

**File Nos. 1792 and 1801
Board Order No. 1792/1801-1**

May 14, 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 ¼ OF SECTION 10 TOWNSHIP 78 RANGE 16
WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")**

BETWEEN:

James London and Keir London

(APPLICANTS)

AND:

Spectra Energy Midstream Corporation

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing May 10, 2013

Appearances: J. Darryl Carter, Q.C., Barrister and Solicitor, for the Applicants
Rick Williams, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] Spectra Energy Midstream Corporation (Spectra) seeks to have applications brought by James and Keir London pursuant to sections 163 and 164 of the *Petroleum and Natural Gas Act (PNGA)* summarily dismissed. Spectra alleges that the Board does not have jurisdiction, or alternatively, that the Londons are barred from seeking the requested relief.

BACKGROUND

[2] James and Keir London own the Lands described as the Northeast ¼ of Section 10 Township 78 Range 16 West of the 6th Meridian Peace River District (the "Lands"). In February 2009, the Londons entered a Right of Way Agreement with Encana Corporation ("Encana") granting Encana access to and use of the Lands for the purpose of constructing, operating and maintaining a pipeline or pipelines in exchange for compensation. The Londons executed a Release and Waiver of damages arising from the exercise of rights under the Right of Way Agreement, specifically with respect to crop loss and fence cuts.

[3] In April 2010, Encana assigned the Right of Way Agreement and Release to Spectra.

[4] In November 2010, Spectra filed an application to the Board seeking right of entry to a portion of the Lands for use as temporary workspace in the construction of a flow line. On December 17, 2010, the Oil and Gas Commission ("OGC") issued a pipeline permit to Spectra authorizing the construction and operation of the Bissette Pipeline on the Lands. On December 23, 2010, the Board issued a Right of Entry Order authorizing Spectra's use and occupation of .94 acres of the Lands for temporary workspace (Order 1694-1), and on January 31, 2011, the Board amended the Right of Entry Order to authorize Spectra access to and use of an additional 3.61 acres of the Lands for temporary workspace (Order 1694-2). The compensation payable to the Londons for Spectra's use and occupation of the Lands for temporary workspace is not yet resolved.

[5] Purporting to exercise its rights under the Right of Way Agreement and the Right of Entry Orders, Spectra constructed portions of the Bissette Pipeline on the Lands in 2011.

[6] In October 2012, the Londons filed an application to the Board pursuant to section 163 of the *PNGA* alleging that Spectra had caused damage to the Lands (file 1792). They also allege that the Bissette Pipeline is not a flow line and that the Board did not have jurisdiction to issue the Right of Entry Orders.

[7] In January 2013, the Londons filed an application to the Board pursuant to section 164 of the *PNGA* alleging that the oil and gas activity approved by the OGC, namely the Bissette Pipeline, is substantially different from the oil and gas activity proposed by Encana during the negotiation of the Right of Way Agreement (file 1801). They ask the Board to amend the Right of Way Agreement to “make it clear that the construction and operation of a major 16” sour gas transmission pipeline on the land is not authorized”.

[8] Spectra submits that the Board does not have jurisdiction to determine the Londons’ applications or to grant the relief sought, or that the Londons are barred from advancing their claims and the applications should be summarily dismissed.

ISSUES

[9] The issues are to determine whether the Board has jurisdiction in either or both applications, or alternatively, whether either or both applications should be summarily dismissed. As a further alternative, the issue is whether the applications can be amended to clearly fall within the jurisdiction of the Board and more clearly define the substantive issues.

ANALYSIS

File 1792: the section 163 application

[10] With respect to file 1792, Spectra asks:

- a) Can the Londons now challenge whether the Bissette Pipeline is a flow line?
- b) Are the Londons barred from seeking additional damages from Spectra?

[11] For the reasons that follow, I find that the Londons cannot challenge that the Bissette Pipeline is a flow line if they wish to pursue a claim pursuant to section 163 of the *PNGA* for damages. On the basis that the Bissette Pipeline is a flow line, I find that the Londons are not barred from seeking additional damages from

Spectra. Whether they are entitled to additional damages is a matter for the Board to mediate and, if necessary, ultimately determine on evidence in consideration of the merits of the Londons' application. On the basis that the Bissette Pipeline is a flow line, the Board has jurisdiction to hear the application for damages and it should not be summarily dismissed.

- a) Can the London's now challenge whether the Bissette Pipeline is a flow line?

[12] The Board's jurisdiction to issue right of entry orders for an oil and gas activity, to determine the compensation payable for the use and occupation of land for an oil and gas activity, to determine if damages are payable arising from a right of entry, or with respect to any other remedies or orders that the Board is authorized to make under the *PNGA*, does not arise with respect to pipelines if the pipeline is not a flow line (*PNGA*, section 154(2)). Section 154(2) of the *PNGA* says:

154 (2) This Part does not apply to the entry, occupation or use of land relating to a pipeline, other than a flow line.

[13] The term "Part" in section 154(2) is a reference to Part 17 of the *PNGA*. None of the provisions of Part 17 of the *PNGA*, therefore, applies to the entry, occupation or use of land for a pipeline that is not a flow line.

[14] In considering Spectra's application for right of entry to the Lands for use as temporary workspace in the construction and operation of a flow line, the Londons did not take issue with Spectra's contention that the Bissette Pipeline was a flow line. The Board accepted that it was a flow line and no appeal was taken from the Board's Right of Entry Orders. Without leave of the Court, the time for seeking judicial review of the Board's orders granting Spectra right of entry to a portion of the Lands for temporary workspace has long since passed. Spectra has entered the Lands and constructed the Bissette Pipeline. The Board has not concluded mediation in an effort at resolving the compensation payable to the Londons arising from Spectra's use and occupation of the Lands for temporary workspace, but is not about to go back and consider at this time whether it had jurisdiction in the first place to grant the Right of Entry Orders.

[15] If the Board did not have jurisdiction to grant the Right of Entry Orders because the Bissette Pipeline is not a flow line, then it would not have jurisdiction in the Londons' application pursuant to section 163 for damages. Section 163 of the *PNGA* provides in part as follows:

163 (1) A person may apply to the Board for mediation and arbitration if the person

- (a) is a landowner or occupant of land that is subject to a right of entry, and the exercise of the right of entry causes damage to the land or other land of the owner or occupant or causes loss to the owner or occupant,...
- (b) ...

(2) On application under subsection (1), the board may order the right holder to pay compensation to the landowner ... for damage to the landowner, ... or loss to the landowner, ... as a result of the exercise of the right of entry, including, without limitation, compensation relating to negotiation with the right holder before the application was made to the board.

(3)...

[16] A “right holder” is a person who holds a “right of entry” (*PNGA*, section 141(1)) and a “right of entry” includes a right of way agreement (*PNGA*, sections 141(1) and 142(d)). Spectra is a right holder, and the Londons, as landowners, may apply to the Board for mediation and arbitration if Spectra’s right of entry causes damage to their land or loss to them. If the Board finds the alleged loss or damage has occurred as a result of the right of entry, it may order Spectra to pay compensation to the landowners.

[17] However, section 163 falls within Part 17 of the *PNGA*. Therefore, if the application made under section 163 relates to damages caused to the land or loss to the landowner arising from the entry, occupation or use of land for a pipeline that is not a flow line, it does not apply, and the Board does not have jurisdiction to order compensation.

[18] Having brought the application under section 163 alleging that Spectra’s right of entry, use and occupation of the Lands for the construction and operation of the Bissette Pipeline has caused damage to the Lands or loss to the landowners, the Londons can not now argue that the Bissette Pipeline is not a flow line. The Board’s jurisdiction under section 163 to award compensation arising from Spectra’s entry to and use of the Lands to construct and operate the Bissette Pipeline is only triggered if the Bissette Pipeline is a flow line.

b) Are the Londons’ barred from seeking additional damage?

[19] Spectra argues the Release and Waiver executed by the Londons bars them from claiming further damages. This is an issue that will have to be determined by the Board in considering the London’s application under section 163 of the *PNGA*. The Board will need evidence as to the alleged damage and

loss and will need to hear argument as to whether compensation for that damage is covered by the Release.

File 1801: the section 164 application

[20] With respect to file 1801, Spectra asks:

- a) Does the Board have jurisdiction to interfere with permits granted by the OGC?
- b) What are the circumstances necessary to trigger the Board's jurisdiction to amend a right of way agreement and are they met in this case?

[21] As to the first question, the Board does not have jurisdiction to interfere with permits granted by the OGC. The Board's jurisdiction is to grant rights of entry for an oil and gas activity and to determine the compensation payable for the use and occupation of land for an oil and gas activity. The permitting of the oil and gas activity itself is within the jurisdiction of the OGC. Any order of the Board cannot change a permit, it can only authorize entry and use of land for an oil and gas activity.

[22] In order to conduct an oil and gas activity on private land, a person requires both a permit from the OGC and either an agreement with the landowner or a right of entry order from the Board. The right of entry must authorize entry to land for the purpose of carrying out the permitted activity. If it does not, then entry to the lands to carry out the permitted activity would not be authorized until either an agreement with the land owner is obtained or a right of entry order authorizing entry for the permitted activity granted. Any order of the Board to amend a surface lease or right of way agreement under section 164 could potentially change the purpose for which right of entry is authorized, but could not change the permit granted by the OGC. In that event, the right holder would need either a new agreement or a new right of entry order to continue to enter and use the land for the permitted activity.

[23] As to the second question, these issues ought properly to be determined upon considering the evidence and arguments made in relation to the merits of the Londons' application. Section 164 of the *PNGA* provides in part as follows:

- 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) ...;
 - (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) ...

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

[24] A “surface lease” includes a right of way agreement (*PNGA*, section 141(1)). The Londons, as a party to the Right of Way Agreement, allege that the oil and gas activity approved by the OGC, i.e. the Bissette Pipeline, is substantially different from the oil and gas activity that was proposed during the negotiation of the Right of Way Agreement. Spectra argues the Right of Way Agreement authorizes entry to construct and operate a pipeline and the Bissette Pipeline is a pipeline so it is not “substantially different”. What constitutes “substantial difference” and whether the Bissette Pipeline is “substantially different” from the oil and gas activity proposed during negotiation of the Right of Way Agreement will be for the Board to determine after hearing the evidence and considering the arguments. Similarly, whether the Board should amend the Right of Way Agreement as a result of any finding of “substantial difference” and the nature of any amendment, will also be for the Board to determine. However, on the basis that Spectra purportedly exercised the rights granted to it in the Right of Way Agreement to enter the Lands and construct the Bissette Pipeline, the Board has jurisdiction to hear the application brought under section 164 of the *PNGA*. That application should not be summarily dismissed without hearing and considering the evidence and arguments of the parties.

[25] I find, however, that the Londons’ application should be amended to seek a remedy within the jurisdiction of the Board. The Londons may not ask the Board to amend or alter the OGC’s permit or to amend the Right of Way Agreement so as to imply that the OGC’s permit does not authorize construction and operation of the Bissette Pipeline. They may, however, ask the Board to amend the Right of Way Agreement to clarify that entry to and use of the Lands is not authorized for the purpose of constructing and operating a 16” sour gas transmission pipeline. Additionally, or alternatively, the Londons may ask the Board to amend the terms of the Right of Way Agreement with respect to the compensation payable for entry to and use of the Lands on the basis that the impact to the Lands and loss to the landowner is different than that contemplated during negotiation of the Right of Way Agreement because the oil and gas activity permitted by the OGC is substantially different from that contemplated during

negotiation of the Right of Way Agreement. The Board can determine whether to amend the Right of Way Agreement as requested upon considering the evidence and the arguments of the parties.

[26] Section 164, as with section 163, is within Part 17 of the *PNGA*. The Board's jurisdiction to grant a remedy under section 164 in relation to a right of way agreement for a pipeline must be in respect of a pipeline that is a flow line.

CONCLUSION

[27] On the basis that the Bissette Pipeline is a flow line, the Board has jurisdiction to consider the Londons' application under section 163 of the *PNGA* for damages. Spectra's argument that the Release and Waiver bars any claim for additional damages may be considered with the merits of the claim and does not go to the jurisdiction of the Board or give cause for summary dismissal of the claim.

[28] Upon amendment of the section 164 application to clarify that the remedy sought is within the jurisdiction of the Board, and on the basis that Bissette Pipeline is a flow line, the Board has jurisdiction to consider the Londons' application under section 164 of the *PNGA* asking the Board to amend the terms of the Right of Way Agreement. Spectra's argument that the oil and gas activity permitted by the OGC is not substantially different from that contemplated during negotiation of the Right of Way Agreement goes to the merits of the claim not the jurisdiction of the Board, and does not give cause for summary dismissal of the claim.

ORDER

[29] As indicated above, the Board has jurisdiction to hear these applications. The applications are referred to a Board mediator.

DATED: May 14, 2013

FOR THE BOARD



Cheryl Vickers, Chair