

File No. 1791
Board Order No. 1791-1

January 8, 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
THE NORTH EAST $\frac{1}{4}$ OF SECTION 10 TOWNSHIP 78 RANGE 16 WEST OF
THE 6TH MERIDIAN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

James Nelson London and
Keir Marie London

(APPLICANTS)

AND:

Encana Corporation

(RESPONDENT)

BOARD ORDER

Heard by written submissions

Appearances: J. Darryl Carter, Q.C., Barrister and Solicitor, for the Applicants
Thomas R. Owen, Barrister and Solicitor, for the Respondent

INTRODUCTION AND ISSUE

[1] James and Keir London entered a right of way agreement (the "ROW Agreement") with Encana Corporation ("Encana") dated February 14, 2009 granting Encana a right of way over Lands owned by them to construct, operate and maintain a pipeline or pipelines and for incidental purposes. Pursuant to a Conveyance Agreement dated April 20, 2010, (the "Conveyance Agreement"), Encana conveyed and assigned its rights and interests in certain assets including the ROW Agreement to Westcoast Energy Inc., carrying on business as Spectra Energy Transmission ("Spectra").

[2] On December 17, 2010, the OGC issued a pipeline permit to Spectra authorizing construction and operation of a pipeline on the Lands. Spectra has constructed the pipeline permitted by the OGC on the Lands, exercising its rights under the ROW Agreement assigned to it to gain access to the Lands, and pursuant to right of entry orders granted by the Board for access to and use of initially .94 acres, and later 4.55 acres of the Lands required for temporary workspace (Order 1694-1 dated December 23, 2010 and Order 1694-2 dated January 31, 2011). The Londons and Spectra have not agreed to compensation for Spectra's access to and use of the Lands authorized by the Board's Orders.

[3] Encana has not entered the Lands or constructed anything on the Lands pursuant to the ROW Agreement.

[4] The Londons submit that the oil and gas activity permitted by the OGC and now conducted on the Lands by Spectra is substantially different from the oil and gas activity that was proposed by Encana during the negotiation of the ROW Agreement. They allege that Encana represented that the ROW Agreement was for the construction and operation of two pipelines (2" and 4") necessary for connecting facilities to a wellsite, but that Spectra constructed and now operates a major 16" sour gas transmission pipeline on the Lands. They allege that such an activity was not proposed by Encana and submit the ROW Agreement did not contemplate such an activity. The Londons ask the Board to amend the ROW Agreement under section 164 of the *PNGA* to make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the Lands is not authorized, especially by another company such as Spectra. Section 164 of the *PNGA* is set out in full at Appendix "A" to this decision.

[5] Encana submits it is not a candidate for service of an application under section 164 of the *PNGA* because it is no longer a party to the ROW Agreement as a result of its assignment to Spectra. Encana submits the application against it should be dismissed.

[6] The only issue before me at this time is whether Encana is the proper party to an application under section 164 of the *PNGA*. I have not considered the substance of the London's allegations and make no findings in that regard.

SUBMISSIONS

[7] Encana says it is no longer a party to the ROW Agreement, and therefore, not the appropriate party to an application under section 164 of the *PNGA*. The Londons submit Encana is a party to the ROW Agreement, and cannot simply remove itself as a party by entering an assignment with a third party. Encana, in turn, argues that is the very point of an assignment, and that the ROW Agreement does not restrict assignment and expressly only binds a party while it has an interest in the Lands. The Londons argue the ability to walk away from an agreement "flies in the face" of section 164 of the *PNGA*, and that an assignee can acquire no more than the Grantee acquired from the Grantor. Referring to Cheshire and Fifoot's *Law of Contracts*, the Londons argue that an assignment does not relieve an assignor of its obligations under a contract. Encana, in turn, points out the exception to this general rule, where the parties to a contract agree that the burden of a contract may be assigned.

ANALYSIS

[8] Pursuant to Clause 1 of the ROW Agreement, the Londons, as Grantor, granted Encana, as Grantee, right of access to the Lands owned by them as follows:

1. Grant of Statutory Right of Way

The Grantor does hereby grant, convey, transfer and set over to the Grantee its successor, and assigns a right of way across over under on or through the said lands to construct, operate and maintain a pipeline or pipelines including accessories and appurtenances (collectively referred to as the "Works"), and for any other purpose preparatory or incidental thereto including the right to repair or replace the said pipeline or pipelines and generally do all acts necessary or incidental to the foregoing and to the business of the Grantee in connection therewith. The right to construct more than one pipeline in the right of way hereby granted shall be limited to one construction operation.

[9] Clause 11 of the ROW Agreement provides that the ROW Agreement is a covenant running with the land. It contemplates assignment and expressly provides that its covenants and conditions are not personal or binding on the parties unless they have an interest in the Lands as follows:

11. Assignment

This Agreement is a covenant running with the said Lands and the provisions of this Agreement including all covenants and conditions herein contained shall extend and be binding upon and enure to the benefit of the heirs, executors, affiliates, administrators, successors and assigns of the Grantor and the Grantee and shall not be personal or binding on the parties hereto except during such time as the parties hereto shall have any interest in the Lands and only in respect of such portion of the Lands in which the parties have an interest. (Emphasis added)

[10] By way of the Conveyance Agreement, and for consideration, Encana assigned its rights under the ROW Agreement to Spectra and Spectra acquired “the entire right, title, estate and interest” of Encana in and to various assets including the ROW Agreement. The transfer of the ROW Agreement to Spectra is registered on the Title to the Lands (BB1269442).

[11] The ROW Agreement is a statutory right of way under section 218 of the *Land Title Act*. Section 218(3) of the *Land Title Act* provides that registration of an instrument creating a statutory right of way

- (a) constitutes a charge on the land in favour of the grantee, and
- (b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.

[12] A statutory right of way agreement registered on title is expressly binding on the successors in title to the agreement, unless otherwise contemplated in the agreement itself. The ROW Agreement expressly contemplates assignment and expressly provides that the covenants and conditions are not personal to the parties or binding upon them unless they continue to have an interest in the Land. As Encana’s interest in the Lands has been assigned to Spectra, and transfer of those rights are registered on the title to the Lands, Encana is no longer a party to the ROW Agreement. As Encana’s successor and assign, the terms, conditions and covenants in the ROW Agreement are now binding on Spectra and enure to the benefit of Spectra. Spectra effectively becomes the Grantee.

[13] With respect to the Londons’ argument that an assignee can acquire no more than the Grantee acquired from the Grantor, I agree. Spectra does not

acquire any rights beyond those originally held by Encana under the ROW Agreement. But it is Spectra who is now bound by the terms of the ROW Agreement, not Encana, and if Spectra purports to exercise rights it does not have under the ROW Agreement (about which I make no finding) it is against Spectra that the Grantor may seek a remedy.

[14] Such an interpretation does not fly in the face of section 164 of the *PNGA* as the Londons submit. An application under section 164 must be brought against the current party to a surface lease or right of way agreement, and any orders of the board to remedy an alleged non-compliance or to amend the terms of an agreement will bind the current parties, and their successors, to that agreement. Such an interpretation conforms with the legislative scheme allowing the registration of statutory rights of way against title and providing that the terms of contracts of this nature are binding against successors in title.

CONCLUSION

[15] I conclude that Encana is not the proper party to an application under section 164 of the *PNGA* with respect to the ROW Agreement. I find that the Conveyance Agreement effectively assigned Encana's rights and obligations under the ROW Agreement to Spectra. I find that the ROW Agreement contemplated that rights could be assigned, and that the parties agreed that the ROW Agreement was only personally binding upon the original parties so long as they held an interest in the Lands. As Encana subsequently conveyed its interest in the Lands to Spectra, and as that interest is registered against the title to the Lands, Spectra is the party that is bound by the terms and covenants of the ROW Agreement, and against whom any application under section 164 of the *PNGA* should be brought.

ORDER

[16] The application against Encana is dismissed.

DATED: January 8, 2013

FOR THE BOARD



Cheryl Vickers, Chair

APPENDIX "A"

Petroleum and Natural Gas Act, section 164 and relevant definition in section 141:

141 (1) In this Part:

...

"surface lease" means a lease, easement, right of way or other agreement authorizing the entry, occupation or use of land for a purpose described in section 142 (a) to (c).

164 (1) A party to a surface lease may apply to the board for mediation and arbitration in respect of either or both of the following:

- (a) a disagreement respecting the operation of or compliance with a term of the surface lease;
- (b) a disagreement respecting whether the surface lease should be amended based on a claim by a party that the oil and gas activity or related activity as approved by the commission on the land that is subject to the surface lease is substantially different from the oil and gas activity or related activity that was proposed during the negotiation of the surface lease.

(2) On application under subsection (1) (a), the board may do any or all of the following:

- (a) make an order confirming the right of entry under the surface lease, subject to the terms and conditions specified in the order, if any;
- (b) if the board is satisfied that a party to the surface lease has failed to comply with an obligation under the surface lease, order that party to pay compensation to the other party for that failure;
- (c) order that interest is payable on an amount payable under paragraph (b);
- (d) order that compensation awarded under paragraph (b) is payable by a party instead of the party complying with an obligation under the surface lease.

(3) On application under subsection (1) (b), or in making an order under subsection (2) (d), the board may make an order amending the terms of the surface lease from the effective date set out in the order.