

December 19, 2013

SURFACE RIGHTS BOARD

**IN THE MATTER OF THE PETROLEUM AND NATURAL GAS
ACT, R.S.B.C. AS AMENDED**

AND IN THE MATTER OF

**SW ¼ of Section 30, Township 78, Range 16, W6M, Peace River District,
except Parcel A (D7781)
and
Southeast 1/4 , Section 25, Township 78, Range 17, W6M, Peace River District
(The "Lands")**

BETWEEN:

SPECTRA ENERGY MIDSTREAM CORPORATION

(APPLICANT)

AND:

**LESLIE LLOYD SEMPLE, EXECUTOR OF THE WILL OF
LLOYD R. SEMPLE – DECEASED AND LESLIE LLOYD SEMPLE**

(RESPONDENTS)

BOARD ORDER

Heard: By written submissions closing November 14, 2013
Appearances: Rick Williams, Barrister and Solicitor, for the Applicant
Elvin Gowman, for the Respondents

INTRODUCTION

[1] The Respondent, Leslie Lloyd Semple, in his own capacity and as executor of the estate of Lloyd R. Semple, owns land (the "Landowners") in the Peace River District, near Dawson Creek, namely Southwest 1/4 , Section 30, Township 78, Range 16, W6M, Peace River District and at Southeast 1/4 , Section 25, Township 78, Range 17, W6M, Peace River District (the "Lands").

[2] On December 23, 2010, the Board issued Right of Entry Orders authorizing Spectra Energy Midstream Corporation ("Spectra") access to the Lands for the purpose of constructing and operating a natural gas line called the Bissette pipeline (the "Pipeline") as approved by the Oil and Gas Commission (the "OGC"). The Pipeline lies in a strip 18 metres wide on the Lands, and access was granted for 7.09 acres of right of way ("ROW") and 4.52 acres for temporary work space ("TWS").

[3] The parties were unable to resolve the issue of the appropriate compensation for the entry and use of the Lands. The Board scheduled an in person arbitration to hear this issue but the hearing was converted to written submissions when Mr. Semple failed to produce documentary evidence pursuant to the Board's pre-hearing Orders. Although Mr. Semple failed to comply with the Board's pre-hearing Orders, the Board allowed Mr. Semple the opportunity to respond to Spectra's evidence.

ISSUE

[4] The issue is: what is the appropriate compensation to be paid to the Landowners by Spectra arising from its entry to the Lands in accordance with the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, ch. 361 (the "Act")?

BACKGROUND

[5] The Lands comprise two properties used for hay and forage production in the Agricultural Land Reserve near Dawson Creek.

[6] In mid-2010, prior to construction of the Pipeline, Spectra determined that it would have to proceed under the *Pipeline Act*, R.S.B.C., 1996, c. 364, and the *Railway Act*, R.S.B.C. 1996, c. 395, and expropriate the interests of landowners along the route because the Pipeline may not have met the then definition of "flow line". As part of those proceedings, Spectra obtained an appraisal report and an agricultural damage report prepared by John Wasmuth, AACI, P. App, P. Ag, CAC.

[7] Prior to the expropriation, the *Pipeline Act* was repealed and the *Oil and Gas Activities Act* was brought into force. As a result of this legislative change, the definition of “flow line” was amended and, as the Pipeline now met this new definition, Spectra abandoned the expropriation proceedings and instead applied to the Board, and was granted, a right of entry order to the Lands.

[8] Following the application to the Board, Mr. Semple requested and obtained a change in routing of the Pipeline to eliminate a severance issue by having the Pipeline follow the property boundary.

[9] In February and March, 2011, Spectra constructed the 16 inch diameter sour gas Pipeline extending approximately 33 kilometres from the NE 15-77-15-W5M to the Spectra Energy Transmission South Peace Pipeline riser site. The Pipeline traverses a number of separate parcels of land, including the subject Lands. In May 2011, portions of the right of way on the Lands were eroded, which erosion Spectra remedied. In January, 2012, Mr. Semple and Spectra came to an agreement on damages. Also, in August, 2012, Spectra paid an additional \$390.00 for weed control.

PRELIMINARY ISSUE

[10] Spectra relies upon the appraisal and agricultural damage reports from Mr. Wasmuth in these proceedings. Mr. Semple says these expert reports should be given no weight because they were prepared for purpose of the initial expropriation proceedings, which is not the same as the acquisition of the statutory right of entry, and that compensation in the two situations is not based on the same principles. As he has been limited to a response to Spectra’s material, Mr. Semple submits there is no merit in providing a response to materials prepared on the basis of expropriation and further requests that Spectra’s application be dismissed and a new hearing struck.

[11] Spectra responds that having Mr. Wasmuth redo his reports is a waste of resources and of no benefit and that if Mr. Wasmuth were to prepare an analysis under section 154 of the *Act*, his numbers would be lower not higher as expropriation is far more onerous. In any event, the instructions Mr. Wasmuth would have received for an opinion under the *Act* would have been the similar, namely provide an opinion on the market value of the right of way and temporary work space and the reduction in the market value, if any, to the remainder of the lands as a result of the entry and occupation.

[12] Although the expert reports were prepared for the expropriation proceeding, I find this fact alone is not sufficient reason to give the reports no weight or to have the application before me dismissed and have a new hearing struck. They are tendered as evidence to support Spectra’s position in this matter and must be considered. I will place the appropriate weight on those expert opinions in light of all of the evidence before me and taking into account the expert’s assumptions and conditions that form the parameters of his assignment.

THE LEGISLATIVE FRAMEWORK

[13] Section 143(2) of the *Act*, provides that a right holder is liable to pay compensation to a landowner for loss or damage caused by the right of entry. Where right of entry relates to a flow line, compensation is payable for loss or damage caused by the entry, but no annual rent is payable (section 143(2)(b)).

[14] Section 154(1) of the *Act* sets out factors the Board may consider in determining an amount to be paid as compensation, including,

- (a) the compulsory aspect of the right of entry;
- (b) the value of the applicable land;
- (c) a person's loss of a right or profit with respect to the land;
- (d) temporary and permanent damage from the right of entry;
- (e) compensation for severance;
- (f) compensation for nuisance and disturbance from the right of entry;
- (g) the effect, if any, of one or more other rights of entry with respect to the land;
- (h) money previously paid for entry, occupation or use;
- (i) the terms of any surface lease or agreement submitted to the board or to which the board has access;
- (j) previous orders of the board;
- (k) other factors the board considers applicable;
- (l) other factors or criteria established by regulation.

[15] Compensation is for the landowner's loss or damage that has occurred or is reasonably probable and foreseeable; it is inappropriate to make a speculative award (*Arc Petroleum Inc. v. Piper*, MAB Order 1598-2, *Arc Petroleum Inc. v. Miller*, SRB Order 1633).

[16] Finally, the upper limit of compensation is the value of the land and if the landowner receives full value for the land, no additional payment is required for the compulsory aspect of the taking (*Western Industrial Clay Productions Ltd. v. MAB*, 2001 BCSC 1458).

COMPENSATION EVIDENCE AND ANALYSIS

Section 154 Factors

Land Value

[17] Under section 154 of the *Act*, the Board may consider the value of the land in determining appropriate compensation.

[18] In support of this consideration, Spectra relies upon Mr. Wasmuth's appraisal report in which he provides an opinion of the value, effective June, 2010, of the statutory right of way and temporary work space to be expropriated and an opinion on the reduction in the market value, if any, to the remainder of the lands as a result of the

expropriation. Spectra says the effective date of the appraisal is not relevant as nothing changed from June, 2010 to the effective date for valuing loss in this case (namely December 23, 2010 which is the date of the Right of Entry Order) that would impact the highest and best use analysis.

[19] The appraiser determines the market value of the fee simple interest in the Lands based on the highest and best use of the Lands as continued agricultural production. He relies upon the sales of five bare land sales that ranged in adjusted sale prices from \$642 to \$814 per acre and concluded that the market value of the fee simple interest in the Lands in a bareland state was \$750 per acre as of June 2, 2010.

[20] Spectra submits that the Landowners are not entitled to the full market value of the fee simple interest (\$750 per acre) as no land or permanent legal interest was taken, but rather the Board must consider the residual and reversionary value in the Lands to take into account the fact that the Landowners are able to continue using the Lands after the Pipeline is installed and the Lands will be returned to the Landowners upon the Pipeline ceasing to be used. In quantifying these values, Spectra relies on Mr. Wasmuth's conclusion of the market value of the statutory right of way at 50% or \$375.00 and the market value of the temporary workspace to be acquired at 25% or \$187.50. He also concluded that there would be no reduction in the market value of the remaining land (ie outside the ROW and TWS) as a result of the proposed Pipeline and Spectra says there should be no compensation for injurious affection.

[21] Therefore, Spectra submits the value of the Lands subject to the Right of Entry Orders is $\$3,506.25 = (2.42 \times \$187.50 \text{ TWS}) + (3.56 \times \$375 \text{ ROW})$ and $(2.10 \times \$187.50 \text{ TWS}) + (3.53 \times \$375 \text{ ROW})$.

[22] Although the appraisal report was not prepared for the purpose of these proceedings, it is the only evidence of the market value of the Lands before me. The report analyzes the sale of comparable properties near the effective date and makes appropriate adjustments to those sales to determine the market value of the fee simple interest in the Lands. Without contrary market evidence, I accept Mr. Wasmuth's opinion of value on the market value of the fee simple interest and the reversionary and residual interests in the Lands.

[23] Mr. Semple says there is a 30 metre setback adjacent to the right of way that diminishes the lands in both utility and value, which has not been accounted for in Spectra's analysis (11.8 acres of setback or 30 m. x 1592 m). Spectra disputes this and says the prescribed distance is measured from the Pipeline and not the right of way. A person carrying out a "ground activity" which is defined to include farming activity to a depth of more than 45 cm (for which there is no evidence the Landowners will be carrying out) within 10-30 metres from a pipeline is required to advise BC One Call in advance. For activity within 10 metres of a pipeline, the person would need agreement of the pipeline permit holder (Spectra) or an order from the OGC. Therefore, as the 16 inch Pipeline is in the middle of an 18 metre right of way, there is only one additional metre on either side of the right of way where Mr. Semple would have to ask for Spectra's agreement for carrying out farming activity to a depth greater than 45 cm.

Spectra provides consent to any reasonable activities, on request, carried out in a manner that will not affect the safety and integrity of the Pipeline in a letter provided as part of its submissions.

[24] Mr. Semple also says the *Pipeline and Liquefied Natural Gas Facility Regulation* has not been taken into account as the Landowners' home and farm headquarters are located in the heart of the emergency planning zone. However, Spectra says that no evidence is provided to support the claim that the emergency zone would affect the market value of the Lands. Finally, Mr. Semple argues that there is the possibility that he will never regain the unencumbered land if the works are abandoned in place and this possibility has not been accounted for.

[25] I find that the Landowners have not substantiated the claims for the effect of the setback, emergency zone or the possibility of abandonment of the works. These claims are either not substantiated by any evidence and/or are speculative. As stated in previous decisions, the compensation to be paid must compensate for actual or reasonably foreseeable loss or damage by the landowner (*Arc Petroleum Inc. v. Piper*, MAB Order 1598-2). The Landowners' claims and supporting evidence regarding the emergency zone or abandonment of the works do not support a finding of reasonably foreseeable loss or damage.

Compulsory Aspect of the Taking

[26] Under section 154, the Board may consider the compulsory aspect of the taking in determining compensation.

[27] The Board has previously indicated that an amount for the compulsory aspect of the taking will of necessity be arbitrary and that, considering the compensation for these factors cannot exceed the value of the land, the actual value of the land is sufficient to compensate a landowner for the intangible loss of rights, including the compulsory aspect (*Arc v. Miller, supra*).

[28] Spectra says that in this case the combined amount of compensation for the loss of value/rights and the compulsory aspect for the right of way would be at the most \$7,012.50 (7.09 acres x \$750).

[29] I agree that this sets the upper limit of compensation as indicated by the Court in *Western Industrial Clay, supra*. and would adequately compensate the Landowners for the value of the Lands, taking into account the residual and reversionary interests, loss of rights, and compulsory aspect of the right of entry.

Loss of Profit and Temporary and Permanent Damage

[30] The Board may also consider a person's loss of profit with respect to the land in awarding compensation, as well as any temporary and permanent damage and nuisance and disturbance from the entry.

[31] This amounts to reimbursement to the landowner for any actual damage suffered as a result of the Right of Entry Order and for any loss of profit as a result of his inability to utilize the land for a period of time due to construction. Spectra says there is not any appreciable nuisance or an otherwise negative impact on the Lands nor is there evidence of any injurious affection to the remaining lands. However, if there were, Spectra argues the generous assumptions made in the landowners' favour in Mr. Wasmuth's analysis of loss provide more than sufficient compensation.

[32] In Mr. Wasmuth's Agricultural Damage Report, he concludes \$6,202 would fully compensate the Landowners for the monetary value of the damages/losses likely to arise from Spectra's construction on the Lands. In arriving at this figure, Mr. Wasmuth made generous assumptions in favour of the Landowners. However, he did use a proposed route that was different than the one constructed and that resulted in some severance of lands. That route was subsequently amended. Therefore, based on the actual route (7.09 acres rather than 7.41 acres for ROW and 4.52 acres rather than 4.84 TWS), Spectra says the award for damages/loss should be \$5,183.26.

[33] Mr. Semple says that Mr. Wasmuth has disregarded the risk of farming over the Pipeline as trenches fail and machinery is damaged when a wheel falls into the trench causing delay and repairs to machinery and equipment. Spectra says there is no evidence provided to show this event has occurred or is likely to occur, and refers to photographs showing that the right of way has been farmed since the Pipeline was constructed. Spectra also provides an assessment completed by M. Edgar, an environmental scientist. Mr. Edgar concluded that the trench has not failed and does not prevent continued farming, although he did observe some "minor rill erosion" at one point of the right of way which Spectra is prepared to remedy.

[34] I find that the Landowners' claim for risk of farming is speculative and does not meet the threshold of actual or reasonably foreseeable or probable loss or damage (*Arc v. Piper, supra.*). The Landowners have provided insufficient evidence to support their claim. There is no evidence that there is actual loss or damage or loss that is reasonably foreseeable or probable as a result of farming over the right of way.

[35] As well, Mr. Semple submits the right of way and 30 metre setback preclude some farm activities such as subsoiling. A letter from Larry Fossum is provided that indicates he will not be cutting or baling hay on the right of way next year unless the washouts, rough ground and weed problems have been rectified. Spectra notes that Mr. Fossum does not indicate which land or pipeline he is referring to and says there have been no prior complaints of this nature made by either Mr. Semple or Mr. Fossum.

[36] I find that there is insufficient evidence to show that the issues identified by Mr. Fossum are connected to the existence and operation of the Pipeline but, in any event, there is insufficient detail of the issues provided to show an actual or reasonably foreseeable or probable loss, or a quantification of compensation for these issues.

[37] Finally, Mr. Semple provides his actual yields and calculations and argues the damages should incorporate "tax gross up". Spectra responds that, incorporating the

evidence of actual yields for the two years for which yields were impacted by construction and the correct figure of 11.61 acres as the actual area impacted by construction, leads to a total loss of \$3,715.20, less than Mr. Wasmuth's estimation.

[38] I find the best evidence of crop loss is from the actual yields provided by Mr. Semple for the two years that were impacted by construction and the actual area impacted by construction (11.61) acres. Calculating crop loss on this basis amounts to a total crop loss of \$3,715.20. I have nothing to support a claim for "tax gross up".

Money Paid to Others

[39] The Board may also consider money paid to others.

[40] Spectra advises that it reached agreements with many other landowners along the Pipeline route for \$950/acre for the land value of the permanent right of way, \$500/acre for the compulsory aspect of the taking, \$450/acre for the use of any temporary work space, and \$1,000 signing bonus for those that reached agreement with Spectra without Board involvement. For crop lands, Spectra paid other landowners \$625/acre (\$250/acre per year at 100% for two years and 50% for the third year) as total damages.

[41] Spectra is prepared to pay the Landowners the same arrangement reached with others, less the signing bonus, as follows:

Permanent right of way: 7.09 acres x \$950	\$6,735.50
Temporary work space: 4.52 acres x \$470	\$2,147.00
Crop Loss 3 years: 11.61 acres x \$625	\$7,256.25
Compulsory aspect of taking: 7.09 acres x \$500	<u>\$3,545.00</u>
Total:	\$19,683.75

[42] Mr. Semple says he has other adjoining lands impacted by a pipeline right of way for which he has received \$12,700 per acre and asks for this amount as compensation here. I am unable to consider this as appropriate compensation. No details or explanation as to how this figure was arrived at has been provided. Also, if Mr. Semple is requesting compensation of \$12,700 per acre for 7.09 acres, this amount is substantially higher than the market value of the fee simple interest in the Lands at \$750/acre, which should set the upper limit of compensation for the value of land and compulsory taking as the only other head of compensation payable is crop loss, which I have found is actually \$3,715.20 (*Western Industrial Clay, supra*).

Global Review of Compensation

[43] Applying my findings above in relation to the various factors the Board may consider, the Landowners are entitled to the following:

For compulsory aspect of taking/loss of rights/value of the land:	\$7,012.50
For loss of profit/crop loss:	\$3,715.20

[44] However, this calculation does not take into account what has been paid to others along the same Pipeline. Consideration of that factor increases the global sum to \$19,683.75. I am aware that this amount might be above the upper limit of compensation that has been referred to in terms of the value of the land and loss of rights, as well as crop loss. However, as Spectra is willing to pay this amount, and in the interest of fairness, I will order compensation in this amount to be paid by Spectra to the Landowners.

ORDER

[45] The Landowners are entitled to compensation in the sum of \$19,683.75 for access to the Lands by Spectra to construct and operate the Pipeline. However, as Spectra has previously made a partial payment of \$2,000 pursuant to Order 1689-1 and \$1,800 pursuant to Order 1690-1, Spectra shall forthwith pay to the Landowners the amount of \$15,883.75, being the amount of compensation owing on both applications less the two partial payments.

DATED: December 19, 2013

FOR THE BOARD



Simmi K. Sandhu, Vice Chair