

November 23, 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 WEST $\frac{1}{4}$ OF SECTION 34 TOWNSHIP 82 RANGE 15 WEST OF THE 6TH
MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Leucrotta Exploration Inc.

(APPLICANT)

AND:

Jedidiah John Franklin and
Amber Kay Franklin

(RESPONDENTS)

BOARD ORDER

Heard by teleconference: November 23, 2018
Appearances: Rick Williams, Barrister and Solicitor, for the Applicant
Elvin Gowman and Jed Franklin, for the Respondents

INTRODUCTION AND ISSUE

[1] The Applicant, Leucrotta Exploration Inc. (Leucrotta) has applied to the Board for a right of entry order granting it access to the Lands owned by the Respondents, Jed and Amber Franklin, for the purpose of constructing, operating and maintaining an access road to a proposed wellsite on neighbouring land. The proposed access road will use an already existing and constructed high grade road on the Lands that is the subject of an easement agreement between the Franklins and the neighbouring landowner on whose land the proposed wellsite is to be constructed. The Oil and Gas Commission (OGC) has granted a permit to Leucrotta for the proposed access road.

[2] The Respondents submit that the Board does not have jurisdiction to grant a right of entry order on land already encumbered by an easement agreement. Mr. Franklin submits that the Board does not have the jurisdiction to impose positive and personal covenants on a landowner by way of a right of entry order or to impose a liability on a landowner. He submits that he is precluded by the easement agreement from causing damage to the existing road or to the dominant tenement and that a right of entry order will have the effect of imposing liability upon him and his wife in the event Leucrotta's activities cause damage to the road or harm to other persons. He submits the Board does not have the jurisdiction to impose such a liability.

[3] The issue is whether the Board has jurisdiction to issue a right of entry order over land already encumbered by an easement agreement in favour of another landowner.

ANALYSIS

[4] The Board's jurisdiction to issue a right of entry order is found in the *Petroleum and Natural Gas Act*. Section 159 of the *Act* provides that the board or a designated mediator may make an order authorizing right of entry, subject to terms and conditions, if the board or mediator is satisfied that an order authorizing right of entry is required for a purpose described in section 142(a) to (c). The purposes described in section 142(a) to (c) are:

- 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 OGC.

[5] The Board may, therefore, issue a right of entry order if it is satisfied a right of entry order is required for an "oil and gas activity".

[6] "Oil and gas activity" is defined by the *Oil and Gas Activities Act* and includes: the exploration for and development of petroleum, natural gas or both, and the construction, use or operation of a prescribed road. As I understand it, there is no issue that the access road is an "oil and gas activity" and indeed, the OGC has issued a permit authorizing its use.

[7] The Board, therefore, has jurisdiction to issue a right of entry order for the access road if it is satisfied the right of entry order is necessary.

[8] There is nothing in the *Petroleum and Natural Gas Act* which limits the Board's jurisdiction to land that is not already encumbered. The Board or mediator, as the case may be, must only be satisfied that a right of entry order is required for a purpose set out in section 142. The Board has jurisdiction to issue a right of entry order in this case.

[9] Mr. Franklin submits the Board does not have the jurisdiction to impose a positive or personal obligation on a landowner and refers to the decision of the Supreme Court of BC in *Atco Lumber Ltd. v. Kootenay Boundary (Regional District)* 2014 BCSC 524. The *Atco* case involved expropriation of a right of way for a linear development. The Court found the statutory right of way expropriating the land in that case imposed a number of positive and personal covenants upon the landowner that were impermissible.

[10] The Board has not yet granted a right of entry order in this case, and I am not aware of the terms and conditions the mediator and parties are considering that may or may not be incorporated into a right of entry order, or whether any terms being considered would impose a positive or personal covenant against the Respondents. I make no finding as to whether *Atco* applies to a right of entry order by the Board or whether the Board is or is not permitted to include terms and conditions in a right of entry order that would impose positive or personal covenants on a landowner. The parties are still negotiating the terms of a right of entry order. If the Board ultimately issues a right of entry order that a party considers includes impermissible terms, the remedy would be to seek judicial review of the Board's order.

[11] Mr. Franklin submits the Board cannot make a right of entry order that has the effect of imposing liability on the landowner because of already existing obligations under the easement. Again, I have no knowledge of the terms being considered or whether they would in fact have the effect of imposing liability on the Franklins and encourage the parties to negotiate terms that will alleviate Mr. Franklin's concerns. In any event, the *Act* does not speak to potential liability of a landowner as a factor the Board can or should consider in granting a right of entry order. The Board has jurisdiction to grant a right of entry order if it is satisfied the order is required for an oil and gas activity. As above, if the Board grants a right of entry order that a party believes includes terms or conditions that the Board is not authorized to make, that party may seek judicial review of the Board's order.

CONCLUSION

[12] The Board has jurisdiction to issue a right of entry order for the proposed access road. The application is referred back to the mediator to consider the necessity of a right of entry order and any terms and conditions.

Dated: November 23, 2018

FOR THE BOARD

A handwritten signature in black ink, appearing to read 'Cheryl Vickers', written in a cursive style.

Cheryl Vickers, Chair