE 17 W6M
 AND ARE DERIVED FROM S BAY SEC 25 TP 86 RGE 17 W6M

[illegible]

LE R LITTLE OF THE CITY OF KODJ ST JOHN, B.C., BRITISH COLUMBIA LAND SURVEYOR,
MAY OATH AND SAY THAT: WAS PRESENT AT AND DID PERSONALLY SUPERINTEND THE SURVEY
REPRESENTED BY THIS PLAN AND THAT THE SURVEY AND PLAN ARE CORRECT THE SAID
SURVEY WAS COMPLETED ON THE 26th DAY OF JULY 1979.

SWORN BEFORE AT THE CITY OF
FORT ST JOHN, BC THIS 14TH DAY
OF Sept 1979

THE LITTLE AGENTS

COMMISSIONER FOR TAKING AFFIDAVITS WITHIN BRITISH COLUMBIA

APPROVALS

NOTE THIS PLAN LIES WITHIN THE PEACE RIVER - LIARD REGIONAL DISTRICT

NORTHSTAR RESOURCES LTD.

REFERENCE PLAN OF WELLSITE & ACCESS
in
S.W.1/4 SEC. 25 TP 86 RGE 17 W6M
Peace River District

SCALE: 1:5,000

JOB No. 127 - 79