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Can An Oil and Gas Operator Carry On Bitcoin Operations Under The Terms of a Surface Lease?

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Decisions Commented On: *Persist Oil and Gas Inc v Flowers*, 2023 ABLPRT 236 (CanLII) (the ROE Decision), *Flowers v Persist Oil and Gas Inc*., 2024 ABLPRT 271 (CanLII) (the Compensation Decision), and *Flowers v Persist Oil and Gas Inc.*, 2025 ABKB 142 (CanLII) (the KB Decision)

Bitcoin operators have an incentive to co-locate with natural gas production sites that offer the opportunity to self-generate electricity to power the bitcoin operations without needing to pay interconnection charges. Just bring some portable generators onto the site, add the necessary computing capacity and let it rip! While other approvals will usually be required, some bitcoin operators have played fast and loose until brought into line through the enforcement actions of the Alberta Utilities Commission (AUC). I wrote about one example of this a few years ago in "Off-Grid Energy for Bitcoin Mines in Alberta: A Problematic Legal Regime" (2021).

The three related decisions that are the subject of this post deal with a different issue, that being the question of whether a surface lease (and in this case an expired surface lease) affords the putative bitcoin operator adequate proprietary authority to carry on bitcoin operations within the boundaries of the surface lease. The Court of King's Bench (KB) answered "no", but I begin with some discussion of the facts before turning to the two decisions of the Land and Property Rights Tribunal ((LPRT) (formerly known as the Surface Rights Board), the first being a right of entry (ROE) order and the second a compensation order. These two decisions provide the necessary background and context.

The Facts

Persist's predecessor in title acquired a surface lease for oil and gas operations on the lands in question from the then owner in November 1999. The initial term of the lease was 10 years, to November 12, 2009, with one 10 year renewal ending on November 12, 2019. By then Flower was the owner of the lands and the assignee of the lessor's interest in the lease. The lease allowed the leased premises to be put to "any and all purposes and uses as may be necessary for the exploration, development and production of oil, gas, related hydrocarbons or substances produced in association therewith, including the right to lay a pipeline or pipelines, construct and operate a sweet natural gas compressor facility, remediation and reclamation." (KB Decision at para 8) The annual compensation payable under the lease was $12,150. Attempts to negotiate a renewal of the lease were unsuccessful but Persist continued to make an annual payment to Flowers and Flowers deposited the payments for 2019, 2020, and the 2021. After that the situation was unclear.

In April 2021 Persist began to use the leased premises for mining Bitcoin, deploying two 1 megawatt gas generators, computers, and other equipment on the lands and using natural gas available from a compressor on the leased lands. Notwithstanding the objections of Flowers, Persist brought three more 1 MW generators on to the lands in September 2021. Persist used the mining operation intermittently when natural gas prices were low. Flowers commenced a KB action against Persist in September 2022 seeking, amongst other things, a permanent injunction enjoining Persist from using the leased property for bitcoin mining purposes.

The Right of Entry Order Decision

In light of the expiration of the surface lease, Flower's continued objections, and Flower's KB action, Persist ultimately applied for a right of entry order (ROE Order) from the LPRT on December 20, 2022. The LPRT's responsibilities include the administration of Alberta's *Surface Rights Act*, RSA 2000, c S-27 (*SRA*). Section 12 of the *SRA* offers an oil and gas operator two options for obtaining the necessary surface rights to carry out mining or drilling operations or activities associated with such operations. The first option is the consent of the owner and occupant (ordinarily evidenced by way of a surface lease). The second option is a so-called ROE Order granted by the LPRT. Section 12 reads as follows:

> No operator has a right of entry in respect of the surface of any land
>
> (a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,
> (b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,
> (c) for or incidental to the construction, operation or removal of a pipeline,
> (d) for or incidental to the construction, operation or removal of a power transmission line, or
> (e) for or incidental to the construction, operation or removal of a telephone line,
>
> until the operator has obtained the consent of the owner and the occupant of the surface of the land or has become entitled to right of entry by reason of an order of the Tribunal pursuant to this Act.

"Operator" is defined in section 1 to mean, inter alia, "the person or unincorporated group of persons having the right to a mineral or the right to work it, or the agent of such a person or group of persons".

In this case, Persist had relied on both means of avoiding the prohibition contained in the opening language of s 12: a surface lease for the first twenty years and now an ROE Order. Flower objected to Persist's application for an ROE Order on the basis of the bitcoin mining operations, but the LPRT ruled that it had no option but to grant the ROE Order once it satisfied itself that Persist held a facility licence granted by the Alberta Energy Regulator (AER) for the compressor station on the lands. That is consistent with earlier authorities including *Togstad v Alberta (Surface Rights*

Board), 2014 ABQB 485 (CanLII) (esp at para 14), 2015 ABCA 192 (CanLII) (see ABlawg comment here), notwithstanding the discretionary language of s 15(4) of the *SRA*.

The LPRT's Compensation Decision

Once the LPRT has granted an ROE, s 23 of the *SRA* requires the tribunal to "hold proceedings to determine the amount of compensation payable and the persons to whom it is payable." In this case the LPRT decided to combine the s 23 proceeding with a further application brought by Flowers under s 27 of the *SRA*. The basic thrust of s 27 is to allow either an operator or the landowner to apply to the tribunal to have it re-establish the terms of compensation, where a period of time has passed since the compensation was first established (whether by way of a surface lease or an ROE Order) and where the parties cannot agree on terms.

The premise of Flowers' s 27 application was evidently that while the original lease and its ten year renewal had come to an end in accordance with its terms in 2019, the lease still had some statutory vitality. This argument is based on s 144 of Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*). Section 144 is one of a number of sections dealing with the duty to reclaim lands that have been the subject of industrial activity and stipulates as follows:

> 144(1) Notwithstanding anything in any other Act or any surface lease or right of entry order,
> (a) no surrender of a surface lease is effective or binding on any person, and
> (b) no expropriation board shall order the termination of a right of entry order
> insofar as the surrender or termination relates to any interest of the registered owner, until a reclamation certificate has been issued in respect of the specified land affected by the surrender or termination.

Section 134 of *EPEA* defines "surrender" in compendious terms to mean "a surrender, relinquishment, quit claim, release, notice, agreement or other instrument by which a surface lease is discharged or otherwise terminated as to the whole or part of the land affected by the surface lease". Hence the argument is that since there was no reclamation certificate for the lands, the surface lease could not have terminated and must still be in force as between the parties and capable of supporting an application under s 27 of the *SRA*. I will refer to this as the constructive lease.

The tribunal essentially accepted that line of argument and confirmed that it could use s 27 to set the rate of compensation for the period between the contractual expiration of the lease in November 2019 (the constructive lease) until the tribunal granted the right of entry order as of April 26, 2023 (as above). From that date following, the tribunal would determine compensation based on its duty under s 23 and the guidance offered by s 26 of the *SRA*. It would seem to follow from this that the tribunal was of the view that Persist was in possession of the site under the terms of the contractual and constructive lease until April 25, 2023, and thereafter under the terms of the ROE Order and the rights associated with such an order under the *SRA*. This was enough to resolve the compensation issues, and the details of those assessments don't concern us here. Both the ROE panel of the tribunal and the compensation panel stressed that they would not deal with the question of whether Persist did or did not have the right to use the site for bitcoin mining purposes. The

compensation panel put the point this way: "The Bitcoin mining dispute is the subject of a concurrent Court of King's Bench application and is not addressed in this decision." (Compensation Decision, at para 4)

The KB Decision

The KB proceedings had been adjourned pending the results of the LPRT matters and did not come on for a hearing until February 12, 2025 (decision rendered March 10). Based on the pleadings Justice Christopher Rickards defined the issues as follows:

> a) Did the Lease expire on November 12, 2019?
> b) Is the mining operation a permitted use under the Lease?
> c) Does Persist have the requisite approvals for the mining operation on the Lands?
> d) Is Persist trespassing on the Lands?
> e) Does the mining operation create a nuisance on the Lands?
> f) Should a permanent injunction be granted in this case?
> g) Is Flowers entitled to disgorgement from the mining operation?

Did the Surface Lease Expire?

Justice Rickards followed the LPRT in concluding that the lease could not have expired in November 2019 because of the prescriptive terms of s 144 of *EPEA*. However, he seems to be of the view that this continues to be the case today. That is to say, in his view, the ROE Order did not replace the lease as the source of Persist's authority to be on the lands. Instead, in his view, the ROE merely "supplemented" "Persist's right to continue in possession of the leased premises …." (at para 29). This conclusion may be understandable in light of the language of s 144 of *EPEA*. But given that the *SRA* seems to have a binary view of the world in which an operator can be in possession either on the basis of consent (a contractual lease plus the constructive lease from 2019 – 2023) or an ROE Order, perhaps the better view is that the ROE Order replaces the lease (contractual or constructive) as the source of authority when tribunal grants the ROE Order. This is still consistent with the overall purposes of s 144 of *EPEA* since the operator retains its obligation to the surface owner under either instrument.

Is the Mining Operation a Permitted Use Under the Lease?

I have quoted the "use" part of the granting clause of the lease above and Justice Rickards wasted little ink in concluding that these uses did not include bitcoin mining operation:

> … the plain and ordinary, literal meaning of the permissible use provisions in the Lease is that it would not include a Bitcoin mining operation. A Bitcoin mining operation is not in the same category or genus as an operation producing oil, gas, related hydrocarbons or substances produced in association therewith. (KB Decision at para 40)

Persist was therefore in breach of the terms of the lease (KB Decision at para 42).

Given Justice Rickard's conclusion that Persist was in occupation throughout the relevant time under the terms of the lease, and that the ROE was simply a supplementary support of its entitlement, Justice Rickard's did not have to consider what the position would be if the relationship between the parties was governed entirely by the ROE. But if he had, my view is that the same conclusion would follow. The purpose of an ROE under the *SRA* is to allow an operator to access the surface for the purposes referenced in ss 12 – 13.2 of the *SRA* (see also the *SRA*'s definition of a surface lease at s 1(o): "a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation.")

None of those listed uses come even close to allowing an operator to use the lands subject to an ROE Order for a commercial business not directly related to one of the specific purposes of the Act. As Justice Rickard states with respect to the lease: "A Bitcoin mining operation no more falls into the category or genus of an operation producing oil, gas, related hydrocarbons or substances produced in association therewith than a cannabis growing operation would." (KB Decision at para 41) This must be an equally sound response to any argument that use of produced gas to generate electricity for an on-site bitcoin operation falls within the purpose of a ROE Order under the *SRA*.

Requisite Approvals?

The question of whether Persist had all necessary regulatory approvals for its bitcoin operation might be important for any potential enforcement action by a relevant regulator (e.g. the AUC or the local/municipal government – in this case Rocky View County) but it also had potential relevance for the lessor/lessee relationship insofar as the lease seems to have contained a fairly standard provision requiring the lessee to abide by all applicable acts and regulations (KB Decision at para 46). In the end, Justice Rickard seems to have ruled that Flowers had been unable to establish its case on this point (ibid). That said Justice Rickard did acknowledge that were there to be a problem with the local/municipal government, Flowers would be at the pointed end of any enforcement action (ibid) – and this seems to have influenced the Court's approach to the injunction issue (see below and KB Decision at para 68.)

I also note that the records of the decision-makers differ on the question of regulatory compliance. For example, the LRPT's compensation decision indicates that "On April 24, 2023, the Alberta Utilities Commission ("AUC") granted approval to the Operator to construct and operate a 2.295 megawatt natural gas-fired power plant to generate electricity." (Compensation Decision at para 21) By contrast, the KB Decision references evidence from cross examination on an affidavit (January 25, 2023) to the effect that "Persist has not received any regulatory permits for the Bitcoin mining operation from the Alberta Utilities Commission or LPRT or anyone else." (KB Decision at para 43). These statements may be reconciled by virtue of the chronology, but they do suggest that Persist took a somewhat cavalier approach to the issue of regulatory compliance.

Trespass?

The trespass issue is, I think, surprisingly easy. A person who enters lawfully is not a trespasser. Such a person may be an overholding tenant, or such a person may have engaged in a non-compliant use, but neither renders the person a trespasser. I agree with Justice Rickards:

> Persist brought the mining operation onto the leased premises without the legal right to do so but that is properly characterized as a breach of the Lease and not also as a trespass as the concept of trespass does not apply where someone is bringing something onto lands which they are in legal possession of. (KB Decision at para 53)

Nuisance?

One can imagine situations in which a lessor can sue a lessee for nuisance, but if there is privity of estate between the parties (as there was here) why not simply sue (as Flowers did) on the limited use covenant? In any case, any nuisance claim that Flowers might have had seems to have failed on evidentiary grounds. (KB Decision at paras 54 – 62.)

An Injunction?

Given that Persist was in breach, the next question for the Court was whether Flowers' entitlement was a liability entitlement or a property entitlement: see Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85:6 Harv L Rev 1089. In other words, should Flowers be able to shut down the non-conforming bitcoin operation (a property entitlement) or should he have to rest content with damages (a liability entitlement)? In this case Justice Rickards favoured the property entitlement.

> Persist's concern that without the mining operation it might not be able to produce as much natural gas as it would with the mining operation, and might not make as much profit, is not a concern which can allow it to breach the Lease. If it cannot negotiate a solution with Flowers which will allow it to continue operating the mining operation it must stop doing so. (KB Decision at para 69).

Disgorgement?

The usual measure of damages in a case such as this is "negotiating damages", which Justice Rickards interpreted as requiring Persist to "make some reasonable recompense to Flowers for breaching the Lease by bringing the mining operation and related equipment onto the leased premises despite it not being a permitted use under the Lease and Flowers' explicit request that it be removed." (KB Decision at para 77) Disgorgement is a remedy, sometimes granted, which would require Persist to disgorge the profits that accrued to it (with or without a deduction for expenses – mild or harsh rule) as a result of its breach of the lease. Justice Rickards considered it to be an exceptional remedy that was "not appropriate in this case." (KB Decision at para 74) For discussion of these ideas in the somewhat analogous context of production on a dead oil and gas lease see: Nigel Bankes, "Termination of an Oil and Gas Lease, Covenants as to Title, and Assessment of Damages for Wrongful Severance of Natural Resources: A Comment on *Williston Wildcatters*" (2005) 68:1 Sask L Rev 23.

Justice Rickards invited the parties to reach agreement on damages failing which the parties would have to proceed to trial on this point at which time the Court might "consider evidence of the fees

demanded and paid between willing parties with respect to lands being used for mining or other operations similar to Persist's." (KB Decision at para 78)

Conclusion

These decisions illustrate the proposition that new technologies throw up new legal questions. These questions may include both questions of private law (permitted uses under a lease) and public law (the necessary regulatory approvals and compliance with land use plans) as well as the interaction between the two (the interaction between private lease law and ROE Orders). The decisions also illustrate that the brave new world of bitcoin mining may count among its those who may be tempted to cut corners, act first and seek permission or absolution later. But perhaps there is nothing unusual about this. The conventional oil and gas business has its own share of operators who default on surface lease obligations (see *SRA*, s 36) or those who strip assets before turning over the obligations associated with those assets to the orphan fund. And in some cases, as here, the same people may be involved.

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