MEDIATION AND ARBITRATION BOARD
Under the *Petroleum and Natural Gas* Act
#114, 10142 - 101 Avenue
FORT ST. JOHN, BC V1J 2B3

Date: 25 October 2002

File 0017 **Board No. 0016A**

BEFORE THE BOARD

IN THE MATTER OF THE MINERAL TENURE ACT, BEING CHAPTER 292 REVISED STATUTES OF BRITISH COLUMBIA, 1996, AND THE PETROLEUM NATURAL GAS ACT BEING CHAPTER 361 REVISED STATUES OF BRITISH COLUMBIA, 1996.
(THE ACTS)

AND IN THE MATTER OF MINERAL CLAIMS KITTY # 10 AND # 12, MINERAL TENURE NOS. 323043 AND 323045, AND THE SW 1/4 OF THE SW 1/4 OF SECTION TWELVE, TOWNSHIP TWENTY-THREE, RANGE TWENTY-ONE, KDYD, PID NUMBER. 014 - 526 - 280, ROLL NUMBER 312 - 12879.040 RED LAKE RURAL
(THE LANDS)

BETWEEN:

WESTERN INDUSTRIAL CLAY PRODUCTS LTD.
714 EAST SARCEE STREET
KAMLOOPS, BC V2H 1E7
(THE APPLICANT)

AND:

CAROLYN BEPPLE
21, 2960 TRANQUILLE RD
KAMLOOPS, BC V2B 8B6
(THE RESPONDENT)

ARBITRATION ORDER

INTRODUCTION

An Arbitration in this matter was conducted in Kamloops on 12 & 13 April 2002.

The Applicant, Western Industrial Clay Products Ltd. (the "Applicant"), was represented by Stein Gudmundseth, Q.C. Caroline Bepple, (the "Respondent") appeared in person. The panel of the Board consisted of Frank Breault, William Wolfe, Julie Hindbo, Ivan Miller and Rod Strandberg. Following the arbitration, but prior to this decision, Ms. Hindbo ceased to be a member of the Mediation and Arbitration Board and, accordingly, was not involved in this Order.

This Arbitration was conducted pursuant to the directions of the Honourable Mr. Justice Brenner. In his decision dated 23 October 2001 Mr. Justice Brenner referred certain aspects of this matter to the Board for reconsideration. (See Western Industrial Clay Products Ltd. vs. Mediation and Arbitration Board, 2001 BCSC 145B, 23 November 2001).

Much of the background information regarding this Application and the proposed use of the Respondent's land is set out in detail in Board Order 0012A and Board Order 0014A. Pursuant to an Order of the Board dated 13 December 2001 these Orders were canceled, by Board Order 0012R, or varied by Board Order 0014-1A. Although these orders are now canceled, this panel considered the background information provided to the Mediation and Arbitration Board at the two arbitrations from which those decisions were made. This order, therefore, should be read in conjunction with those orders for a greater understanding of the nature of the application and the Applicant's plans for the Respondent's land.

POSITION OF THE APPLICANT

The Applicant wishes to enter the entire 40-acre parcel of the land for the purpose of developing its mine. It will remove the timber, strip and store the topsoil for reclamation purposes, remove the minerals in accordance with the requirements of the appropriate regulatory authorities, reclaim the land and return it to the Respondent.

In addition to the information previously provided, the Applicant presented evidence through Mr. Beresford, former District Mines Manager for the Kamloops region and now a consultant to the Applicant.

Mr. Beresford's evidence was that in order to provide space for the storage of overburden and product, given that the existing mine site on the adjacent property to the Respondent's is currently being reclaimed, the entire 40 acres was required to make the mine site practicably viable. His evidence was that the regulators would not allow the storage of overburden or product on reclaimed areas of the existing adjacent mine site. He further advised that the stratigraphy of the Respondent's land suggested that there was

product including diatomaceous clay and leonardite, a mineral high in humic acid, throughout the property but with the thickest layer approximately under the location of the residence and the improvements on the property.

The Applicant advised that two to three years' lead time was required to expand into the Respondent's property. The Applicant relied on an appraisal to establish what it said was the value of the property of $60,000.00, as logged, including the improvements on the property. It was the Applicant's view that, given the activities of the Respondent on the property alternatives could be found, and appropriate compensation paid, to compensate the Respondent for any disruption to her activities. Other proposals suggested by the Applicant included moving the house to the corner of the property. All of these proposals were rejected by the Respondent.

The Applicant felt that a strict interpretation of Section 20 of the *Mineral Tenure Act* would effectively preclude any mineral development on private land in the province. There could always arguably be some activity carried out by the owner of the surface rights, which would be affected or interfered with, by mining activities. This was, in the Applicant's view, clearly not the intention of the legislature. This interpretation would amount to an absurdity. If this were the correct interpretation then Section 19 would not be necessary. The legislation intended this section to have a purpose.

POSITION OF THE RESPONDENT

The Respondent was of the view that the entire property was exempt from entry pursuant to Section 20 of the *Mineral Tenure Act*. It was her view that her activities were protected by the provisions of the *Mineral Tenure Act*. No portion of the property should be allowed to the Applicant by way of right of entry, and the Application should be dismissed.

DISCUSSION

This is an unusual application. The property, although it may be used by the Applicant, remains that of the Respondent with all of the obligations on the Respondent associated with ownership but few of the rights and benefits. At some point in the future the lands will revert back to the Respondent for her own use absolutely. There is, however, no apparent or ascertainable term of occupation. This is also a situation where, as a result of years of fruitless and unsuccessful negotiations and proceedings before this Board, relations between the Applicant and the Respondent are strained.

The position of the Applicant and the Respondent are mutually exclusive. There are competing and incompatible rights to enter, control and use the surface of the Respondent's land. There is no doubt that

the proposed activities of the Applicant will have a large and significant negative impact on the Respondent's ability to use and enjoy any part of her land.

Regarding the application, the Board follows the Decision of Mr. Justice Brenner.

On the question of whether the Board has power to issue a Right of Entry Order Mr. Justice Brenner in his Decision, at paragraph 87, provided wording for an Order that the Applicant "Shall be entitled to all rights of an operator to whom the right to enter, occupy or use the land has been granted under the provisions of the *Mineral Tenure Act*."

Mr. Justice Brenner clearly indicates that the Board has the statutory duty to consider whether a right of entry, occupation or use is to be granted under the provisions of the *Mineral Tenure Act.* The Board could, properly discharging its duty, decline to issue a right of entry order.

To the extent that the Applicant is of the view that the Board's role is solely to determine compensation, and not whether a right of entry should be issued, this position is rejected.

A strict interpretation of the wording of Sections 19 & 20 of the *Mineral Tenure Act* suggests that if there were any disruption to the rights or activities of the surface owner as a result of mining operations, Section 20 of the *Mineral Tenure Act* would apply, no right of entry would be issued and no activities regarding the sub-surface would be allowed.

However, if any activity on the Respondent's land would lead to the protection of Section 20 the *Mineral Tenure* Act, Section 19 the *Mineral Tenure Act*, dealing with compensation, would be redundant and unnecessary in the legislative scheme. Generally speaking, compensation is designed to deal with the adverse impact on the rights of the surface owner by the activities of the sub-surface owner. The presence of Section 19 suggests that some impact on the activities of the Respondent, if compensable after consideration of the appropriate principles, is allowable. The Board's task is to determine whether the activities of the Respondent are so adversely impacted that the protection of Section 20 applies.

It is clear; in this case, that the Applicant's activity on the land will cause a substantial disruption to any activities the Respondent may wish to engage in. The Applicant's activities will cause a substantial disruption to the surface rights of the Respondent. This disruption will occur for an indeterminate period of time. The condition of the Respondent's land when returned by the Applicant is projected only and can not be known with any certainty. Even with the best remediation techniques, the appearance and quality of the Respondent's land will be forever changed. The activities, which can be carried out on it, will not be the same as are currently carried out and enjoyed by the Respondent.

The Board accepts that the intention of the statutory scheme is to balance the rights of the sub-surface and surface owners. Each section of the statute must have been intended by the legislature to have a purpose and to address a specific concern.

The Respondent's current activities which consist of selective logging, grazing of cattle, storage of personal items including running a deep freeze and welding in the structure on the land. The Board finds that the limited activities of the Respondent on her land are insufficient to attract the protection of Section 20 the *Mineral Tenure Act*. The Respondent's use of her property is of a relatively low level. Those activities can be carried on, albeit with some additional expense and inconvenience, in alternative locations. To the extent that there is disruption to the activities of the Respondent an appropriate award of compensation can deal with this disruption. None of the Respondent's activities are of such a unique nature that they can only be carried out because of some inherent quality associated with her land.

It is the Board's view that the entire 40 acres of the Respondent's property may be entered by the Applicant upon the Respondent complying with the terms of this Order. The Applicant must compensate the Respondent for all consequences of this entry, which will deprive the Respondent of the use and enjoyment of the surface of her land for many years.

COMPENSATION

In Board Order 0014A, the Board was of the view, which continues today, that it makes more sense for the Respondent to sell the property to the Applicant than for the Respondent to receive compensation, both for the initial entry of the land and on an annual basis and then to, at an indeterminate date in the future receive the land back in a condition which cannot realistically be known at this time. However, because this option was not accepted by either party, the Board must assess the appropriate compensation due to the Respondent from the Applicant.

In considering the appropriate compensation payable by the Applicant to the Respondents four heads of compensation are considered:

1. Compensation for the value of the property;
2. Compensation for the timber on the property;
3. Compensation for any addition expenses incurred or, alternatively, loss of profit resulting from the requirement that the Respondent obtain alternatives to replace the use being made of the land currently or the profit derived from it; and
4. Costs.

(1) The value of the Property

The Respondent is entitled to receive a payment to place her, as far as money goes, in the same position as she would have been in if her property remained available to her, to replace the current or existing uses of the property and to compensate her for any loss of profit if those uses are not carried on elsewhere.

The Board concludes that the reversionary value of the property is of only marginal value and can safely be ignored in determining the appropriate compensation payable by the Applicant to the Respondent.

The Board accepts, as its starting point, the definition of compensation set out in paragraph 52 of Mr. Justice Brenner's Decision. It is the Board's task to ensure that the compensation paid to the Respondent will allow her to obtain an equivalent or substitute property of equal value to her or, alternatively, to provide to her sufficient moneys to replace her land. This is the loss, which she is sustaining.

It is unclear, with the greatest of respect to Chief Justice Brenner, whether in determining appropriate compensation the Board is entitled to take into account intangible or non-pecuniary value to the landowner, because the focus of compensation is the value to the landowner and not to the taker, or whether the upper limit is the value of the land. Intangible or subjective factors may constitute special factors, which increase the value of the land for a specific owner. If present, the Board should recognize and take these into account when determining the value of the land to the owner of the surface. The Board is, however, uncertain in this regard because at Paragraph 58 of his decision Mr. Justice Brenner states the view that " . . . where an owner receives the full value of the Property, he has been fully compensated." It must be that the phrase "full value" in that quote refers to the value to the owner as adjusted by special considerations which increase the value to the owner, and not simply the market value or appraised value of the property. It does not appear, however, that there are any considerations, which may increase the value, which the Respondent attaches to the land.

The issue for the Board is to determine, as a fact, the amount of money that would be required for the Respondent to obtain land of equivalent value with improvements of equivalent value.

The Applicant submitted that the value of the land was set out in an appraisal report prepared by Carey J. Wale, which established a market value of $60,000.00 "as logged." This was, in the Applicant's view, the appropriate compensation. This appraisal report also contained a value by the cost approach indicating a value of $80,600.00, if 25% accrued depreciation on the value of improvements were applied to their replacement value of $48,825.00. Without application of depreciation, the value of the land and improvements was $92,825.00.

There was little evidence at the hearing of the state of the real estate market in the Kamloops area. The appraisal report indicated that there was minimal activity in comparable properties in the area. No other evidence was adduced regarding whether or what factors were then having an effect on equivalent land in the Kamloops area. The Board was left with no evidence as to whether the market value fairly reflected the actual loss sustained by the Respondent. It would be mere speculation on the part of the Board to attempt to determine whether the market value overstated, understated or reflected the actual value of the land to the Respondent.

However, if the definition of compensation provided by Mr. Justice Brenner is appropriate, then the cost approach, excluding depreciation of 25% on the improvements, should suffice to give the Respondent sufficient funds to purchase land and to construct equivalent improvements to replace, in its entirety, the loss of her land and its improvements. The effect of depreciation is excluded because it is a practical impossibility for a depreciated improvement to be constructed. An Order that the Applicant pay sufficient compensation to allow the Respondent to purchase new property and to build equivalent improvements, such as residences, corrals, fences, wells and the like, will provide a sufficient fund of money to fully compensate her for the loss of her land.

Subject to any additional costs which may be incurred by the Respondent due to a different location of the land or expenses associated with arranging alternative to the activities which she is currently carrying out on the land, which will be addressed below, providing her with equivalent land and improvements should allow her to generate equivalent income or amenities will ensure that she suffers no loss. She will be getting the equivalent for the property being taken by the Applicant.

Accordingly, the value of the Respondent's property, to her, is found to be $92,825.00. This amount will allow her to obtain an equivalently outfitted or equipped parcel of land on which she may carry on the activities, which are currently carried out on the land the use of which she will lose.

(2) Compensation for the timber on the property

At Paragraph 77 of his decision, the Honourable Chief Justice Brenner substituted an order that the Respondent be paid the actual value of the timber logged from the property, net of reasonable expenses associated with logging and transporting the logs.

This order creates a potential tension between the Respondent, who will wish to maximize the actual value of the timber, and the Applicant who wish to log the property as quickly as possible without the goal of maximizing the net return to the Respondent.

To reconcile this tension, the Board finds that the Respondent should be given the opportunity of making arrangements for the property to be logged. If the Respondent does not act in a timely fashion to make those arrangements once the Right-Of-Entry is exercised, then the Applicant will be obligated to arrange for the property to be logged.

The Board Order will set out a procedure to deal with this inherent tension.

(3) Consequential damages and the need for compensation

The Order of this Board provides that the Applicant is entitled to enter all of the Respondent's property. For the duration of the entry into the property by the Applicant, the Respondent will be excluded from using, occupying or enjoying the property.

As a direct consequence of this Order the Respondent will be put to additional expense in removing chattels and other items from the property and in taking steps to organize her affairs. She will, for example, have to find alternate pasture for her cattle, to obtain feed to replace the lost land if other pasture cannot be located and to deal with the consequential loss of the use of her property for an indeterminate period of time. The Respondent will have to remove her chattels and to take these steps immediately after this Order is issued, even if the Applicant chooses not to enter upon the property immediately. The Respondent must begin making plans and implementing them to arrange her affairs. The Respondent would be foolhardy to continue using the property until the Applicant chooses to enter it, as there may be insufficient time for the Respondent to take steps to vacate the property after receiving notice from the Applicant of its intention to enter the property.

To the extent that the making of this Order allowing the Applicant to enter onto the property, even if the Applicant does not exercise this right, puts the Respondent to expense, she is entitled to be compensated.

The Respondent is entitled to compensation for her time and for any other expenses incurred in taking the actions that she considers reasonably necessary as a consequence of the Order. Time is required to arrange for alternative pasturing areas and alternative sources of timber, which is currently harvested and used for constructing improvements at her residence.

Accordingly, having considered the disruption expenses in the first year in making and implementing these arrangements, it is the Board's view that appropriate compensation in the first year would be $6,500.00. However given the amount which the Applicant is required to pay pursuant to this order, after reviewing the evidence and appropriate principals, the Board concludes that the annual payment ordered by this Order will be proper compensation.

There remains also the issue of annual payments by the Applicant to the Respondent.

The Respondent will remain the registered owner of the property. She will, in this capacity, retain an ongoing interest in the proper management, preservation and restoration of the property. She may also incur liabilities as the registered owner of the property for the activities of the Applicant and any residual damages or liabilities arising from the Applicant's ongoing activities or the condition of the property once the Applicant ceases its activities. The Applicant's activities may influence adjoining landowners. The Respondent will be required to monitor the property and to monitor compliance with the terms of this Order as well as any directions from regulators be they provincial or regional. These are reasonable and prudent steps for the Respondent to take as a consequence of the Applicant's activities and are directly related to this order. For this she must be compensated. Additionally, the Respondent will face ongoing annual expenses, in addition to those, which she would incur if her activities were conducted on this property, such as obtaining replacement land for the animals, replacement timber and other expenses incurred on an annual basis as a result of being deprived of the use of her property. For these incremental costs, which are due directly to the entry upon the property by the Applicant, the Respondent is entitled to annual compensation.

An award of annual compensation will also ensure that if there are unforeseen developments on the Respondent's property caused by the Applicant's activities there can be periodic annual compensation reviews pursuant to the provisions of Section 12 of the *Petroleum and Natural Gas Act* to ensure that the compensation remains appropriate. On compensation review the compensation can be adjusted to meet the actual consequences of the Applicant's activities on the Respondent as they occur. In balancing the rights of the Applicant and the Respondent the Board concludes that the sum of $2,250.00, on an annual basis, will compensate the Respondent for her time and incremental expense directly related to her being deprived of the use of her property while the Applicant is occupying it.

(4) Costs

The Respondent sought compensation for out of pocket expenses totaling $1,218.00 together with compensation for the time spent at the day and one-half of hearing, preparation for that hearing, the preparation of written submissions and all other time necessarily spent in reviewing and preparing for this hearing. The Respondent also sought compensation for the costs of attendance at the hearing of the appeal of Board Order 0014A before Mr. Justice Brenner, arguing that these expenses were the result of proceedings before the Board.

The Board, in its discretion, determines that the sum of $3,000.00 inclusive of compensation for time and out of pocket expenses would adequately compensate the Respondent. The Board cannot order compensation to the Respondent for any expenses associated with the appeal of Board Order 0014A. The

Rules of Court provides a specific avenue to deal with those expenses. The Board feels that the specific provisions of the Rules of Court, as they relate to costs in the Supreme Court, override the general provisions of the *Petroleum and Natural Gas Act* and, accordingly, the Board has no jurisdiction to deal with the issue of costs in that forum.

IT IS HEREBY ORDERED THAT:

1. The Applicant is entitled to enter the entirety of the Respondent's property. This Right-of-Entry will expire 90 days from the date of this order if not exercised by the Applicant.

2. This Right-Of-Entry can only be exercised by payment by the Applicant to the Respondent of the sum of $ 92,850.00 by way of certified cheque made payable to the Respondent. Upon payment of this sum the Applicant will be entitled to all rights of an operator to whom the right to enter, occupy or use the land has been granted under the *Mineral Tenure Act*, and amendments therein, subject to this order.

3. The Applicant will provide proof of payment of the sum of $ 92,850.00 to the Respondent to this Board at its office in Fort St. John immediately upon making that payment.

4. The Respondent will have 30 days after the Right-Of-Entry is exercised to remove such chattels and improvements from the property. Thereafter, she may only attend the property as set out in this Order.

5. Following the exercise of the Right-Of-Entry by payment by the Applicant to the Respondent of the sum referred to in Paragraph 2 of this Order, the Respondent will, within 15 days of payment advise the Applicant in writing whether she wishes to arrange for the timely and efficient logging of the property in accordance with all relevant legislation and statutes.

   A. If the Respondent wishes to arrange for the logging, it must be completed within 90 days of the date on which the Respondent advises that she wishes to do so;

   B. If the Respondent does not wish to arrange for the logging of her property, or does not advise the Applicant of her intention to make these arrangements, then the Applicant will be responsible for logging the property and must forthwith provide to the Respondent all relevant details of the plan for logging.

6. The Applicant will pay to the Respondent annual compensation due on the 1st anniversary date following the date of exercise of the Right-Of-Entry pursuant to paragraph 2 of this Order onto the Respondent's property in the sum of $ 2,250.00 and payable on each anniversary date thereafter

until varied by agreement of the parties, further Board Order or the appropriate regulatory body has advised the Respondent in writing that property has been restored or reclaimed to an appropriate standard.

7. The Applicant will maintain liability insurance naming the Respondent as a loss payee in the minimum of $2,000,000.00 and provide annually, but not more than once upon request each year, proof that the insurance remains in good standing.

8. The Applicant will pay the real property taxes on the property effective the calendar year in which the right of entry order is exercised and will provide proof of payment of these taxes within 30 days.

9. The Applicant will, at its expense, fence the property and maintain the fence, and provide the Respondent with a key to any lock which is put on any gate allowing entry onto the property. The Respondent will not enter onto the property without first arranging such entry with the Applicant providing that the Respondent will be entitled to enter her property and inspect any part which she may wish to not less than four times per year.

10. The Respondent will be paid the actual value of the timber logged from the property at the time that it is logged net of reasonable logging, transportation, marketing and related costs to sell the logs in accordance with this Order. The Respondent will execute any documents reasonably necessary to log the timber including but not limited to any documents necessary to obtain a timber mark. Payment of any stumpage is the responsibility of the Applicant if the Applicant is responsible for the logging, who will indemnify and hold harmless the Respondent from any claims arising from the logging of the property.

11. The Applicant will provide the Respondent with copies of all restoration plans, will consult with the Respondent regarding the development of any restoration or rehabilitation plans for the property and provide the Respondent with written notice of any applications to change the restoration plan for the Respondent's property.

12. The Applicant will forthwith pay the Respondent the sum of $ 3,000.00 as costs of the Arbitrations and all other expenses associated with it and provide proof of payment to the Mediation and Arbitration Board within 30 days of this Order. If payment is not made within 30 days, the Respondent will receive interest on the unpaid amount of 1% per month until the amount is paid in full.

13. (1) For the purposes of providing written notice to either of the parties as required by this Order, the address for the Applicant is deemed to be:

WESTERN INDUSTRIAL CLAY PRODUCTS LTD.
714 EAST SARCEE STREET
KAMLOOPS, BC V2H 1E7

And the address for the Respondent is deemed to be:

CAROLYN BEPPLE
21, 2960 TRANQUILLE RD
KAMLOOPS, BC V2B 8B6

(2) Either party may advise the other in writing of any change of address for notices under this Order.

(3) Any notice required in writing by this Order may be sent by ordinary mail and will be deemed to have been received by the recipient five days after mailing.

14. Nothing in this Order is or operates as consent, permit or authorization that by enactment any party is required to obtain in addition to this order.

Dated at the City of Fort St. John, British Columbia this 25th day of October 2002.

MEDIATION AND ARBITRATION BOARD
UNDER THE
PETROLEUM AND NATURAL GAS ACT

Rodney J. Strandberg, Chair

Ivor Miller, Member

S. Frank Breault, Member

William Wolfe, Member