File No. 2162
Board Order No. 2162-1

June 8, 2020

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

DISTRICT LOT 2162 PEACE RIVER DISTRICT, AGRICULTURAL LEASE #344644,
DISPOSITION NO. 869411
(The "Lands")

BETWEEN:

Crew Energy Inc.

(APPLICANT)

AND:

Penalty Ranch Ltd.

(RESPONDENT)

BOARD ORDER

[1] This is an application for costs by the Respondent landowners, Penalty Ranch Ltd. (Penalty Ranch) following the dismissal of an application by Crew Energy Inc. (Crew) for a right of entry order on the basis that the Board did not have jurisdiction.

[2] The Oil and Gas Commission (OGC) granted Crew a permit to construct and operate a pipeline carrying produced water on land including Crown land leased by Penalty Ranch pursuant to an Agricultural Lease. The OGC's permit granted permission to occupy and use Crown land excluding the area within Penalty Ranch's Agricultural Lease unless right of entry was obtained through the Surface Rights Board.

[3] Crew applied to the Board under section 159 of the *Petroleum and Natural Gas Act* (PNGA) for a right of entry order for the construction and operation of the pipeline on the land leased by Penalty Ranch.

[4] The Board convened a mediation teleconference at which Penalty Ranch submitted the Board did not have jurisdiction because the proposed pipeline was not a "flow line" within the meaning of the *PNGA*. The mediator referred the issue of jurisdiction to me.

[5] While taking no position on Penalty Ranch's objection to the Board's jurisdiction, Crew advised that the proposed pipeline was to convey produced water from storage tanks within a plant site to a disposal well for injection and that it was similar to the proposed pipeline in *Arc Resources Ltd. v. Hommy*, Order 1837-1, where the Board determined it did not have jurisdiction. On the basis of that advice, I determined that the Board did not have jurisdiction with respect to Crew's application for a right of entry order.

[6] Penalty Ranch now seeks costs of $900 inclusive of $500 for time spent by Anja and Hans Kirschbaum (the owners of Penalty Ranch), and $400 for time spent by its agent, Elvin Gowman, in dealing with Crew's application and attending the mediation. Mr. Kirschbaum advises that Mr. Gowman's time is billed at $100/hour. He advises that

he and Anja Kirschbaum had to take a five hour round trip to Dawson Creek to attend the mediation call because they do not have reliable telephone service due to the remote location of their ranch and the Board had advised it would proceed without them if they failed to attend the scheduled telephone mediation. He says they also spent a couple of hours researching and meeting with Mr. Gowman.

[7] Crew submits costs should not be awarded for the following reasons:

i) Crew was compelled by the permit condition to come to the Board;
ii) Crew took no position on Penalty Ranch's application; and
iii) Penalty Ranch could have made its application at the outset and avoided the need to attend the mediation call.

[8] Crew questions whether the Board has jurisdiction to make any costs award, having determined it does not have jurisdiction on the underlying application.

[9] I find the Board does have jurisdiction to award costs even where it has determined that it does not have jurisdiction with respect to the merits of an application.

[10] Section 170 of the *PNGA* empowers the Board to order a party to an application to pay all or part of the actual costs incurred by another party "in connection with the application". The authority of the Board to award costs is not restricted in relation to the determination reached in an application, which as in this case, could be a finding that the application does not fall within the jurisdiction of the Board.

[11] In *Altakla v. Power*, 2004 BCHRT 253, the Human Rights Tribunal (HRT) determined it did not have jurisdiction with respect to the matter before it but found that it did have jurisdiction to award costs (although it chose not to do so in the circumstances). The HRT's enabling legislation granted the tribunal the power to order costs against parties who engage in improper conduct "in the course of a complaint". With respect to this authority, the HRT said: "There is no suggestion in this language

that the Tribunal's jurisdiction to order costs for such conduct is limited to those cases in which it ultimately determines the complaint to be within its jurisdiction".

[12] The HRT goes on to reason as follows:

> 19 The Tribunal has, as it must, the jurisdiction to determine if it has jurisdiction over a complaint [citation omitted]. In making that determination, it may need to seek submissions, decide an application or even hold a full hearing on the merits of the complaint: see Blake, *Administrative Law in Canada (3rd ed.)* (Markham: Butterworths, 2001) at p. 110. The Tribunal must be able to control its processes through the course of determining whether it has jurisdiction or not. …
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> 20 If the fact that the Tribunal ultimately determines that it does not have jurisdiction over a complaint meant that it cannot have jurisdiction to order costs against a participant, it would leave the Tribunal unable to control its own processes. The practical implications of such a finding would be very troubling. A participant could engage in the most egregious conduct, and the tribunal would be bereft of any power to control or punish that behaviour. In this connection it is important to note that it may not be until a full hearing on the merits of a complaint has been conducted that the Tribunal will be able to conclude that it does not have jurisdiction. In such a case, the Tribunal would be unable to order costs against any party in its final decision, regardless of their conduct. It would also mean that any preliminary decisions it had made in which it ordered costs would become retroactively void. Such results cannot have been the intention of the Legislature when it granted the authority to order costs.

[13] While the Board's authority to order costs "in connection with the application" is not limited to circumstances of improper conduct, the HRT's reasoning above as to the Board' ability to control its own process, similarly applies. The reasoning above with respect to preliminary decisions becoming retroactively void is particularly relevant to this Board which, similar to the HRT, has the authority under section 169 of the *PNGA* to order advance costs in favour of a landowner. If the Board did not retain jurisdiction over costs after finding it had no jurisdiction with respect to the merits of an application, any order made under section 169 would be void.

[14] Turning to Crew's other reasons for not awarding costs in the circumstances of this case, I disagree that Crew was compelled to apply to the Board because of the term in the OGC's permit. Crew was aware of the Board's decision in *ARC Resources Ltd v. Hommy* with respect to a similar pipeline and could have elected to pursue entry by other means.

[15] The fact that Crew took no position on the issue of jurisdiction may have limited the actual costs incurred by Penalty Ranch but having brought the application to the Board in the first place, Penalty Ranch was nevertheless required to respond.

[16] I agree that Penalty Ranch could have objected to the Board's jurisdiction at the outset and avoided the need for the mediation call. Had it done so its actual costs would have been reduced by the time spent on the call, and the Kirschbaums would have been spared a five hour return trip to Dawson Creek. Any time, however, spent researching the Board's jurisdiction and making the objection would be the same. I note that Crew did not provide any information with its application as to the purpose and function of the proposed pipeline, to enable the Board to make an initial assessment of its jurisdiction. Even if Crew felt compelled to apply to the Board because of the condition in the permit, if it had provided the information subsequently provided as to the purpose and function of the proposed pipeline, the Board could have determined it did not have jurisdiction without scheduling the mediation call, and Penalty Ranch would not have had to bring an application contesting the Board's jurisdiction.

[17] The Board's Rules provide a presumption in favour of landowners recovering their reasonable costs of the mediation process in applications brought under section 159 of the *PNGA*. This is because the process is compulsory in that a landowner cannot say no to a right of entry order if entry is required for an oil and gas activity. The mediation process includes reviewing an application and considering how to respond. It may involve research and discussions with the applicant even if there is no actual mediation.

Rights holders should expect to pay an amount towards a landowner's actual costs in connection with an application when seeking a right of entry order.

[18] In the circumstances, I find Crew Energy should pay $300 towards Mr. Gowman's time, representing 3 hours at $100/hour) and $300 towards Anja and Hans Kirschbaum's time representing 6 hours (3 hours each) at $50/hour, for a total of $600.

ORDER

[19] Crew Energy Inc. shall forthwith pay to Penalty Ranch Ltd. $600 in costs.

DATED: June 8, 2020

FOR THE BOARD

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Cheryl Vickers, Chair