

August 14, 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

Appearances: Rick Williams, Barrister and Solicitor, for the Applicant
Elwin Gowman, for the Respondents

INTRODUCTION

[1] On December 23, 2010, the Board issued Right of Entry Orders authorizing Spectra Energy Midstream Corporation (“Spectra”) to access lands owned by Leslie Lloyd Semple, in his own capacity and as executor of the will of Lloyd R. Semple, at 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”). The purpose of the access was to construct and operate a 16 inch, approx. 33 kilometre long, natural gas line (the “Pipeline”) approved by the Oil and Gas Commission (the “OGC”).

[2] Mr. Semple now says the Board was outside its jurisdiction as the Pipeline was the subject of earlier expropriation proceedings pursuant to the *Railway Act*, R.S.B.C. 1996, c. 395.

BACKGROUND

[3] Prior to the issuance of the Right of Entry Orders, Spectra commenced proceedings to expropriate the Lands in accordance with the provisions of the *Railway Act*.

[4] Section 16 of the now repealed *Pipeline Act*, RSBC 1996, c. 364, stated that Part 7 of the *Railway Act* applied to pipelines and necessary works and undertakings connected to them, while the *Petroleum and Natural Gas Act*, R.S.B.C., 1996, c. 364 (the “PNG Act”) applied to flow lines as defined and necessary works and undertakings connected with them. Spectra determined that the Pipeline may not have come within the definition of “flow line” as it then was and as such commenced proceedings under the *Railway Act*.

[5] Spectra served Notices of Expropriation on Mr. Semple on or about September 22, 2010. Spectra also filed an application to the B.C. Supreme Court for a Warrant of Immediate Possession which would, if granted, permit immediate access to the Lands pending determination of compensation.

[6] However, before the application for the Warrant was heard by the Court, the *Oil and Gas Activities Act*, S.B.C 2008, c. 36 (the “OGAA”) became effective law October 4, 2010. This new Act included a different definition of the term “flow line” and an elimination of the right to expropriate under the *Railway Act*. Spectra determined that

under this new definition, the Board, not the Supreme Court, would have jurisdiction over the Pipeline. In addition, the OGC rescinded its earlier approval for the Pipeline as some of the landowners may have not have been contacted the OGC. As the OGC certificate had been rescinded prior to the OGAA being brought into force, it was not grandfathered and Spectra had to apply under OGAA to carry out the oil and gas activity. On December 17, 2010, Spectra obtained a permit from the OGC to construct the Pipeline on routing requested by Mr. Semple. On or about December 22, 2010, Spectra delivered a revised Board application to Mr. Semple based on the routing change.

PARTIES' SUBMISSIONS

[7] Mr. Semple submits that, in the fall of 2010, Spectra set about to acquire, by expropriation the lands required for the Pipeline by taking the necessary steps to comply with the *Railway Act*, including depositing the plan, profile and book of reference in the Land Title Office, giving public notice of the filings, and serving the notices of expropriation on Mr. Semple on or about September 22, 2010. Mr. Semple says the expropriation was complete as of this date, and, therefore, the Board did not have jurisdiction to issue the Right of Entry Orders in December, 2010.

[8] Mr. Semple says that it is "troubling" that the Board Orders made no reference to the expropriation and this colours the process. In approving the expropriation, the OGC made a decision that the subject was a pipeline falling under the provisions of the *Railway Act*. Therefore, Mr. Semple says that compensation must be determined in accordance with this Act.

[9] Spectra says the expropriation proceedings were commenced as they had determined that the Board likely would not have had jurisdiction based on the old definition of flow line in the *Pipeline Act*, which definition was more ambiguous than the current definition. However, the expropriation never proceeded beyond the preliminary steps because the OGAA came into force which eliminated the right to expropriate under the *Railway Act* and included a broader definition of flow line, and, on October 1, 2010, the OGC rescinded approval for the Pipeline. On or about November 9, 2010, Spectra advised Mr. Semple that due to the change in legislation, Spectra would not be proceeding with the expropriation and was instead applying to the Board.

[10] Spectra submits that Mr. Semple is now seeking, in effect, a reconsideration of the Right of Entry Orders pursuant to section 155 of the *PNG Act*, some 2 ½ years after they were issued. Spectra says that the test for reconsideration is not met as defined by the Board, and in particular, there has been no jurisdictional error as there is no dispute that the Pipeline is a flow line as the term is now defined by the OGAA. Spectra also says the right of way for the approved oil and gas activity was not expropriated as alleged because the OGC rescinded its initial certificate in October 1, 2010 and the expropriation cannot predate the approval, and because the court application for the

Warrant for Immediate Possession and compensation did not proceed. The *Railway Act* expressly provided that the right to take possession of the land does not vest in the company until compensation is awarded or agreed to or paid into Court, neither of which occurred.

[11] Alternatively, even if there was a prior expropriation over the same area, Spectra says the Board would still have had the jurisdiction to issue the Right of Entry Orders as the Board has previously determined that the existence of a surface lease or right of way agreement does not preclude the Board from issuing a right of entry order over the same lands (*Arc v. Miller*, MAB Order No. 1633). Further, if the right of way had been expropriated, the right to expropriate under the *Railway Act* relied wholly on the issuance of the OGC certificate (section 16) , which was rescinded on October 1, 2010; therefore, Spectra had no right to carry out the activities as contemplated under the alleged expropriation.

[12] Spectra submits that, while it initially intended to expropriate the right of way to the Lands, and had commenced steps to do so, due to a change in circumstances beyond its control (legislative amendments and the OGC's rescinding of the prior certificate), it never completed the process.

[13] In response, Mr. Semple says he is not seeking a reconsideration of the Right of Entry Orders but a determination that jurisdiction lies with the B.C. Supreme Court. Mr. Semple says that he did not see a need to dispute the Pipeline as a flow line as the OGC's approval of the expropriation made that decision and Mr. Semple continues to believe it is a pipeline. Mr. Semple also disputes that the OGC's rescinding of the initial approval cancels the expropriation approval. The *Railway Act* makes no provision for the abandonment of an expropriation and Mr. Semple never received notice from the Commission that the expropriation approval was rescinded. Mr. Semple argues that the Board has a legal duty to recuse itself from the matter and the matter rests with the Court.

DECISION

[14] The Board's jurisdiction regarding the determination of entry for an oil and gas activity, compensation or other remedies the Board is authorized to make only arises with respect to pipelines that are "flow lines" (Section 154(2) of the *PNGA*).

[15] During the determination and issuance of the Right of Entry Orders to the Lands, it appears that Mr. Semple did not take issue with Spectra's contention that the Pipeline was a flow line, the Board accepted that it was a flow line, and no appeal was made from the Board's Right of Entry Orders. The Board accepted it had jurisdiction over the matter. Mr. Semple says he is not asking the Board to reconsider the Orders but argues, 2 ½ years later, that the Board did not have nor currently has jurisdiction over the matter. He does not agree the Pipeline is a flow line and believes it is a pipeline but

provides no submissions or evidence to support his belief. Rather he argues that an expropriation has been started and completed, the result of which is that the Board did not and does not have jurisdiction.

[13] The Board disagrees that an expropriation had been “completed” by September, 2010. Spectra had served expropriation materials on Mr. Semple, filed an application in Court for a Warrant for Immediate Possession with supporting Affidavits, and had notices published of Spectra’s intention to apply to obtain statutory rights of way, all as required by the *Railway Act*. In addition, the OGC had issued a certificate to Spectra authorizing the construction and operation of the Pipeline. However, these facts do not mean that an expropriation has been completed, but rather, proceedings for an expropriation had been commenced.

[14] The right to take possession of the land does not vest in the company under the *Railway Act* until payment of compensation to the landowner or into court (section 58 of the *Railway Act*). This had not been done as there was no agreement with the landowner nor an award of the court. Spectra had applied for a Warrant of Immediate Possession under sections 60 and 61 of the *Railway Act* but this application did not proceed nor was a warrant granted by the Court. The requirements of section 58, 60 and 61 had not been met and as a result, an expropriation of the right or the right to enter and take possession of the Lands had not yet vested with Spectra. In addition, the rescinding of the OGC’s initial certificate on October 1, 2010 ensured that Spectra had no right to carry out the activities on the Lands as contemplated in the expropriation materials (section 16 of the *Pipeline Act*) and as such could not proceed with the expropriation proceedings.

[15] At the time application was filed with the Board, the *Pipeline Act* was repealed and the OGAA was in force and Spectra had applied to the OGC for new approval for its oil and gas activity. The new definition of flow line was in place and as such Spectra filed an application to the Board for the right of entry. Subsequent to the Right of Entry Orders, the OGC had issued new approval for the oil and gas activity. There is no concurrent jurisdiction between the Board and the Court. Due to the legislative changes, the jurisdiction over a flow line as defined by the OGAA lies with the Board.

[16] As Mr. Semple does not provide evidence or submissions to argue or show the Pipeline is not a flow line, and as the parties and the Board, until now, have proceeded on the basis the Pipeline is a flow line as defined the OGAA, the Board accepts it has jurisdiction over the matter.

[17] The Board will not reconsider its Right of Entry Orders pursuant to section 155 of the *PNG Act* as there has been no change in circumstances, no new evidence, and no jurisdictional error made by the Board.

CONCLUSION

[18] The Board has jurisdiction over the matter and as such the arbitration will proceed as scheduled.

DATED: August 14, 2013

FOR THE BOARD

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Simmi Sandhu, Vice Chair