

October 30, 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

THE NORTH EAST $\frac{1}{4}$ OF SECTION 17 TOWNSHIP 79 RANGE 14 WEST OF THE
6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

ARC Resources Ltd.

(APPLICANT)

AND:

Mary Kathleen Miller

(RESPONDENT)

BOARD ORDER

Heard: By way of written submissions closing October 25, 2017
Appearances: Rick Williams & Timothy Pritchard, Barristers and Solicitors, for the
Applicant, ARC Resources Ltd.
J. Darryl Carter, Q.C., for the Respondent Owner

INTRODUCTION

[1] ARC Resources Ltd. (ARC) has applied to the Board for mediation and arbitration respecting a right of entry application to construct, operate and maintain a natural gas flow line and associated infrastructure on the subject lands, and respecting the appropriate compensation payable to the owner for the entry and operation. Mary Miller is the Respondent to the application and the owner of the lands (the “Owner”) described as: NE ¼ of Section 17, Twp 79, Rge 14, W6M (the “Lands”).

[2] Section 159 (1) of the *Petroleum and Natural Gas Act*, R.S.B.C., 1996, c. 362 (the “PNGA”) provides that the Board “may make an order authorizing a right of entry, subject to the terms and conditions specified in the order.” (emphasis added).

[3] The Owner requests that any right of entry order issued by the Board contain a term or condition requiring ARC to construct the flow line on the Lands by boring instead of trenching. ARC objects to the proposed condition on the basis that the Board does not have jurisdiction to impose such a condition in a right of entry order.

ISSUE

[4] The issue is whether the Board has the jurisdiction to impose a term or condition to a right of entry requiring a flow line to be constructed by boring instead of trenching.

THE LEGISLATION

[5] Section 147(a) of the *PNGA* provides that 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”.

[6] Pursuant to section 142 of the *PNGA*, "...a person may not enter, occupy or use land (a) to carry out an oil and gas activity..." or related activity unless the entry, occupation or use is authorized under either a surface lease with the landowner or an order of the Board.

[7] If no surface lease with the landowner is entered into, pursuant to section 159(1) of the *PNGA*, the Board may, on application, "make an order authorizing a right of entry, subject to the terms and conditions specified in the order if the board or mediator, as applicable, is satisfied that an order authorizing the right of entry is required for a purpose described in section 142 (a)...", namely an oil and gas activity.

[8] Section 1 of the *PNGA* provides that an "oil and gas activity" has the same meaning as in section 1 of *Oil and Gas Activities Act*, S.B.C., 2008, c. 36 (the "OGAA") which includes: "... (e) the construction or operation of a pipeline..."

SUBMISSIONS, EVIDENCE, & FACTS

[9] The parties have provided written submissions but no affidavit evidence. Any "facts" referenced in this decision are as provided in the parties' written submissions and are referenced and relied on only for the purpose of making a determination on the issue before me.

[10] ARC says the Board's jurisdiction with respect to conditions it can impose in a right of entry order is limited to terms and conditions that relate to the manner of entry onto private land, not that relate to the nature of the underlying oil and gas activity as that is within the exclusive jurisdiction of the Oil and Gas Commission ("OGC").

[11] In reading the *PNGA* with the *OGAA*, ARC submits that the legislature intended to create two statutory bodies with related but not over-lapping jurisdiction: the OGC

for the regulation of oil and gas activities, and the Board for the regulation of entry onto private land for the purpose of undertaking those activities.

[12] Further, ARC submits that a prerequisite to the Board's jurisdiction to issue a right of entry order is that the OGC has issued a permit for an "oil and gas activity" (sec. 142 and 159(1) of the *PNGA*), as defined by sec. 1(2) of the *OGAA*. The OGC has jurisdiction to impose conditions on the permit that it considers necessary (sec. 25(2)(b) of the *OGAA*). If a landowner is dissatisfied with the lack of inclusion of a condition in a permit, they may appeal the permit to the Oil and Gas Appeal Tribunal.

[13] ARC argues that the Board's jurisdiction cannot extend to the manner of the oil and gas activity itself, i.e. the manner of the construction of a flow line, as this would create a system of overlapping jurisdiction between the OGC and the Board, which cannot have been the legislative intention behind the *PNGA* and the *OGAA* (Board's Information Sheet #1, Hansard excerpt March 31, 2010, Volume 13, Number 3).

[14] The Owner says there is no right to access private land except as permitted by the *PNGA* either by agreement with the landowner or by "expropriation" under the legislation which should be interpreted strictly against the oil and gas company seeking entry (*Dell Holdings Ltd. v. Toronto Area Transit Authority* (1997) 60 LCR 81 (SCC)). The Owner says that landowners, including homeowners in the Lower Mainland, have the right to "resist" entry which right to resist can be "taken away" under the *PNGA* only by agreement with the landowner or by a right of entry order by the Board. Further, the Owner argues that a permit from the OGC does not allow a company to go on private land to construct a pipeline in whatever way the company chooses (sec. 34(2) of the *OGAA*).

[15] Further, the Owner submits that under the *PNGA*, the Board order takes the place of an agreement when the parties are unable to agree. Section 159(1) of the *PNGA* allowing the Board to impose terms and conditions in a right of entry order taking away a landowner's rights should be interpreted strictly against the taker.

She says that reference to terms and conditions of a right of entry order in this section, along with the reference in section 164, is evidence of the legislature's intention to give the Board jurisdiction to impose any terms and conditions. As for the Board's Information Sheet #1, the Owner says that the information in the Sheet is not correct and has no legal status. The Owner does not specifically respond to ARC's submissions on over-lapping jurisdiction with the OGC.

[16] ARC does not dispute that there is "no right to access any land except as permitted by the *Petroleum Natural Gas Act*" or that the Board can "impose terms and conditions in issuing a right of entry order", but ARC says the Board does not have jurisdiction to impose certain terms and conditions that are in the jurisdiction of the OGC. Also, the principles of statutory interpretation that apply in relation to expropriation statutes do not apply as the *PNGA* is not an expropriation statute (see *Murphy Oil Company Ltd. v. Shore*, SRB No. 1745-1). ARC argues that the construction techniques for a pipeline must be determined by the OGC which was specifically established to make such determinations "having regard to environmental, economic and social effects" (sec. 4(b) of *OGAA*).

ANALYSIS

[17] The application for a right of entry is made pursuant to section 158 of the *PNGA*. Section 159 allows the Board to issue an order authorizing a right of entry, "subject to the terms and conditions specified in the order". The *Act* does not specify what terms and conditions can be imposed but the Owner says this provision authorizes the Board to impose terms and conditions on the manner of construction of the flow line over her Lands.

[18] Further, the Owner says that the *PNGA* should be interpreted strictly against the oil and gas company as it is expropriation legislation. The Courts have generally construed expropriation statutes strictly to protect landowners from expropriation of their lands by government without express authorization. However, Courts have also specifically found that the entry and occupation authorized by *PNGA* is not an act of expropriation as no land or legal interest in the land is taken from the

landowner (*Dome Petroleum Ltd. v. Juell* [1982] BCJ No. 1510). The fact that the right of entry may be compulsory and contrary to the wishes of the landowner who wishes to resist the entry and occupation does not (by itself) elevate it to an expropriation because it does not divest the landowner of his or her fee simple interest in the land (*Murphy Oil, supra.*).

[19] For purposes of determining the jurisdiction of the Board in section 159 of the *PNGA*, the overriding modern rule of statutory interpretation to be applied is that 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)).

[20] As indicated above, section 159 allows the Board to issue a right of entry subject to “terms and conditions” specified in the order, but the legislation does not define what those terms and conditions may be. An ordinary reading of that section would lead to the conclusion that the terms and conditions that may be imposed would be imposed on the activity that has been authorized.

[22] However, the legislative scheme for exploration, development and extraction of subsurface resources in the province is set out in both the *PNGA* and the *OGAA*. The *PNGA* provides a mechanism by which the holders of rights to subsurface resources can enter private land for an “oil and gas activity” as well as provides a dispute resolution mechanism to determine compensation payable to landowners arising from an entry, use and occupation of their lands. The *OGAA* establishes the regulatory framework for the development of the oil and gas industry in the province. It provides that a person may not carry on an “oil and gas activity” without a permit from the OGC and in compliance with the *OGAA* and its regulations. The OGC may issue a permit and may specify the oil and gas activity, and the manner of the activity, permitted to be carried out. The OGC may impose terms and conditions on that activity in the permit. In this instance, for example, the OGC imposed pipeline conditions on the permit authorizing the activity on the Owner’s Lands (Application

Determination Number 100102516 filed with the Form 1A dated August 29, 2017) that required the permit holder to not undertake directionally drilled pipeline stream crossing work without a submitted feasibility study.

[23] One of the stated purposes and objects of the OGC is to regulate oil and gas activities in British Columbia in a manner that "... ensures safe and efficient practices...." (section 4 of the *OGAA*). In the permits it issues, the OGC "(a) must specify the oil and gas activities the person is permitted to carry out, and (b) may impose any conditions on the permit that the commission considers necessary." (section 25(2)). As noted above, section 1 provides that "oil and gas activities" includes the "construction" of a pipeline. The OGC also has the ability to inspect and monitor oil and gas activities and impose consequences for non-compliance with the Act, regulations, order, or conditions in the permit (Divisions 2-4 of the *OGAA*).

[24] These provisions confirm that the intention of the legislature was to provide separate jurisdiction to Board under the *PNGA* for the authorization of access, occupation and use of private land to explore for, develop, or extract subsurface resources and for the determination of compensation for that access to private land. The *OGAA* provides jurisdiction to the OGC to regulate oil and gas activities, such as the construction of a pipeline, through the permit process and can impose terms and conditions on the manner and nature of those activities. Neither the *PNGA* nor the *OGAA* gives the Board the jurisdiction to regulate and approve an oil and gas activity, such as construction of a pipeline; that jurisdiction lies with the OGC. If a landowner is concerned about the manner of construction of a pipeline, the remedy is to pursue those concerns with the OGC as part of the permit process. The Board does not have jurisdiction to impose terms and conditions on the manner of construction of a pipeline as part of a right of entry order under section 158 and 159 of the *PNGA*. Otherwise, both the OGC and the Board would have over-lapping jurisdiction over this question which can not have been the legislature's intent.

[25] This interpretation is supported by the reading of other sections of the *PNGA* that reference the type of conditions that may be imposed on a right of entry order. For instance, section 159(3) provides that a right of entry may be "conditional on the

person seeking the right of entry receiving approval from the commission to undertake...” an oil and gas activity. Section 159(4) provides that a right of entry order must, “as a condition of the order ”, require the person seeking the right of entry to pay to the landowner an amount as rent or compensation. Section 160(1) provides that a right of entry order may, “as a condition of the order”, require the person seeking the right of entry to deposit to the board security. These provisions confirm that the terms and conditions to be imposed on a right of entry order contemplated by the *PNGA* relate to ensuring the oil and gas activity (including construction of a pipeline) is approved by the OGC and to ensuring adequate compensation to the landowner for the access is provided for. It does not contemplate the Board imposing terms and conditions on the manner or nature of construction of a pipeline or other approved oil and gas activity.

CONCLUSION

[26] Therefore, I find that the Board does not have jurisdiction to impose a term or condition to a right of entry in this matter requiring the flow line to be constructed by boring instead of trenching.

DATED: October 30, 2017

FOR THE BOARD



Simmi K. Sandhu, Vice Chair