

**File No. 1975**  
**Board Order No. 1975-1**

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**November 27, 2018**

**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 SOUTH ½ OF SECTION 14 TOWNSHIP 25 PEACE RIVER DISTRICT  
EXCEPT PLAN A754  
(The "Lands")

BETWEEN:

Barry Reid and  
Darrel Reid

(APPLICANTS)

AND:

Encana Corporation

(RESPONDENT)

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**BOARD ORDER**

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Heard: October 16, 2018 at Dawson Creek, BC  
Appearances: Barry Reid for the Applicants  
Tom Owen, Barrister and Solicitor, for the Respondent

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## **INTRODUCTION**

[1] The applicants, Barry and Darrel Reid, seek review of the rent payable under a surface lease with Encana Corporation (Encana). The leased area is 3.121 acres and is used by Encana for an access road to a riser site. The annual rent payable under the lease is \$2,500. Mr. Barry Reid, on behalf of both applicants, seeks to have the rent increased. Encana submits the current rent more than covers the ongoing and reasonably anticipated losses arising from the right of entry and submits the rent should be decreased. The effective date of this review is April 25, 2017.

## **ISSUE**

[2] The issue is to determine whether the rent should be revised to reflect the ongoing and reasonably foreseeable loss to the owners of the Lands arising from Encana's continued use and occupation of the Lands.

[3] The onus is on the applicants to establish their ongoing and reasonably prospective loss and to establish that an increase to the rent is warranted (*Progress Energy Canada Ltd. v. Salustro*, 2014 BCSC 960).

## **PRELIMINARY MATTER**

[4] Prior to the hearing, Mr. Reid asked the Board to make an order requiring Encana to produce the Encana agent or employee who negotiated each of the Encana leases relied on at the arbitration. He submitted requiring the agent who negotiated the leases relied on by Encana to testify would allow the landowner to cross-examine that individual with respect to the circumstances of the agreement. I did not make the requested order.

[5] It may be presumed that surface leases, like any other contract, speak for themselves. Extrinsic evidence may be used to prove otherwise, such as for example that there is a collateral contract, unconscionability, or additional terms, or as an aid to construction. But if a party is alleging a contract does not speak for itself, then it is up to that party to lead evidence to that effect by calling the parties to the contract or through cross-examination of the witnesses put forward.

[6] Other surface leases are only helpful to the extent they demonstrate a pattern of dealings, regardless of evidence of actual loss (*Encana Corporation v. Lumnitzer*, Order 1840/1847-2, November 24, 2016; *Dietz v. CNRL*, Order 1870-1, March 6, 2017). Proof of the negotiation process is not necessary to make out a valid pattern of dealings (*Enbridge Pipelines v. Karpetz*, 2010 ABCA 185).

[7] It will generally, therefore, not be necessary to have the persons who actually negotiated a surface lease attend to give evidence of the negotiations. And unless there is evidence to support the need for extrinsic evidence to establish circumstances beyond those addressed in the contract itself relevant to the question of whether the leases establish a pattern of dealings and the individual tendered to provide evidence of the contract is not able to provide evidence of the relevant circumstances, it will not generally be necessary to require attendance of the persons who actually negotiated the contract.

[8] I was not satisfied of the necessity to call the Encana agents who actually negotiated any of the Encana leases relied on by Encana in this arbitration.

## **BACKGROUND**

[9] The Lands have been owned by members of the Reid family for approximately 90 years. They were originally purchased by Mr. Reid's grandfather and passed to his father upon his grandfather's death. His father owned the lands until his death in 2008,

when they passed to Mr. Reid's mother, Martha Reid, as the executrix of his father's estate.

[10] It was soon after Mr. Reid's father's death that Encana approached Martha Reid respecting entry to the Lands for a pipeline right of way and an access road to a riser. They entered a surface lease and right of way agreement on April 25, 2008. The annual rent payable under the lease was \$1,500.

[11] Mr. Reid is extremely critical of Encana's conduct in entering the surface lease and right of way agreement with his mother in light of his mother's age, and physical and mental condition at the time. He is of the view that his mother was not mentally competent, Encana entered an unconscionable contract, and the original lease was invalid.

[12] Martha Reid died in May 2009, and the Lands passed to Mr. Reid and his sister as co-executors of his mother's estate. Upon his sister's death in 2012, Mr. Reid became the sole executor of Martha Reid's estate. In that capacity, he attempted to get in touch with Encana about the lease. He served a Form 2 to commence rent review proceedings and filed an application for rent review with the Board in June of 2012. The parties successfully resolved the application and on May 9, 2013 entered a new surface lease effective April 25, 2008 (the Surface Lease) to replace the original surface lease. The Surface Lease increased annual rent to \$2,500 retroactive to April 25, 2009. It is the rent payable under the Surface Lease that is the subject of this application.

[13] Mr. Reid sees the new agreement reflected in the Surface Lease as an acknowledgment by Encana that the rent of \$1,500 in the original surface lease with his mother was inadequate. He continues to be angry and frustrated with Encana for the manner in which they dealt with his mother and deeply resents that "in the name of building a pipeline and a road, Encana would walk into an assisted living facility and sign a contract."

[14] Encana does not acknowledge that the original lease was unconscionable or invalid. It submits it was dealing with the right person as Martha Reid did not have a Power of Attorney and provided some evidence that Mr. Reid's sister was with their mother when she signed the agreement. Encana says it was not able to register the original lease in the Land Title Office because the original lease had been signed by Martha Reid as the lessor, whereas ownership of the Lands were registered to Martha Reid as Executrix of her late husband's estate. Encana says the Land Title Office would not permit the original surface lease to be registered, so to protect its interest in the Lands, it needed to enter a new lease.

[15] Whether the original lease was valid, the conduct of Encana, the capacity of Mrs. Reid in entering the original lease, the sufficiency of the original rent, and the reasons for entering a replacement lease are not relevant to the rent review before me in this arbitration and I make no findings on any of these matters. I set out the background above to acknowledge that these issues are important to Mr. Reid and are the source of considerable stress, anger and resentment. However, the only issue before me in this arbitration is to determine whether the rent of \$2,500 payable under the Surface Lease is adequate to compensate him and his brother as co-owners of the Lands for their prospective ongoing and reasonably foreseeable loss until the rent becomes eligible for review again.

## **THE LANDS**

[16] The Lands comprise a half section and are owned by Mr. Reid and his brother, Darrel Reid.

[17] The Lands are undeveloped other than with two small cabins and a couple of outbuildings in a clearing close to the south east corner boundary. Mr. Reid and his family use the Lands for recreational purposes. No one lives on the Lands. Mr. Reid visits the Lands at least a couple of times a year, sometimes more often, and will stay for three to four days at a time. His brother is generally able to visit the Lands a little more frequently, maybe four or five times a year, again staying three to four days at a

time. The Lands are used for family events such as reunions, weddings and memorial services. Mr. Reid expressed a deep emotional connection to the Lands. He goes there to connect with his ancestors.

[18] The leased area comprises 3.121 acres. It is a 15 metre wide roadway extending from just west of the middle of the Lands in a north east direction diagonally to the north boundary of the Lands. The road connects a well pad operated by Encana located just south of the Lands to a riser site north of the Lands. The Encana well site is accessed by an access road from the south. There is a gate to the south of the well site and another gate at the start of the subject access road at the north edge of the well site on the south boundary of the Lands. There is a gate on the north boundary of the Lands across the subject access road and another gate closer to the riser site a little to the north.

[19] A pipeline right of way lies on the east side of the access road containing a pipeline from the Encana well site just south of the Lands to the riser site just north of the Lands.

[20] The riser site is accessed by pickup truck for pigging once a month. Additionally, the access road is used by vegetation management crews for weed spraying. Spraying occurs once or twice in the summer months. The road will be accessed by maintenance crews or snowplows as required to enable the monthly access for pigging.

[21] There is a well pad operated by Murphy Oil Ltd. (Murphy) north of the Lands. An access road to this well site runs the length of the Land's eastern boundary. Another Murphy well pad is just south of the Lands and to the east of the Encana well site. A pipeline lies adjacent to the access road connecting the two Murphy well sites.

[22] The cabins on the Lands are approximately 30-35 metres from the Murphy access road.

[23] The Lands drain to the north. Water from a borrow pit south of the Lands has flooded an entire strip of the Lands from the south to north boundary to the west of the cabins and to the east of the subject access road. As a result of the flooding, approximately  $\frac{3}{4}$  of the Lands including the access road are not accessible from the cabins other than with an amphibious vehicle. The borrow pit is not operated by Encana.

[24] The Tupper River runs through the western side of the Lands.

[25] The Lands are treed with spruce, pine, aspen and cottonwood. A large area of the Lands was logged in the mid 1990's. The trees have been allowed to regrow naturally. Sixty-three acres of the previously logged area lies to the west of the access road. The entire area of the Lands lying west of the access road is 173 acres including unlogged land and area comprising the Tupper River valley.

## **EVIDENCE AND ANALYSIS**

[26] Section 154(1) of the *Petroleum and Natural Gas Act* provides a non-exclusive list of factors the Board may consider in determining compensation payable for a right of entry either periodically or otherwise. Section 154(2) provides that in determining the amount to be paid in a rent review application, the Board must consider any change in the value of money and of the land since the surface lease was originally made. I will discuss the factors set out in section 154 to the extent they are relevant to this application and to the extent I was provided evidence of them.

### Value of the land and change in value of the land

[27] In 2013, BC Assessment assessed the Lands at \$144,000. In 2017, BC Assessment assessed the Lands at \$210,000 suggesting an increase in value of 36%.

### Loss of profit

[28] The land is not farmed or used for any other income generating activity. Mr. Reid expressed concern that the presence of the access road and pipeline right of way would prevent logging of the Lands in future. Ashlin Ray of Encana gave evidence that Encana works with logging companies and landowners all the time to facilitate safe crossing of a pipeline right of way or access road by logging equipment. The evidence does not establish that the presence of either the access road or pipeline right of way would prevent future logging of the Lands causing potential loss of income. In any event, Mr. Reid acknowledged that he had no plans to log the Lands over the next few years. Loss of income from logging is not, therefore, reasonably foreseeable in the time prior to the lease's next eligibility for rent review.

[29] The evidence is that Encana typically pays \$250/acre for bushland. Mr. Reid did not dispute that \$250/acre was appropriate compensation for loss of profit. Although Mr. Reid does not in fact experience loss of profit as a result of the Surface Lease, I will nevertheless use \$250/acre for this factor in assessing an appropriate annual rent.

### Severance

[30] Mr. Reid claims that the 173 acres west of the access road are effectively severed by the lease and should be included in the lease area for the purpose of an annual rent. He submits there is no way to access to the 173 acres west of the access road other than to cross the pipeline and access road.

[31] Mr. Reid submits he is beholden to Encana to get the permission to cross the right of way and access road in order to develop or engage in any development of that area. There is no evidence, however, of any plans to develop the area or otherwise use the area for income generating purposes or in any manner other than as currently used as recreational land. Further, there is no evidence that Encana would not permit or facilitate safe crossing of the right of way and access road by equipment or vehicles required for the development of the land to the west. While, Mr. Reid would need to seek Encana's permission for heavy equipment to cross the right of way and access



road, the evidence of Ashlin Rae is that such permission is regularly given and Encana will work with landowners and contractors to ensure safe crossing is available at no cost to the landowner.

[32] There is no evidence that the landowners' use for recreational purposes of the 173 acres to the west of the access road has been lost as a result of Encana's right of entry.

[33] In the alternative, Mr. Reid argued rent should be paid for the 63 acres west of the access road that were previously logged. There is likewise no evidence that the 63 acres previously logged cannot be used, developed or logged as a result of the access road and cannot continue to be used as they have been a recreational land. There is no basis for increasing the lease area for severance and I will use the lease area of 3.121 acres to calculate ongoing rent.

#### Nuisance and Disturbance

[34] Mr. Reid's evidence was that from the cabins he can hear traffic on the access road. He can also hear traffic on the Murphy access road and workers on the Murphy well site immediately to the south east.

[35] Ms. Rae's evidence was that Encana personnel and contractors use the access road for approximately one hour to one and half hours a month. Her evidence was that vehicle traffic on an access road to a riser site is less than on an access road to a well site. Well sites typically require access daily by an operator, as opposed to monthly for a riser site, as well as access by maintenance service rigs.

[36] Mr. Reid's evidence was that he often finds the gates have not been locked. His evidence was that when he visited the Lands just prior to the hearing, it was the first time he had found the gates locked. On his visits to the Lands, he finds litter, vehicle tracks, fire pits, animal drag tracks and other evidence of hunters and trespassers having been on the Lands. Ms. Rae's evidence was that she had not received any reports from operators of damaged locks or of other persons using the access road.

[37] I accept Mr. Reid's evidence that he has found gates unlocked in the past and has found evidence of trespassers. Mr. Reid does not spend a lot of time on the Lands, so while I accept that he has experienced and may continue to experience nuisance and disturbance in the form of trespassers and traffic, these are not nuisances with which he is faced daily as may someone who lives full time on land subject to a right of entry.

[38] I also accept Ms. Rae's evidence that Encana's use of the access road is minimal compared to the use of an access road to a well site and that the consequent nuisance and disturbance from traffic using this access road is likely less than that associated with an access road to a well site.

[39] Mr. Reid expressed considerable frustration in his dealings with Encana. He estimated that he spends about 10 hours a year on activities related to Encana's right of entry including inspecting the property, checking if the gates are locked, reporting issues to Encana, and dealing with correspondence. In terms of the value of his time, Mr. Reid works as an independent consultant and sessional instructor. For some of his work, he earns in excess of \$100 hour.

#### The effect of other rights of entry

[40] Mr. Reid gave evidence that oil and gas activity in the area has increased over the years. Certainly, the Lands are impacted not only by Encana's activities but also by Murphy's activities. Mr. Reid does not blame Encana for Murphy's activities. He does not blame Encana for the flooding to the Lands, but wondered to what extent the presence of the Encana access road affected drainage. In the absence of any evidence that Encana's access road has in fact contributed to nuisance or damage caused by other operators I am not able to conclude that rent is payable for this factor.

Terms of other surface leases

[41] Mr. Reid provided evidence of rents payable under seven surface leases, including two Encana leases, six of which were for access roads only, and one of which was for a wellsite and access road. They ranged in date from 2006 to 2014. Mr. Reid also relied on his recent rent renewal with Murphy Oil respecting its access road lease on the Lands. The Murphy Oil lease is for 1.99 acres. The new annual rent, effective November 2017, is \$3,500.

[42] Ms. Heidi Berscht, of Encana, also provided evidence of surface leases. Her evidence was that two of the Encana leases relied on by Mr. Reid had been cancelled. Ms. Berscht provided five surface leases for access roads to risers and three surface leases for access roads to padsites, one of which was for a site relied on by Mr. Reid. The access road to riser site leases range in date from 2016 to 2018. The access road to padsite leases range from 2014 (being the one relied on by Mr. Reid) to 2016. Ms. Berscht's evidence was that there are not a lot of surface leases for access roads to riser sites.

[43] Mr. Reid calculates a per acre rate for each of the surface leases provided by dividing the total annual rent by the number of acres leased. Equating leases on a per acre basis is not appropriate if the various components of the rent are not calculated on a per acre basis.

[44] The Encana leases provide a breakdown of the rent as between loss of profit and nuisance disturbance. The leases provided by Mr. Reid involving operators other than Encana, do not. The Encana surface leases compensate loss of profit for bushland at \$250/acre. The compensation for nuisance and disturbance ranges from \$250 to \$2,000, with \$2,000 being paid for access roads to well sites. Nuisance and disturbance relating to access roads to riser sites ranges from \$250 to \$1,000, with \$1000 being paid where the access road passes within 50 metres of the landowners' residence. The average annual compensation for nuisance and disturbance for access

roads to riser sites is \$587. If the \$1000 payment related to an access road in close proximity to a residence is removed, the average payment is \$483.75.

[45] Other surface leases are only helpful to the extent they establish a pattern of dealings for comparable projects in comparable circumstances (*Encana Corporation v. Lumnitzer, Dietz v. CNRL*). None of Mr. Reid's comparables are for comparable projects in that they are for access roads to wellsites and not access roads to riser sites. While Encana has provided leases for access roads to riser sites, none of those leases cut across the whole of a piece of land as does the subject lease. While neither party has provided evidence that sufficiently establishes a specific pattern of dealings, the leases do indicate that nuisance and disturbance paid for access roads to riser sites is typically less than that paid for access roads to padsites.

[46] The leases support the evidence that Encana typically compensates for loss of profit at \$250/acre for bushland.

#### Change in the value of money

[47] Mr. Reid provided a printout of the Bank of Canada's Inflation calculator indicating that at basket of goods and services that cost \$2,500 in 2013 would cost \$2,726.46 in 2018 for an increase of 9.1%. I have taken the liberty of using the Bank of Canada's website to calculate the change between 2013 (when the Surface Lease was negotiated) and 2017 (the effective date of this rent review) at 6.08%. A basket of goods and services that cost \$2,500 in 2013 would cost \$2,652.07 in 2017.

#### Determining Annual Rent

[48] Applying loss of profit of \$250/acre to 3.121 acres equates to \$780.25. The current rent of \$2,500 therefore allows \$1,719.75 for nuisance and disturbance. This amount is higher than that paid for nuisance and disturbance in any of the leases for riser site access roads before me. Encana submitted that \$500 for nuisance and disturbance was justified and that the rent should be reduced to \$1,280.

[49] I am satisfied that the intangible nuisance and disturbance from this site is minimal in relation to that from access roads to padsites including the Murphy access road on the Lands. It makes sense that the payment for intangible nuisance and disturbance for the Murphy road would be higher than for this road because of the difference in the volume and nature of traffic as well as the proximity of the Murphy road to the cabins. I accept that a payment of \$500 would not be out of line with other Encana leases to riser site access roads, but am not satisfied it will fully compensate Mr. Reid for nuisance and disturbance.

[50] Mr. Reid also provided evidence of tangible nuisance and disturbance in the form of his time spent in relation to dealing with Encana generally and in inspecting the lease. His estimate of 10 hours per year at \$100 equates to \$1,000. The evidence supports a payment for both tangible and intangible nuisance of at least \$1,500.

[51] Considering the evidence as a whole, I am satisfied that the current rent of \$2,500 continues to adequately compensate Mr. Reid for his reasonably foreseeable prospective losses until the rent becomes eligible for renewal again. I am not satisfied that the rent needs to be increased so as to continue to compensate Mr. Reid for his ongoing losses associated with the Surface Lease, but neither do I accept that it significantly over compensates Mr. Reid and that it should be reduced.

## **CONCLUSION**

[52] The annual rent payable under the Surface Lease shall remain at \$2,500 effective April 25, 2017.

DATED: November 27, 2018

FOR THE BOARD



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Cheryl Vickers, Chair