THE SURFACE RIGHTS BOARD OF MANITOBA
BOARD ORDER
Under *The Surface Rights Act*, C.C.S.M. c. S235

File No: 01-2013
Hearing: Town Municipal Office

Order No: 01-2013
Virden, Manitoba

Date issued: July 24, 2013

BEFORE:

Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant
(Owner)

Harmsworth Farms Ltd.

- AND –

Corex Resources Ltd.
Enerplus Resources Ltd.

Respondent
(Operator)

CONCERNING:

LSD's 9, 10, 14, 14A, 15 & 16 in 21-11-26WPM in the Province of Manitoba
(The "Lands")

BOARD ORDER

BACKGROUND:

The Applicant applied on September 25, 2012 under s. 21(1)(a) and s. 21(1)(b) of *The Surface Rights Act* for a hearing granting annual rental adjustments of $1,800.00 for 2010, plus interest. It was contended there had been an agreement made in August 2010 with Enerplus Resources Ltd, which covered the period prior to filing for the hearing that resulted in Variation Order No. 4/2011. The Applicants' position was that s. 25(7) of *The Surface Rights Act*, gave the Board the authority to rehear an application to correct an oversight or error.

The Respondent objected to the hearing on the basis that the application constituted an abuse of process as the Surface Rights Board was without jurisdiction to hear the matter because they contended that the Applicant was seeking compensation based on "without prejudice discussions" on sites that had already been before the Board and decided by the Board in Variation Order No. 4/2011 in January 2012.

ISSUES:

1. Can the Board amend Variation Order No. 4/2011 to require payment of compensation for a period before an application for variation was filed?
2. Was there a separate agreement relating to surface rights over which the Board has jurisdiction?

APPEARANCES:

For the Applicant:
Counsel: Glen Harasymchuk of McNeill, Harasymchuk, McConnell

Witnesses:
- Wallace Gabrielle, "Sworn", Landowner
- Kevin Gabrielle, "Sworn", Harmsworth Farms Ltd.
- Scott Andrew, "Sworn", Andrew Management Ltd.

For the Respondent:
Counsel: David E Swayze of Meighen Haddad LLP

Witnesses:
- David W Chorney, "Sworn", Enerplus Resources Ltd.
- Curtis Dobbyn, "Sworn", Landman, Mammoth Land Services Ltd.

EXHIBITS:

List of Exhibits:

#1	Book of Applicant's Documents
#2	Book of Respondent's Documents
#3	Estoppel Document filed by the Applicant
#4	Submission of the Respondent to the Surface Rights Board re: Jurisdiction

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on the 28th day of May 2013 and reviewing the submissions into evidence and final arguments; decision being reserved until today's date the Board orders that the application is dismissed.

REASONS FOR DECISION

The Respondent argued that the Board is without jurisdiction and this application should be dismissed based on written submissions. The Board concluded that it would be impossible to make a determination of whether it has jurisdiction over the application made pursuant to s. 21(1) of *The Surface Rights Act* without first hearing the evidence. Section 25(1)(b) of *The Surface Rights Act* of Manitoba indicates an application can be made where there is a dispute over the "interpretation of an agreement", and the Applicant alleged he had an agreement with rights and entitlements, so the Board concluded it was necessary to hear the submissions to determine what rights or entitlements the Applicant thought he had.

From the evidence, it is apparent that in June of 2010, the parties were reviewing the rents payable for the Respondent's surface rights to the Lands and negotiating an increased rent. The Applicant says that an email, dated August 11,2010 from the Respondent, evidences an agreement that the Respondents would pay any new rental amounts (whether negotiated or ordered by the Board) backdated to the 2010 anniversary dates.

The negotiations were not successful and on June 27, 2011, the Applicants filed the application that lead to Variation Order No. 4/2011.

The Applicant suggests that not ordering compensation back to the anniversary dates was an error or oversight within the meaning of those words in section 25(7) of the Act. The Applicant says that the Board can rehear the matter and revise the order under that section. The Board does not accept this position. There is no evidence of any error or oversight. Further, section 33(1) of the Act specifically states that a variation order takes effect on the date the application is filed. The Board does not have jurisdiction to specify some other date.

The question then becomes whether the parties entered into some other separate agreement for compensation that covered the period in question and over which the Board has jurisdiction. Based on the evidence the Board finds that the reference in the email dated August 11, 2010 to compensation being dated from the 2010 anniversary dates was part of an offer from the Respondent to the Applicant that was not accepted. It is not an agreement and in fact appears to be part of without prejudice negotiations that ultimately were not successful.

Section 26(3) of *The Surface Rights Act* gives the Board discretion to the costs of and incidental to any proceedings of the Board.

The Board makes no award for costs.

Decision delivered this 24th day of July 2013

M. D. Hodgson, Presiding Member