

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

Hearing:

Town Municipal Office
Virden, Manitoba
April 15, 2014

Order No: 04-2014

File No. 03 -2014
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Date issued: May 8, 2014

BEFORE: Clare Moster, Acting Presiding Member
Claude Tolton, Board Member
Russell Newton, Board Member

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant
(Landowner)

G. Nicholson Ltd.

- AND -

Respondent
(Operator)

Penn West Petroleum Ltd.

Occupant

Gary Nicholson

CONCERNING:

NE1/4 13-7-28 WPM in the Province of Manitoba (the "Lands").

PURPOSE OF HEARING:

To hear and receive evidence regarding an application dated March 7, 2014 (Exhibit #1, the "Application") under Subsection 34(1) of *The Surface Rights Act* of Manitoba ("the Act") submitted by the Applicant for termination of Right of Entry Order No. 22-2013 (the "Order") granted to the Respondent on September 25, 2013 for an oil pipeline.

TERMINATION OF RIGHT OF ENTRY ORDER FOR A PIPELINE

BACKGROUND:

Issuance of the Order to the Operator followed a hearing (the "ROE hearing") held in Virden on June 26 and July 23, 2013. The ROE hearing pertained to right of entry applications by the Operator regarding 37 parcels of land involving 27 separate landowners. The Order was one of 30 right of entry orders issued by the Board following the ROE hearing. The Order granted right of entry subject to terms and conditions, and required the Operator to pay interim compensation within 60 days to the Landowner in the amount of \$1,000.00 for each quarter section of land affected by the Order. The 30 Orders issued had similar conditions, including the "interim compensation" requirement.

At the ROE hearing, the landowners referred to clause (e) of subsection 25(4) of the Act and questioned the Operator as to whether the proposed pipeline was actually going to proceed, and whether the applied for right of entry were rights which the Operator reasonably proposed to utilize within the six month period which would follow the issuance date of any order granted. The Operator stated at the ROE hearing that it was their intent to commence construction of the proposed crude oil pipeline following issuance of the requested right of entry orders, and subject to weather conditions that could affect construction operations.

The Application pertains to two (2) separate Board Orders covering two parcels of land owned by different landowners, namely:

- Board Order No. 22-2013 (NE1/4 13-7-28WPM) G. Nicholson Ltd. landowner (Garry Walter Nicholson - occupant)
- Board Order No. 29-2013 (SW1/4 18-7-27WPM) Garry Walter Nicholson landowner

This order pertains to Board Order No. 22-2013.

In its Application, the Applicant also requested a hearing be held in accordance with Subsection 34 (2) of the Act and that "the Board should re-visit its decision as permitted in Section 25(7) and Section 34 at a hearing on this matter."

Two additional landowners also filed applications requesting the Board issue termination orders regarding right of entry Orders issued by the Board for the same proposed pipeline and heard at the ROE hearing.

These applications pertained to:

- Board Order No. 15-2013 (NW1/4 12-8-28WPM) from Glendon and Linda Campbell
- Board Order No. 35-2013 (SW1/4 12-8-28WPM) from Rhonda Lee Russell

On March 14, 2014, the Board sent Notice of Hearings to each of the affected parties notifying them as to their scheduled hearing times at a hearing scheduled for April 15, 2014 (the "Hearing") to be held at the Town Municipal Office in Virden MB.

By letter to the Board dated March 28, 2014, the Respondent informed the Board that it consented to the Board issuing an order terminating the Order provided that "the sole stipulation in such order is that it is without prejudice to the operator's right to re-apply for a Right of Entry Order". The letter also requested confirmation from the Board that the order would be issued without the necessity of conducting a hearing as provided for under subsection 34(4) of the Act. This letter was copied to the Applicant.

The Applicant, in its email to the Board dated April 1, 2014 (Exhibit #3) stated that:

- it was not opposed to the requested termination order having a "stipulation that Penn West has the right to re-apply for right of entry."
- the requested termination order require Penn West "to pay all legal fees, past and future regarding the Right of Entry applications to my land."
- the requested termination order require that "Penn West requests the immediate removal of the caveats from the titles of my property at Penn West's expense."
- it would hope the Board "urges Penn West to re-enter into negotiations for compensation ---".

By email dated April 10, 2014 (Exhibit #4), the Respondent responded to Exhibit #3 stating that the Board had already ruled on costs related to the ROE hearing in the Order which stated "The Board makes no award for costs" and that the Board "cannot now revisit the issue on your application for a termination order." The Respondent further stated that "The Board cannot make an order to discharge a caveat."

As both parties disagreed on terms or conditions that would be included in a termination order, the Board decided that the scheduled Hearing would proceed.

At the "Hearing", the Respondent provided an overview as to what had occurred within the company over the last year, and how it had affected the Operator's plans regarding the planned pipeline. The Respondent stated that it had no plans to construct the pipeline and was unaware of any third party plans to take over the project. They stated they had made the \$1,000.00 per quarter section "interim compensation" payments ordered under the 30 Right of Entry Orders on or about October 15, 2013. The Respondent also stated that earlier this year it had initiated negotiations with some of the landowners affected by the 30 ROE Orders, and that "final compensation" agreements had been concluded with 3 landowners involving 11 quarter sections.

ISSUES:

1. Should a termination order be made, and if so, what, if any, terms and conditions should be in the order?
2. Should costs be awarded?

APPEARANCES:

APPLICANT: Gary Nicholson (sworn)

RESPONDENT: Murray Douglas (Kanuka Thuringer LLP) - counsel
Keith Grainger - Surface Landman for Penn West Petroleum Ltd. (sworn)

EXHIBITS:

- Exhibit #1 – Letter of application dated March 7, 2014 from Gary Nicholson requesting termination of Board Order No. 22-2013 pertaining to NE1/4 13-7-28 WPM as per Subsection 34(1) of the Act.
- Exhibit #2 – Letter dated March 28, 2014 from Murray Douglas indicating Respondent's "conditional" consent to Board issuing requested termination order, without the necessity of conducting a hearing.
- Exhibit #3 – Email dated April 1, 2014 from the Applicant to the Board as described above.

Exhibit #4 - Letter dated April 10, 2014 from Respondent to Applicant stating why the Respondent was opposed to the legal costs and caveat removal stipulations requested by the Applicant.

DECISION:

Upon hearing the evidence and the submissions of the parties; decision being reserved until today's date:

It is the Order of This Board That:

1. **Board Order No. 22-2013 is hereby terminated and the Operator is ordered to take action necessary to have the caveat filed against the Lands pertaining to the Order removed within 60 days of the issuance date of this order.**
2. **If the Applicant determines that the expenses it has incurred related to its participation in the proceedings related to this Hearing warrant consideration for payment, it may prepare a request for costs, including how the amount requested has been determined, and provide a copy of the request to the Applicant and to the Board within 30 days of the issuance of this order.**

Within 30 days of receipt of the requested costs, the Respondent shall either pay the requested costs or submit a request to the Board to determine the costs. Such request should be accompanied by supporting information.

On receipt of a request from the Respondent, the Board, using the supporting information accompanying each request and its discretion as provided for under Section 26 of the Act, will determine and order any costs to be paid.

REASONS FOR DECISION:

At commencement of the Hearing, all parties confirmed that they were satisfied that all requirements under the Act regarding the Application and setting of the Hearing had been met. As described under "Background", the parties were also in agreement with the issuance of a termination order by the Board.

Had the parties been in agreement as to what, if any, stipulations or terms and conditions should be included in the order, there would have been no need to hold a hearing. However, as there were contentious issues, the Board decided that a hearing was appropriate to allow each party the opportunity to present their position and ask questions of the other party.

1. **Should a termination order be made, and if so, what, if any, terms and conditions should be in the order?**

As previously stated, the Respondent confirmed that it had not commenced to exercise the right of entry granted by the Order, and, at this time, had no plans to construct the planned pipeline, nor was there any known plans to involve a third party in the construction of the pipeline.

The Respondent has consented to the issuance of a termination order.

Therefore, the Board has decided to terminate the Order.

Regarding what, if any, terms or conditions should be in a termination order, the Board considered the following requests:

- (i) The Applicant, in its Application (Exhibit #3) requested the Board include in the termination order a provision that "Penn West requests the immediate removal of the caveats from the titles of my property at Penn West's expense."

The references to "caveat" made by both the Applicant and the Respondent would suggest to the Board that the Lands are registered by way of a Certificate of Title under *The Real Property Act*. Otherwise the Operator would have registered a certified copy of the Order under *The Registry Act*.

The Respondent in its letter dated April 10, 2014 (Exhibit #4) referenced Subsection 64 of the Act and stated "The Board cannot make an order to discharge a caveat." The Board is of the opinion that nothing in the Act or in *The Real Property Act* prevents the Board from ordering an Operator to take action to remove a caveat that pertains to an order terminated by the Board.

Should an operator not take timely action to have such a caveat removed, *The Real Property Act* also provides a means whereby the affected landowner can request the "registrar" (under *The Real Property Act*) to have the caveat removed by providing the termination order as evidence that the order to which the caveat relates has been terminated by the issuing authority (the Board).

This does not conflict with Subsection 64(1) of the Act, as that Subsection pertains to an interest in land registered under *The Registry Act*.

During the hearing, the Operator when asked if it would voluntarily agree and commit to remove the caveat it had filed against the title to the Lands pertaining to the Order, agreed and committed to do so.

Notwithstanding the Operator's commitment to voluntarily remove its caveat, thereby satisfying the Applicant's request, the Board considers it prudent to order the Operator to take the action necessary to have the caveat removed in a timely manner, with the deadline being within 60 days of the issuance of this termination order.

- (ii) The Respondent's request that "the sole stipulation in such order is that it is without prejudice to the operator's right to re-apply for a Right of Entry Order" is considered unnecessary by the Board. There is nothing precluding the Operator from re-applying for a right of entry order at a future date should the situation become necessary, and the Operator continues to have a valid "construction permit" issued under *The Oil and Gas Act*. The Respondent did acknowledge this during the hearing, and indicated the reason it had requested the inclusion of the stipulation in the termination order was to ensure that the Landowner was aware that this situation could occur.

Therefore, the requested stipulation is not included in this order.

2. Should costs be awarded?

The Applicant, in its Application (Exhibit #3) requested the Board include a stipulation in the termination order that orders Penn West "to pay all legal fees, past and future regarding the Right of Entry applications to my land." No evidence was filed to support this request.

Section 26 of the Act states in part as follows:

Costs of hearing

26(2) *The board may award the costs of and incidental to participation in any of its proceedings, including awards in advance of proceedings where appropriate, to persons*

- (a) who effectively represent an interest which contributed to or could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account the need for representation of a fair balance of interests;*
- (b) who represent an economic interest which is small when applied to individual persons in comparison to the costs of effective participation in the proceeding, or who do not have sufficient resources available to participate effectively in the proceeding without undue curtailment of that person's other activities in the absence of a cost award; or*
- (c) who are permitted to participate in the board's proceedings by law, board practice or the exercise of the board's discretion.*

The Respondent, in its letter to the Applicant dated April 10, 2014, stated that in respect to legal costs related to the ROE hearing proceedings that "the Board ruled at p. 7 of the Right of Entry Order: The Board makes no award for costs." The position of the Respondent was that the Board having already ruled on "costs" for the ROE hearing, the Board cannot revisit that issue under the present application for a termination order. The Respondent also stated that "an award for costs would be inconsistent with s. 26(5) of The Surface Rights Act." and that "The operator has also made payment of \$1,000.00 interim compensation to you through your solicitor on October 15, 2013."

The Board does not share the view of the Respondent that "an award for costs would be inconsistent with Subsection 26(5)" of the Act, which relates to compensation. The Board considers that Subsection 26(2) can apply in the current proceeding, as this is not a proceeding pertaining to "compensation".

In regard to the Applicant's request for the Board to re-visit the Order as provided in Subsection 25(7) of the Act, the Board is of the opinion that there was no oversight or error in its making of the Order, and therefore the Order stands.

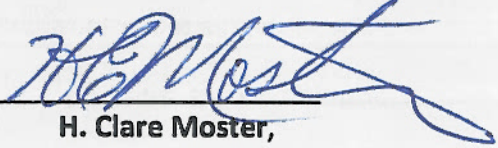
The Applicant has filed no expense information related to the current proceedings.

The Board is of the opinion that should the Applicant have expenses resulting from its participation in the current proceedings, the Board will be prepared to consider the awarding of costs. The Board would prefer that the Parties come to an agreement on costs without the need for further involvement of the Board.

However, should the Parties not be able to come to agreement, then the Board is prepared to consider written submissions from either or both Parties, supported by evidence, where possible.

In either case, the matter of costs should be resolved in a timely manner, and within 60 days of the issuance of this order is considered to be a reasonable timeframe.

Decision delivered this 8th day of May, 2014.


H. Clare Moster,
Acting Presiding Member