File No. 1747
Board Order No. 1747-1

December 19, 2013

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
NORTH EAST ¼ OF SECTION 10 TOWNSHIP 78 RANGE 16 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Jay London and Keir London

(APPLICANTS)

AND:

Encana Corporation

(RESPONDENT)

BOARD DECISION

Application for dismissal of Lessors' application received: December 13, 2012

INTRODUCTION

[1] Jay and Keir London applied to the Board for mediation and arbitration services respecting the renewal of rental provisions in a surface lease with Encana Corporation (Encana). The parties engaged in mediation but were unable to resolve the dispute. The Board's mediator referred the dispute to arbitration. An arbitration hearing has been scheduled for June 2014. Encana now asks the Board to summarily dismiss the Londons' application alleging the Form 2, Notice to Negotiate, provided by the Londons is invalid, with the result that the Board does not have jurisdiction to resolve the rent review dispute.

[2] For the reasons that follow, I decline to summarily dismiss the Londons' application. I find the required Notice to Negotiate was effectively given to initiate the rent review process, and the parties in fact engaged in a rent review process as a result. While the Form 2, Notice to Negotiate, provided by the Londons was premature, the conduct of Encana both prior to and subsequent to the receipt of that Notice precludes them from now disputing that there is a valid rent review application before the Board.

FACTS

[3] The Londons entered into a surface lease with Encana effective February 19, 2007. On January 17, 2011, Encana wrote to the Londons advising them of their right to a compensation review within the next year. The letter contained erroneous information respecting the requirements for the review of rent payable under a surface lease in British Columbia, but included an invitation to write if they desired a rent review. On January 6, 2011, the Londons sent Encana a Form 2, Notice to Negotiate, requesting a review of the rent payable under the surface lease. By letter dated August 29, 2011, Encana provided the Londons with a written offer to amend the annual rent payable under the surface lease. The Londons did not accept this offer. On February 1, 2012, the Board received the Londons' application for mediation and arbitration services. The Londons sent a copy of this application to Encana by registered mail on January 30, 2012.

[4] By letter dated February 3, 2012, the Board acknowledged receipt of the application and asked the parties to confirm their contact information. In response to this correspondence sent by email to Jasone Blasevic of Encana, Mr. Blasevic advised by email dated February 6, 2012, that Encana was not in

receipt of the Londons' application. By email dated February 6, 2012, the Board provided Mr. Blasevic with a copy of the application.

[5] On February 8, 2012, Ms. Hannigan of the Board's offices inquired as to the parties' availability to schedule a mediation teleconference. On the same date, Mr. Blasevic responded that he would like the opportunity to meet with the Londons first before engaging in the Board's mediation process, referencing that to his knowledge, there had not been any communication between the parties since Encana's offer from the previous summer. The parties agreed to meet and engage in negotiations without the assistance of the Board and did engage in negotiations throughout the summer and early fall of 2012. In November 2012, in response to an inquiry from the Board as to whether the parties had successfully concluded their negotiations, Mr. London asked the Board to schedule a mediation session. The Board conducted three mediation sessions with the parties between January 30, 2013 and September 25, 2013 before refusing further mediation and referring the matter to arbitration. The mediator's letters disclose that the parties engaged in extensive discussions in an effort at resolving the rent review application. There is no reference to any objection from Encana to the validity of the process.

ANALYSIS

[6] Section 165(2) of the *Petroleum and Natural Gas Act (PNGA)* provides that a right holder or a landowner may serve notice on the other party to a surface lease or board order, in the form and manner prescribed by the Rules of the Board, requiring negotiation of an amendment to the rental provisions in the surface lease or order. The Board's Rules prescribe the Form 2 – Notice to Negotiate. Section 165(3) of the *PNGA* says that a Notice to Negotiate may not be served before the fourth anniversary of the effective date of the surface lease or board order or the most recent amendment to the rental provisions in the surface lease or board order. Section 166(7) of the *PNGA* provides that any revised rent is retroactive to the anniversary date immediately preceding the Notice to Negotiate.

[7] The *PNGA* provides a scheme, therefore, by which either party to a surface lease or Board order may request renegotiation of the rental provisions under that surface lease or order no earlier than the fourth anniversary date of the lease or order or the most recent amendment. A rent review is not automatic, but only occurs when requested. Once requested, any revised rent is effective as of the anniversary immediately preceding the request.

[8] The Board has found that while use of the prescribed Form 2 is preferable, it is not necessary if it can be discerned from the circumstances that Notice to

Negotiate was effectively given and received, and the parties engaged in negotiation towards rent renewal (*Wilderness Ranch Ltd. v. Progress Energy Ltd.*, SRB Order 1786-90-1, February 27, 2013).

[9] The date the Notice to Negotiate is either made or effectively made is important because it is that date that provides the trigger for determining the effective date of any renegotiation and sets the earliest next opportunity for requesting renegotiation. The purpose of the notice is to initiate the rent review process, which is otherwise not automatic, and to set the effective date of any renewal. If it can be demonstrated that written notice has been given and acted upon, regardless of whether that notice is in the prescribed form, the purpose of the requirement for notice set out in section 165(2) will be met and notice will effectively have been given in accordance with the *PNGA*.

[10] The fourth anniversary of the surface lease between the Londons and Encana was February 17, 2011. A Notice to Negotiate could not have been served by either party prior to that date. More importantly, any rent renegotiation could not be effective prior to that date. The Londons can hardly be faulted for providing their Notice to Negotiate early, having received the letter from Encana dated January 17, 2011 advising them of their right to seek a rent review in the coming year.

[11] Despite having received the Notice to Negotiate early, by letter dated August 29, 2011, Encana provided the Londons with an offer to amend the rent payable under the surface lease. Even if the Londons' Notice to Negotiate was premature and could not engage the rent review process, with this written offer Encana effectively provided the Londons with Notice to Negotiate the rent payable under the terms of the surface lease. Encana itself initiated the rent review process, with this letter, and had clearly engaged in a renegotiation of the rental provision under the surface lease by this date, despite the early notice from the Londons.

[12] Encana received a copy of the Londons' application to the Board on February 8, 2012, and engaged in further negotiations in an effort at resolving the rent payable under the surface lease.

[13] In the circumstances, it would be manifestly unfair to conclude that Notice to Negotiate pursuant to section 165(2) of the *PNGA* had not effectively been given and that the Board does not have jurisdiction to continue with the Londons' application for rent review. The communications between the parties and the conduct of the parties operated to effectively provide the required notice and to initiate the rent review process.

CONCLUSION

[14] Encana's application for the Board to summarily dismiss the Londons' application for mediation and arbitration services is dismissed. The arbitration of the Londons' application will proceed as scheduled.

DATED: December 19, 2013

FOR THE BOARD

Cheryl Vickers, Chair