

File No. 2090
Board Order No. 2090-1

November 9, 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
LOT 17 ST. JOHN INDIAN RESERVE NO 172 TOWNSHIP 85 RANGE 19 WEST OF
THE 6TH MERIDIAN PEACE RIVER DISTRICT PLAN 3986 EXCEPT PLAN 18795
(The "Lands")

BETWEEN:

Marguerite Hasiuk,
Darlene Patricia Beer and
Kimberley Delmage

(APPLICANTS)

AND:

Canadian Natural Resources Ltd.

(RESPONDENT)

BOARD ORDER

Heard: by written submissions closing August 21, 2020
Submissions from: Amy L. Diaz, Barrister and Solicitor, for the Applicants
Daron K. Naffin, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] The Applicants, Marguerite Hasiuk, Darlene Beer and Kimberly Delmage (the Owners), are the registered owners of land described as LOT 17 ST. JOHN INDIAN RESERVE NO 172 TOWNSHIP 85 RANGE 19 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT PLAN 3986 EXCEPT PLAN 18795 (the Lands). The Owners purchased the Lands in November 1998.

[2] The Respondent, Canadian Natural Resources Limited (CNRL), operates a battery site on the Lands. 5.51 acres of the Lands are used and occupied by CNRL for the battery site. CNRL's use and occupation of 3.67 acres of the Lands for the battery site is authorized by a surface lease entered November 1, 1978 between Robert James Large and Scurry Rainbow Oil Limited (Surface Lease #1). Surface Lease #1 is registered on the Title to the Lands.

[3] The Owners submit that CNRL does not have a valid right of entry for its use and occupation of the remaining 1.84 acres of the Lands used for the battery site. They have applied to the Board pursuant to section 158 of the *Petroleum and Natural Gas Act (PNGA)* for mediation and arbitration respecting access by CNRL to the 1.84 acres of the Lands and for compensation for that access.

[4] CNRL says its use and occupation of the 1.84 acres of the Lands is authorized by a surface lease also entered November 1, 1978 between Robert James Large and Scurry Rainbow Oil Limited (Surface Lease #2). Surface Lease #2 is not registered in the Land Title Office. CNRL submits that the Owners had constructive notice of CNRL's interest in the Lands and that their attempt to defeat that interest due to Surface Lease #2 not being registered against Title amounts to fraud within the meaning of section 29 of the *Land Title Act*. CNRL submits further that the Owners are estopped from claiming Surface Lease #2 is invalid because of their conduct including, among other things, accepting rental payments under the surface leases.

ISSUE

[5] The issue is whether CNRL has a valid right of entry that is binding on the Owners for the 1.84 acre portion of the Lands used for the battery site. Put another way, the issue is whether the Owners can rely on the fact that Surface Lease #2 is not registered in the Land Title Office against the Title to the Lands to defeat CNRL's interest in the 1.84 acre portion of the Lands.

FACTS

[6] The evidentiary record consists of the Affidavit of Marguerite Hasiuk made March 16, 2020 and the Affidavit of Dwayne Werle made June 16, 2020. In addition to those facts set out above in the Introduction, I determine the following facts.

[7] A battery site has been operated on the Lands including on the 1.84 acre portion since the early 1980's. Facilities on the 1.84 acre portion of the Lands include: an office or shop; a master control centre building, including a boiler and air compressor; a fresh water treatment building; a fresh water injection pump building; and a treater or inlet separator building.

[8] When the Owners purchased the Lands in 1998, the battery site was being operated on the Lands including over the 1.84 acre portion. The Owners were aware of Surface Lease #1 and I find they were aware of the existence of the battery site on the Lands. The Owners were not aware of Surface Lease #2 when they purchased the Lands. The Owners assumed Surface Lease #1 covered the whole of the battery site.

[9] On January 1, 2014 Devon Canada Ltd. (Devon), assigned Surface Lease #1 and Surface Lease #2 to CNRL. CNRL has occupied the Lands covered by the Surface Leases and operated the battery site continuously since that date.

[10] The Owners have received annual rental of \$3,450.00 for the battery site since at least 2000, initially from Anderson Explorations Ltd., then from Devon and commencing in 2014, from CNRL.

[11] In 2016, following consultation with the Farmers' Advocate Office, the Owners became aware that the 1.84 acre portion of the battery site was not included in Surface Lease #1.

[12] In 2018, the Owners and CNRL entered a Settlement Agreement resolving various disputed issues including right of entry and compensation for a pre-existing pipeline on the Lands, and rent review for the battery site and two wellsites. During the course of the settlement negotiations, the Owners questioned CNRL's rights to the 1.84 acre portion of the Lands and requested a copy of any surface lease relied on. CNRL provided the owners with a copy of Surface Lease #2 on October 23, 2018. CNRL has paid and the Owner's have accepted the increased rent for the battery site as agreed between the parties as part of the Settlement Agreement.

[13] In 2019, the Owners commenced this application to the Board submitting no valid right of entry existed for CNRL's use and occupation of 1.84 acres of the battery site.

ANALYSIS AND DECISION

[14] For the reasons that follow, I find that CNRL has a valid right of entry to the 1.84 acre portion of the battery site. I accept CNRL's submissions that the Owners cannot rely on the fact that Surface Lease #2 was not registered against Title to claim that CNRL does not have a valid right of entry. I also accept CNRL's submissions that the Owners are estopped from claiming CNRL does not have a valid right of entry to the 1.84 acre portion of the battery site.

Non-registration of Surface Lease #2

[15] The Owners submit that because Surface Lease #2 is not registered on the Title to the Lands and because they had no knowledge of Surface Lease #2 when they purchased the Lands, that CNRL's right of entry to the 1.84 acre portion of the Lands is not valid, that CNRL requires a valid right of entry and the Owners must be compensated for the entry.

[16] Section 29(2) of the *Land Title Act* provides that a registered owner of land is not affected by a notice, express implied or constructive, of an unregistered interest affecting the land except in the case of fraud in which the owner has participated in. CNRL points me to two series of cases interpreting this provision. The first concludes that fraud, in the context of section 29 of the *Land Title Act* "involves no overt act or dishonest intent but merely the attempt to rely on the statutory effect of registration to defeat a prior claim of which the party asserting such reliance had actual or constructive notice." (*Vancouver City Savings Credit Union v. Automotive Finance Corp*, 2000 BCSC 441). The second, concludes that "an element of dishonesty combined with

constructive notice” is necessary to deprive an owner of the protection of section 29. (See: *Szabo v. Janiel Enterprises Ltd.*, 2006 BCSC 502, and the cases discussed therein). The Owners submit there is no evidence they have participated in any fraud and there is no dishonesty on their part to deprive them from the ability to rely on the unregistered nature of Surface Lease #2. CNRL submits an element of dishonesty is not necessary, but even if it is, that element can be met in all of the circumstances.

[17] The first question is whether the Owners had actual or constructive notice of CNRL’s predecessor’s interest in the Lands when they purchased the Lands. The primary consideration in determining constructive notice is whether “a prudent person should have made the necessary inquiries in view of the known circumstances” (Bruce Ziff, *Principles of Property Law*, 7th ed).

[18] When the Owners purchased the Lands, they knew a battery site was being operated on the Lands. There were battery site improvements and equipment over the whole of the area used as a battery site including the 1.84 acres. The Owners had actual knowledge of Surface Lease #1 covering only 3.67 acres. Rather than assuming Surface Lease #1 covered the whole of the battery site, the presence of battery site equipment over 5.51 acres of the Lands should have caused the Owners to make inquiries as to the basis for the use of the whole site. While I accept that the Owners did not have actual notice of Surface Lease #2, their knowledge of the use of the Lands as a battery site provided constructive knowledge that the predecessors to CNRL exerted an interest in the whole of the area occupied by the battery site for that use.

[19] Applying *Vancouver City Savings Credit Union, supra*, I find that having had constructive notice that CNRL and its predecessors asserted an interest in 1.84 acres of the Lands, the Owners cannot now rely on their recent discovery that CNRL’s interest in 1.84 acres of the Lands is by way of an unregistered lease to say CNRL’s right of entry to the 1.84 acres is not valid.

[20] The Owners received rent of \$3,450 annually for the battery site. They submit that the documentation from Devon accompanying the payment describes the payment as being for “Miscellaneous” without reference to the Battery Site. The same documentation includes reference to two other annual payments both described as being for wellsites on the Lands. As

[21] I have not been provided with any evidence of other occupations and uses of the Lands by CNRL other than for the battery site and the two wells that would necessitate payment of annual rent, it is hard to imagine what the Owners thought they were receiving \$3,450 annual rent for other than for Devon's, and subsequently CNRL's, use of the Lands for the battery site.

[22] If "an element of dishonesty" is required for the Owners to defeat CNRL's unregistered interest in the lands, I accept that such an element exists in the Owner's acceptance of rent from CNRL and its predecessors over the years for the use of the Lands as a battery site and in their more recent agreement with CNRL for increased rent for the battery site and acceptance of CNRL's payments of the increased rent. In all of the circumstances, it is disingenuous for the Owners to say they did not know CNRL asserted an interest in the Lands for use as a battery site. Despite their lack of actual knowledge of the actual source CNRL's interest in 1.84 acres of the Lands, namely Surface Lease #2, they knew CNRL and its predecessors asserted an interest in the Lands for use as a battery site and accepted rent over the course of many years for the use of the Lands for that purpose.

[23] I find the Owners cannot rely on Section 29(2) of the *Land Title Act* to defeat CNRL's interest in the 1.84 acre portion of the Lands.

Estoppel

[24] It is clear from the e-mail correspondence attached to the Affidavit of Dwayne Werle that the Settlement Agreement reached between the parties in 2018 was a global settlement of all issues between the parties. Counsel for the Owners provided a settlement offer in respect of various issues including "the battery site expansion", which is the term generally used by the Owners for the 1.84 portion of the battery site. Counsel suggested using a "global approach" and made a "global offer". Following the global settlement offer, counsel noted that CNRL had "yet to produce a lease agreement or right of entry order for the battery site expansion". He wrote: "Should it not be able to produce any documentation authorizing such expansion, kindly confirm same and I will seek instructions on that front."

[25] Counsel for CNRL provided a copy of Surface Lease #2 with its counteroffer noting that its willingness to resolve matters with the Owners was "contingent upon a global resolution of all matters outlined below". The "matters outlined below" in the counter offer addressed the same

matters in the Owners original offer proposing a global settlement including the request for a copy of the surface lease authorizing entry to the 1.84 acres. The Owners did not raise any issue with Surface Lease #2 upon being provided with a copy. The parties ultimately agreed on a new surface rental in respect of the entire 5.51 acre battery site. CNRL has paid, and the Owners have accepted, the increased rental in accordance with this agreement.

[26] CNRL relied on the Owners' assurances of a global resolution in making its counteroffer contingent on that event. Both parties agreed to a revised rental for the whole of the site and that rental has been paid and accepted. The Owners did not take issue with Surface Lease #2 having been provided with a copy. I find it would be unfair in all of the circumstances to permit the Owners to now assert that Surface Lease #2 does not provide a valid right of entry.

CONCLUSION

[27] CNRL has a valid right of entry to the whole of the battery site including the 1.84 acre portion of that site covered by Surface Lease #2.

DATED: November 9, 2020

FOR THE BOARD



Cheryl Vickers, Chair