Court of King's Bench of Alberta

Citation: Flowers v Persist Oil and Gas Inc., 2025 ABKB 142

Date: 20250310
Docket: 2101 14998
Registry: Calgary

Between:

Roy Flowers

Plaintiff

- and -

Persist Oil and Gas Inc.

Defendant

Reasons for Judgment
of the
Honourable Justice C.A. Rickards

Background

[1] This matter came before me on February 12, 2025 as a Special Chambers application in which the Applicant Roy Flowers ("Flowers") was seeking summary judgement with respect to his claim for a permanent injunction and other relief against the Respondent Persist Oil and Gas Inc. ("Persist") and in which Persist was seeking a summary dismissal of Flowers' claim against it.

[2] Flowers' application was filed on September 8, 2022 and was originally scheduled to be heard in morning Chambers on October 3, 2022. It was adjourned to a Special Chambers hearing

and was to be heard on November 2, 2023 but on November 1, 2023, on the application of Persist, Justice Poelman of this Court adjourned Flowers' application and Persist's cross application for summary dismissal sine die pending the decision of the Alberta Land and Property Rights Tribunal ("LPRT") in LPRT File No. SL2022.0350 and LPRT File No. RE2022 .022 as it was concluded that the LPRT in making its decision would make factual determinations which would be relevant and material to the issues before this Court on the summary judgement and summary dismissal applications.

[3] The Special Chambers hearing was re-scheduled for February 12, 2025 but as late as January 17, 2025 Persist filed an affidavit in this action attaching the LPRT decision as an exhibit.

[4] Flowers attempted to file an Affidavit even later which dealt with issues which had not been brought up before and had also sought to file a Bench Brief with respect to these issues days before the applications were to be heard. He was not allowed by the court clerks to file either before the hearing on February 12, 2025 and at the commencement of the hearing he sought leave of the Court to file both the Affidavit and the Bench Brief. He had provided unfiled copies of both to the Court and to Persist's counsel days before the hearing.

[5] In seeking leave of the Court to file both the Affidavit and the Bench Brief Flowers 'counsel indicated that he would not object to the matter being adjourned again to allow Persist to respond to the matters in the Affidavit and the Bench Brief but he was ready to proceed with the application if Persist did not require an adjournment and Persist's counsel indicated that she had no objection to the Affidavit and the Bench Brief being filed and that she was ready to proceed and did not need an adjournment as she did not think there were any matters in the Affidavit and the Bench Brief which should affect the decision on the applications before the Court. Flowers was granted leave to file both the Affidavit and the Bench Brief and the applications proceeded.

Facts

[6] Flowers has been the fee simple owner of the land legally described in paragraph 3 of his Amended Statement of Claim ("the Lands") since February 2012.

[7] Olympia Energy Inc., as lessee, and Douglas Milton Chapman, as lessor, entered into a November 12, 1999 surface lease agreement with respect to the Lands ("the Lease"). Flowers is the successor in interest to Chapman and Persist is the successor in interest to Olympia.

[8] The leased premises under the Lease consisted of a 3.14 acre oil and gas compressor site and access road within the Lands and the Lease described the purposes to which the leased premises could be put as "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."

[9] The initial term of the Lease was 10 years, to November 12, 2009, with one renewal 10 year term ending on November 12, 2019.

[10] The annual compensation payable under the Lease was $12,150.

[11] Persist has operated a compressor station on the leased premises pursuant to Alberta Energy Regulator License No. 3655 and prior to April 2021 the compressor station had been used exclusively for the production of natural gas on the leased premises.

[12] Persist and its predecessors had attempted to negotiate a renewal of the Lease prior to its ending on November 12, 2019 but were unsuccessful and to date Persist and Flowers have not agreed on a renewal of the Lease.

[13] Despite the Lease not being renewed Persist continued to pay the annual payment to Flowers and Flowers deposited the payments for 2019, 2020 and the 2021. The evidence was not clear as to whether Flowers has accepted any payments from Persist on the Lease since then.

[14] In April 2021 Persist brought onto the leased premises two1 megawatt gas generators, computers and other equipment for the purpose of mining Bitcoin using natural gas available from the compressor (the "mining operation"). Persist has been utilizing the mining operation intermittently since then when natural gas prices are low compared to what could be made from using the natural gas to produce Bitcoin through the mining operation.

[15] Flowers has been opposed to Persist operating the mining operation on the Lands and on August 30, 2021 Flowers sent Persist a written demand that the mining operation be stopped and any equipment related to same be removed from the leased premises.

[16] Persist did not comply with Flowers' demand but rather in September 2021 brought three additional 1 megawatt generators (and related equipment) onto the leased premises to further expand the mining operation.

[17] On October 25, 2021 Flowers issued a second written demand to Persist that the mining operation be stopped and the equipment removed from the leased premises and in response Flowers' legal counsel received an email from Persist's legal counsel indicating that Persist was not required to comply with Flowers' demands and that Flowers had no say or interest in what uses Persist makes of the natural gas it produces on the leased premises.

[18] As the Lease had expired and Persist and Flowers were unable to agree on renewal terms Persist sought a Right of Entry Order from LPRT and Flowers objected to Persist's application for the Right of Entry Order on October 28, 2022 largely on the basis that Persist was conducting the mining operation on the Lands which was in violation of the Lease. Flowers also filed a section 27 application for a compensation review with the LPRT, seeking increased compensation under the Lease.

[19] On April 26, 2023 the LPRT granted Persist the Right of Entry Order it was seeking finding that Persist's application was supported by a valid Alberta Energy Regulator facility license for a compressor station and indicated that the right of entry was limited to activities for or incidental to the operation of that facility and access to that facility and is subject to the requirements of the Alberta Energy Regulator license. The LPRT also indicated that Flowers' allegations regarding past Bitcoin mining by Persist were outside of its jurisdiction.

[20] On May 31, 2024 the LPRT issued its decision with respect to Flowers' claim for increased compensation under the Lease. The LPRT decided that the compensation payable under the Lease for the period to April 25, 2023 was $12,150 and it also decided that the amount payable pursuant to the Right of Entry Order of April 26, 2023 was also $12,150. In coming to these conclusions, the LPRT applied section 144 (1)(a) of the *Environmental Protection and Enhancement Act* which provides that a surface lease cannot be surrendered or terminated until a

reclamation certificate has been issued in respect of the specified land affected by the surrender or termination, and there was no reclamation certificate with respect to the Lands in this case. The LPRT indicated that compensation is payable under the Lease until the Lands are reclaimed or a new Right of Entry Order is granted with respect to the Lands at which time compensation becomes payable under the Right of Entry.

[21] The LPRT again indicated that Flowers had brought up in the proceeding that Persist conducts a Bitcoin mining operation on the Lands which Flowers disputes as a permitted use, and it indicated that the Bitcoin mining dispute was the subject of a concurrent application in the Court of King's Bench [this application] and would not be addressed in its decision.

[22] On or about January 23, 2025 Flowers approached Rocky View County (the "County") in which the Lands were located, and was advised that Persist did not have the appropriate municipal approvals for the mining operation. As a result of the discussions with the County and subsequent discussions between Flowers' counsel and other County officials, the County issued a formal notice to Flowers' counsel on February 5, 2025 advising that the mining operation was noncompliant with the County's Land Use Bylaw and that Persist did not possess the required development permit for the mining operation. On February 7, 2025 the County issued a Bylaw Compliance Notice against Flowers requiring him to bring the mining operation into compliance by March 13, 2025 which would require a change to the zoning of the leased premises and the application for a development permit. The Bylaw Compliance Notice indicated that failure to comply may result in enforcement action being commenced under the Land-Use Bylaw, the Municipal Government Act, the Provincial Offences Procedure Act or any other applicable bylaw or enactment.

Positions of the parties

[23] Flowers' position is that a permanent injunction against Persist should be granted on a summary judgement basis as:

a) The Lease expired on November 12, 2019 and was never renewed;

b) The mining operation is not a permitted use under the Lease;

c) Persist does not have the requisite approvals for the mining operation on the Lands;

d) Persist is trespassing on the Lands; and/or

e) The mining operation is creating a nuisance on the Lands.

[24] Flowers also says that he is entitled to a disgorgement from the mining operation.

[25] Persist denies that Flowers is entitled to a permanent injunction or to disgorgement on any basis and says that Flowers' action against it should be summarily dismissed as it is without merit.

Issues

[26] The issues in this application are hence 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 lease expire on November 12, 2019?

[27] While the Lease by its terms did expire on November 12, 2019 and was not renewed by the parties, the operation of section 144 of the *Environmental Protection and Enhancement Act* indicates that the Lease cannot be terminated until a reclamation certificate has been issued and no reclamation certificate has been issued in this matter. As such the Lease remains valid and operable by statutory authority.

[28] Flowers might argue that section 144 should not apply as it applies to surface leases and the Lease in this case is not a traditional surface lease as it provides for only one renewal which is not usual. This argument is without merit though as the section applies to surface leases, not just to what might be called "traditional" surface leases. The Lease in this case is a surface lease and by the operation of section 144 of the *Environmental Protection and Enhancement Act* it remains valid and operable after November 12, 2019 until a reclamation certificate has been issued.

[29] Persist's right to continue in possession of the leased premises is also supplemented by the Right of Entry Order granted by the LPRT on April 26, 2023 and as such Flowers' contention that he is entitled to a permanent injunction against Persist on the basis that it has no right to be in possession of the leased premises fails.

Is the mining operation a permitted use under the lease?

[30] Flowers says that the clear and literal interpretation of the provision in the Lease which provides that the Lease was granted "for 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, remediation and reclamation" does not include the mining operation as a permitted use.

[31] Cases such as ***Wood Buffalo Housing & Development Corp. v Flett***, 2014 ABQB 537 at paragraph 64 tell us that a written contract must be given its literal meaning, and the words in a contract must be given their plain and ordinary meaning, unless to do so would result in a contractual absurdity.

[32] ***Freyberg v Fletcher Challenge Oil & Gas Inc.***, 2005 ABCA 46 at paragraph 57 tells us that Courts should resist implying unwritten terms to contractual parties when doing so does not give effect to the plain and ordinary meaning of the contract.

[33] The contractual interpretation principle of *ejusdem generis* is also applicable here. In ***Construction Equipment Co. v Bilida's Transport Ltd.***, 1966 CANLII 439 (ABKB) at page 683

this Court held that perhaps the clearest statement of the rule was found in 36 Hals., 3rd ed. as follows:

> As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.... For the *ejusdem generis* rule to apply, the specific words must constitute a category, class or genus; if they do constitute such a category, class or genus, then only things which belong in that category, class or genus fall within the general words.

[34] Flowers submits that the literal, plain and ordinary meaning of the words in the Lease indicate that it permits activities with respect to hydrocarbons and like substances which Bitcoin mining is not. Bitcoin does not fit into the category of "oil, gas and related hydrocarbons and substances", and as such mining of it is not something which falls within the words of the Lease as a permitted use.

[35] Persist responds that the mining operation is within the scope of the "any and all purposes and uses" language in the Lease because "the development of natural gas to produce electricity is within the scope of the exploration, development and production of oil, gas, related hydrocarbons or substances produced in association." [Persist's Brief filed on March 22, 2023 at paragraph 58]. Persist's argument continues that Persist can use the electricity it produces from natural gas as it sees fit and to generate profits when natural gas prices are low which will encourage the continued production of natural gas on the leased premises which benefits the Province and the public generally. The Bitcoin mining operation, Persist would conclude, is allowed as it is simply the use of the electricity which is produced from the natural gas which allows for the continued production of natural gas even when prices are low or there are other impediments to its production.

[36] Persist also argues that even if the mining operation is not within the scope of the Lease, Flowers' acceptance of rental payments after the mining operation commenced is a waiver of such breach and acceptance by Flowers of the mining operation.

[37] I will deal with this waiver argument from Persist first.

[38] I do not accept the waiver argument as Flowers has made it very clear that he does not accept the mining operation, both in his written demands that the mining operation cease and be moved from the Lands, and in this action. He had been accepting the rental payments in the amount of $12,150 prior to the mining operation coming onto the Lands and he was accepting the same amount after the mining operation came onto the Lands and as such it cannot be said that he was necessarily accepting the mining operation by doing nothing other than accepting the same amount he was being paid before the mining operation. It might have been different if there was a specific amount added for the mining operation which he then accepted but that is not the case here. He was simply accepting the amounts that had been paid all along, before the mining operation, while making it very clear that he was not accepting that the mining operations should continue on the Lands. In these circumstances it cannot be said that he must be taken to have implied that he was accepting the mining operation particularly when he explicitly said otherwise.

[39] As indicated above, it is not clear from the evidence what payments Flowers has accepted since 2022, but even if he has been accepting the $12,150 since then that does not constitute a waiver with respect to his clearly stated position that he believes that the mining operation is not permitted on the Lands. A lessee cannot impose a new term (such as that snakes are now allowed in the rented apartment) on a lessor simply by the fact that the lessor accepted the rent which the lessee had an obligation to pay prior to and independent of the introduction of the new term, and this is especially the case when the lessor makes it clear that it does not accept the new term.

[40] With respect to the argument that the mining operation is within the scope of the Lease I agree with Flowers' position on this that 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.

[41] Bitcoin mining may well be something that Persist used to make a profit from its natural gas production when natural gas prices are low but that is not sufficient to make Bitcoin mining a permissible use under this Lease. If that were the case, then everything which might allow Persist to make a profit from its natural gas while natural gas prices were low would also be permissible uses. By this same logic Persist could have brought a cannabis growing operation (assuming that the cannabis growing operation is as legal as the Bitcoin mining operation would be) onto the leased premises and that would be a permissible use as it would involve Persist using its natural gas to produce the electricity to run the cannabis grow operation and make profits therefrom and to continue producing natural gas when natural gas prices were low or there were other impediments to its production. I think there would be no question but that Flowers would have the right to say that the cannabis growing operation could not be brought onto the leased premises without his approval and that in the absence of his approval Persist would be in breach of the lease if it simply brought the cannabis growing operation onto the leased premises. I see no difference between that situation and bringing a Bitcoin mining operation onto the leased premises without Flowers' approval. 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.

[42] I find that the mining operation is not a permitted use under the Lease and that by failing to remove the Bitcoin operation and all associated equipment from the leased premises in accordance with Flowers' demands, Persist is in breach of the Lease.

Does Persist have the requisite approvals for the mining operation?

[43] Massimo Geremia who is the chief executive officer and president of Persist was cross-examined on January 25, 2023 on an Affidavit he swore in this action on December 9, 2022, and with respect to the issue of whether Persist has received any regulatory permits for the Bitcoin mining operation he testified at page 29 of his transcript beginning at line 20 and continuing to line 27, and then on page 30 lines 1 and 2 that Persist has not received any regulatory permits for the Bitcoin mining operation from the Alberta Utilities Commission or LPRT or anyone else. With respect to municipal permits from Rocky View County no such permits had been received either but he indicated that they were not needed as they were under the guise of the Alberta

Energy Regulator and the Alberta Utilities Commission but confirmed that they had no regulatory permits from them either.

[44] We have seen above that the LPRT has throughout taken the position that the issue of whether Persist can operate the mining operation on the leased premises is beyond its jurisdiction and we have also seen that Rocky View County takes the position that the Bitcoin mining operation does not comply with the zoning of the Lands and that it is operating without a required development permit and in the absence of the zoning being changed and a development permit being issued, the mining operation must cease operating.

[45] Rocky View County takes the position that Flowers as the owner of the Lands is responsible for taking the steps which need to be taken to bring the mining operation into compliance with the Land-Use Bylaw and with the requirement for a development permit but Flowers has indicated that he has no intention of doing so given that he wants the mining operation removed from the Lands. As Persist's counsel indicated at the special chambers hearing, it is early days yet with respect to what will happen with Rocky View County but it seems clear that at this stage Flowers is facing the jeopardy of having to deal with potential enforcement actions and court actions by Rocky View County and the potential for costs awards against him arising from such with respect to a mining operation which he has been trying to get off his Lands for almost 3.5 years.

[46] At this stage there is a question as to whether or not Persist has the requisite approvals from at least Rocky View County with respect to the mining operation, but it is too early to say conclusively that it does not have the requisite approvals as Persist has not had a chance yet to respond to the concerns from Rocky View County regarding its Land-Use Bylaw and the development permit issue. As such it is too early to say that Persist is in breach of section 12 of the lease which requires it and Flowers to abide by all applicable acts and regulations, but at the very least it appears at this stage that Flowers will be involved in the dispute with Rocky View County as to whether the mining operation is required to comply with Rocky View County's approvals and there will likely be financial costs to Flowers with respect to this involvement.

Is Persist trespassing on the Lands?

[47] Flowers says that Persist is trespassing on the Lands as it continues to occupy the Lands despite the fact that the Lease has expired, and in the alternative because it has brought the mining operation onto the Lands which does not fall within the permitted use provision of the Lands and has refused to remove it despite Flowers' demands that it be removed from the Lands.

[48] Persist denies it is trespassing on the Lands as it says it has a statutory right to continue to occupy the Lands supplemented by the Right of Entry Order, and it says that the mining operation does not constitute a trespass as trespass requires direct and physical interference on Flowers' property and the mining operation is not on Flowers' property but rather on property in Persist's legal possession.

[49] Trespass to land is defined as the following in ***Smed v. Priddis Golf & Country Club***, 2011 ABQB5 at paragraph 47:

> Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so.Such interference must

> be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with the land possessed by the plaintiff. The requirement of directness differentiates trespass from nuisance, which is committed when the defendant makes a use of his land that indirectly affects the land of the plaintiff.

[50] I agree with Persist's position that this is not a case of trespassing.

[51] Firstly, as we have seen, Persist has a statutory right to continue to occupy the Lands supplemented by the Right of Entry Order.

[52] Secondly, trespass requires a direct interference with lands possessed by the aggrieved party and in this case the leased premises are in the possession of Persist.

[53] As I have found above, 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.

Does the mining operation create an nuisance on the Lands

[54] Flowers says that the mining operation creates a nuisance on the lands as the noise emanating from it is unreasonable and significantly interferes with his enjoyment of the Lands. Flowers does not live on the Lands but has a gym on the Lands which he and his partner use. In his affidavit sworn on June 16, 2022 he says that the noise which emanates from the mining operation is persistent and it can be heard at all hours of the day, every day and that it is much louder than Persist's facility was prior to the addition of the mining operation. He says that using an app on his phone he has measured the noise level from the mining operation at the door of the gym at between 57 dB and 70 dB and as high as 80 dB at the fence which separates the leased premises from the Lands.

[55] Flowers also indicates in his June 16, 2022 affidavit that he believes that the market value of the Lands is decreased as a result of the noise emanating from the mining operation as portions of the Lands where residences could have been built are now not suitable for that purpose as a result of the noise emanating from the mining operation.

[56] Persist denies that the mining operation constitutes a nuisance and says that the alleged noise emanating from the mining operation is reasonable as the character of the neighbourhood is a rural oil and gas operation next to a much larger operation and in close proximity to a provincial highway. Persist says that the standard of comfort of an ordinary and reasonable person in these surroundings would not find the noise emanating from the mining operation as being anything more than trivial.

[57] Nuisance consists of an interference with the claimant's occupation or enjoyment of land that is both substantial and unreasonable. (***Antrim Truck Centre Ltd. v. Ontario (Transportation)***, 2013 SCC 13 at paragraph 18).

[58] ***Gichuru v York***, 2011 BCSC 342 aff'd 2013 BCCA 203, leave to appeal to SCC refused indicates that the claimant has the burden of proving on a balance of probabilities that there is an actionable nuisance (para. 21). ***Gichuru*** also tells us that the requirement of proof of a substantial interference recognizes that trivial annoyances or minor discomforts will not likely

attract liability and that the requirement of proof of an unreasonable interference imports an objective component into the legal test. The interference with the use and enjoyment of the claimant must be such that it would not be tolerated or accepted by the ordinary occupier and be such that it would materially interfere with ordinary comfort according to the standards held by those of "plain and sober tastes". (paragraph 22)

[59] Flowers' evidence with respect to the noise levels from the mining operation are based on his subjective experience and his own measurements with an app on his phone and the problem with this is set out in the following passage from ***Gichuru*** at paragraph 29:

> While nothing precludes the court from being satisfied, in relation to the objective aspect of the alleged nuisance, on the plaintiff's evidence alone, in most circumstances such proof would be very challenging for a plaintiff who has tendered no evidence other than his or her subjective experience and assessment. This is particularly so where, as here, it has been alleged the plaintiff is hypersensitive and where it was entirely feasible for the plaintiff to acquire and tender evidence from a third party.

[60] In this case Persist attached to an affidavit sworn by Massimo Geremia on March 20, 2023 a Noise Impact Assessment conducted by FDI Acoustics which sought to determine the environmental noise impact of the mining operation and Persist's compressor station. The Assessment indicates that FDI Acoustics personnel completed sound pressure measurements of the compressor station and the mining operation during visits to the area on November 5, 2021, February 19, 2022, November 1, 2022 and February 13, 2023.

[61] The task was to determine if the predicted cumulative sound levels comply with the Permissible Sound Levels (PSLs) of the Alberta Utilities Commission (AUC) Rule 012, Noise Control (Rule 012) and as applicable, the Alberta Energy Regulator (AER) Directive 038, Noise Control (Directive 038). After doing their measurements and utilizing the various procedures set out in the Assessment report, the conclusion was that the cumulative sound levels of Persist's operation (including the mining operation) are predicted to comply with the daytime and nighttime PSLs of AUC rules 012 and AER directive 038.

[62] When contrasted with this noise impact assessment and its conclusion, Flowers' personal observations and measurements with a phone app seem lacking. He could have, and probably should have, had his own expert noise assessment done particularly when the area in question is a rural location which is already noisy with an existing natural gas operation in the shadow of the much larger Canlin sour gas plant and bordering a provincial highway. Without his own expert noise assessment to rely on, or at least some other third-party assessment supporting his personal assessments and measurements, I cannot find that Flowers has satisfied his burden of proving on a balance of probabilities that the mining operation constitutes an actionable nuisance in the context of a rural location which already has noise from Persist's existing natural gas operation, a much larger sour gas plant, and highway noise where there has been a noise impact assessment which indicates that the cumulative sound levels of Persist's operation, including its mining operation, are predicted to comply with the daytime and nighttime PSLs of the AUC and AER.

Should a permanent injunction be granted in this case?

[63] Flowers says that he is entitled to a permanent injunction in this case requiring Persist to remove its mining operation from the Lands and all associated equipment.

[64] The two-part test for granting a permanent injunction requires that (1) the claimant must establish his legal rights and (2) the Court must determine whether an injunction is appropriate in the circumstances (***Liu v Hamptons Gold Course***, 2017 ABCA 303 at para. 17). The Court should consider the equities between the parties in determining whether a permanent injunction should be granted. (***Airco Aircraft Charters Ltd. v. Edmonton Regional Airports Authority***, 2010 ABQB 397 at para. 95).

[65] Flowers satisfies the first part of this test as I have found that the operation of the mining operation on the leased premises by Persist is a breach of the lease as it is not a permitted use under the Lease and has not been approved by Flowers.

[66] Persist says that an injunction is not appropriate in this case as any breach of Flowers' legal rights can be adequately remedied by damages, and the equities of the case favour Persist as any nominal damages that Flowers would be entitled to would be greatly outweighed by the damage Persist would suffer if it were not able to continue with the mining operation and have to suffer shutdowns when the price of natural gas at times did not warrant continued production of natural gas.

[67] I do not agree with Persist's position that damages would be an adequate remedy in this case. Continued operation of the mining operation on the leased premises without Flowers' approval and in the face of his express request that it be removed could not be remedied by an award of damages. Without an injunction the breach of the Lease would continue at Persist's discretion and Persist would be allowed to further increase the mining operation despite Flowers' disapproval (as Persist has done in the past) which would presumably require Flowers to come back to court on an ongoing basis to seek changing amounts of damages to deal with changing levels of breaches.

[68] As has been noted above, Rocky View County is now in the picture and is threatening to bring proceedings against Flowers if the mining operation is not removed or brought into what it considers to be compliance with its Land-Use Bylaw and development permit requirements. Flowers is now in this fight as a result of Persist doing something which amounts to a breach of the Lease and damages to Flowers would not be an adequate remedy to deal with this.

[69] 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. When the equities of the parties are considered the only appropriate remedy is a permanent injunction requiring Persist to remove the mining operation and all associated equipment from the Lands unless they are able to secure Flowers' approval for the mining operation to continue on the Lands, and that is the remedy I grant in this case.

Is Flowers entitled to disgorgement from the mining operation?

[70] Flowers says that in addition to a permanent injunction, disgorgement is the appropriate remedy in this case.

[71] The Supreme Court of Canada in ***Atlantic Lottery Corp. Inc. v. Babstock***, 2020 SCC 19 makes it clear that disgorgement is only available for breach of contract cases (as this case is) in certain exceptional circumstances. The SCC held that "disgorgement for breach of contract is available only where other remedies are inadequate and only where the circumstances warrant such an award" (paragraph 53). Disgorgement would be available only where the remedies of damages, specific performance and injunction are inadequate (paragraph 52).

[72] I have granted an injunction in this case but that deals with the situation moving forward. There still remains the issue of the relief that would be appropriate with respect to Persist's breach of the Lease from the time the mining operation commenced on the Lands to the time the injunction was granted. Flowers' argument would be that the remedy of disgorgement is the only appropriate remedy with respect to that period.

[73] I do not agree that disgorgement is the appropriate remedy with respect to that period as damages would be an adequate remedy. In ***Atlantic Lottery***, the SCC at paragraph 57 points out that Courts have "granted what might be termed "negotiating damages" to prevent a defendant from obtaining for free an advantage for which it did not bargain". The SCC then goes on in the same paragraph to quote the following from ***One Step (Support) Ltd. v. Morris – Garner***, [2018] 3 All E.R. 659 at paragraph 95:

> Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset… The rationale is that the claimant has in substance been deprived of a valuable asset, and his loss can therefore be measured by determining the economic value of the right in question, considered as an asset. The defendant has taken something for nothing, for which the claimant was entitled to require payment.

[74] In this case I have not found that there was an actionable nuisance or that Persist trespassed on the Lands; rather, I have found that Persist breached the lease by bringing the mining operation and associated equipment onto the leased premises where such was not a permitted use and without the approval of Flowers. The ongoing breach of the lease is remedied by the injunction which I have granted and the historical breach is adequately remedied by "negotiating damages". As such the exceptional remedy of disgorgement is not appropriate in this case.

[75] In ***Smith v. Landstar Properties Inc.***, 2011 BCCA 44, the British Columbia Court of Appeal dealt with, among other issues, whether the plaintiff was entitled to damages for breach of contract even although she was not able to demonstrate financial loss. The British Columbia Court of Appeal in ***Smith*** quoted with approval the approach taken by the English Court of Appeal in ***Experience Hendrix LLC v. PPX Enterprises Inc.***, [2003] EWCA Civ 323. In the ***Experience Hendrix*** case the defendants held a license to musical recordings as a result of a settlement in previous litigation. They breached that settlement agreement and used the licensed recordings in a way not permitted. The plaintiff could not prove financial loss because there was

no evidence that they would have used the license recordings for their own benefit. Additionally, there was evidence that the plaintiff would not have allowed use of the licensed recordings by the defendants on any terms. The issue was what damages the plaintiff would be entitled to in the circumstances.

[76] The English Court of Appeal in ***Experience Hendrix*** indicated that whether or not the claimant would have been better off if the wrong had not been committed the wrongdoer ought not to gain an advantage for free and should make some reasonable recompense. The English Court of Appeal said the following at paragraph 45:

> … in the absence of any proven loss, I would confine any financial remedy to an order that PPX pay a reasonable sum for its use of material in breach of the settlement agreement. That sum can properly be described as being "such sum as might reasonably have been demanded" by Jimi Hendrix's estate "as a quid pro quo for agreeing to permit the two licenses into which PPX entered in breach of the settlement agreement", which was the approach adopted by Brightman J in ***Wrotham Park***… This involves an element of artificiality, if, as in ***Wrotham Park***, no permission would ever have been given on any terms.… That said, the approach adopted by Brightman J has the merit of directing the court's attention to the commercial value of the right infringed and of enabling it to assess the sum payable by reference to the fees that might in other contexts be demanded and paid between willing parties. [citations omitted]

[77] This is the approach to damages which makes the most sense in the circumstances of this case where Flowers would likely not be able to prove financial loss (give my finding that he has not been able to establish an actionable nuisance or trespass), but Persist should 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.

[78] The damages to which Flowers would be entitled as a result of Persist's breach of the Lease is the sum which Flowers might reasonably have demanded for allowing Persist to bring the mining operation and its associated equipment onto the Lands and to operate it from April 2021 until the time it is removed from the Lands pursuant to the injunction granted herein. In assessing the damages to which Flowers would be entitled the Court could 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.

[79] That evidence is not before this Court so unless the parties are able to agree on the amount of these damages the parties will have to proceed to trial on this issue if Flowers wishes to pursue it.

Conclusion

[80] There was no disagreement between the parties on the issue of whether this case was appropriate for a summary resolution. The issues for the most part involved legal interpretations with respect to a factual background which was not in dispute and a trial would not have put the issues into a better framework for a final decision to be made, except with respect to the issue of

damages as set out above. In the result, Flowers is granted a permanent injunction requiring Persist to immediately cease the mining operation and to remove all trailers, generators and other chattels and fixtures associated with the mining operation from the Lands. Flowers' application for disgorgement is dismissed and if he wishes to pursue his claim for damages arising from Persist operating the mining operation from April, 2021 until the time it is removed from the Lands pursuant to the permanent injunction granted herein that matter would have to proceed to trial unless the parties are able to agree on the amount of the damages. Flowers application for a declaration that the Lease has expired and his applications for declarations that Persist is trespassing on the Lands and that the mining operation constitutes an actionable nuisance are dismissed. Persist's cross application for summary dismissal of Flowers' action in its entirety is dismissed.

Costs

[81] As I reserved my decision after the hearing, the parties were not able to address the issue of costs at the time. If the parties are not able to agree on costs they may provide me with their written submissions on the issue within 30 days of the date of this decision.

Heard on the 12th day of February, 2025.
Dated at the City of Calgary, Alberta this 10th day of March, 2025.

C.A. Rickards
J.C.K.B.A.

Appearances:

Ryan Barata
for the Plaintiff

Emily McCartney
for the Defendant