File No. 1618
Board Order No. 1618-1

February 23, 2010

MEDIATION AND ARBITRATION BOARD

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

AND IN THE MATTER OF
Parcel A (P2913) of Section 1, Township 77, Range 15, W6M,
Peace River District
(The "Lands")

BETWEEN:

GEORGE MERRICK AND IRENE MERRICK

(APPLICANTS)

AND:

ENCANA CORPORATION

(RESPONDENT)

BOARD ORDER

Heard by way of written submissions closing January 22, 2010

Irene Merrick, for the Applicants
Tom Owen, Barrister and Solicitor, for the Respondent

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[1] On June 24, 2009, George and Irene Merrick filed an application for arbitration for a dispute on rent renegotiation under section 12(1) of the *Petroleum and Natural Gas Act,* R.S.B.C. 1996, chap. 361.

[2] The parties have been unable to resolve the dispute and seek the Board's determination in arbitration. However, Encana Corporation, the Respondent, says that the Form 2- Notice for Rent Renegotiation dated January 30, 2008 and the application filed with the Board are not valid pursuant to sections 11 and 12 of the *Act*.

Background Facts

[3] The surface lease that is the subject of the rent renegotiation was signed by the parties on July 19, 1997 and provided for an annual rent of $4,200.00 for wellsite Swan 13-1-77-15.

[4] On or about September 23, 2006, the parties renegotiated the annual rent to $6,000.00 along with a lump sum payment of $2755.00 for miscellaneous expenses. The new annual rent was retroactive back to 2003. The Merricks signed a Release and Waiver for this lump sum payment on September 23, 2006. Encana has paid $6000 for the annual rent to date.

[5] On January 30, 2008, the Merricks sent Encana a Notice for Rent Renegotiation to be effective July 19, 2007.

The Legislation

[6] Section 11(2) of the *Act* says that if a person has, "for a continuous period of 4 years, been entering, occupying or using land to explore for, develop or produce petroleum or natural gas.., an owner of the land may, on or after the next anniversary of the making of the lease...., on giving 60 days' notice in the prescribed form...require renegotiation of rental provisions in the surface lease..."

[7] Section 11(3) says that the above applies if "4 years have elapsed since (a) the completion of the last renegotiation of rentals under subsection (4)...". Subsection (4) says that if notice is given, the parties may renegotiate the rental provisions by mutual agreement.

[8] If rental provisions are not renegotiated under section 11(4) within 6 months after expiration of the 60 days notice, the owner may apply to the Board for arbitration.

[9] Section 12(2) provides that a renegotiation is effective from the immediate past anniversary date of the surface lease preceding the notice and is retroactive to the extent necessary.

Notice of Rent Renegotiation under section 11 of the Act

[10] Encana says that the effect of section 11 is to put a four year review cycle in place for rent renegotiations. For the subject lease, which was signed in 1997, the four year cycle would be 2001, 2005 and 2009, not 2007 as requested by the Merricks here.

[11] The Merricks say that they were given incorrect information from Encana's agent regarding renegotiations; at one point they were told that they were eligible for rent review "at any time" and then subsequently, every five years. In 2004, they verbally requested the rent be renegotiated, and then asked by written correspondence. It was not until September, 2006 that they were able to renegotiate with Encana, which agreement was retroactive. They then requested the second rent review initially in March, 2007 because four years had elapsed since the retroactive rent of 2003, but did not send the Form 2 Notice until January, 2008. The Merricks argue that the *Act* does not tie the four years of occupation to the date of the original signing of the lease.

[12] Although there may have been conversations between the parties, the first written request for the renegotiation in evidence is a September 13, 2005 email from the Merricks to Encana's agent requesting the renegotiation. In September, 2006, the parties reached agreement on increased rent along with a retroactive rent for three years, back to 2003.

[13] The Merricks say that four years from 2003 means that in 2007 they were entitled to request a further renegotiation.

[14] However, the language of the legislation does not support this interpretation. Section 11(3)(a) specifically speaks of four years elapsing from the "completion of the last renegotiation" (emphasis added), and in this instance, the completion occurred in September, 2006. Four years from that time would mean that the Merricks would be entitled to request a renegotiation by delivering a prescribed notice under section 11(2) in September, 2010.

[15] Unfortunately, the Merricks delivered the Form 2 Notice for renegotiation in January, 2008 and, as such, it is premature.

[16] The intent and purpose of the legislation, as determined from the language of the *Act*, is to allow owners to request a renegotiation of rents in a surface lease every four years. The legislation has set up a mechanism by which notice is to be given for such renegotiation. Here, the notice for the initial renegotiation is deemed to be September 13, 2005, which is the first written request for renegotiation the Merricks gave to Encana, which notice Encana accepted and acted upon. Pursuant to section 12(3), a renegotiation or Board order is effective from the immediate past anniversary date of the lease preceding the notice, which would have been July, 2004. The Merricks received retroactive rent beyond that time frame to three years, by mutual agreement of the parties.

[17] Encana also argues that, pursuant to section 12(3), the four years should be calculated from the immediate anniversary of the lease preceding the notice that was given in September, 2005. This would mean that the Merricks are entitled to give notice for a renegotiation no earlier than July, 2009. Section 12(3) speaks to when an order or renegotiation is effective.

[18] Although section 11(3) says that renegotiation could be requested four years from the "effective" date of an order in subsection (b), subsection (a) uses very different wording and criteria when dealing with a renegotiated rent as opposed to an order of the Board. In subsection (a), it speaks of fours years elapsing from the date of the completion of the last renegotiation of rentals, not the "effective" date of the renegotiation. Therefore, the fact that the renegotiation was retroactive for three years is not determinative. Rather, it is the date of the completion of the renegotiation that is the operative date, which, on the evidence before me, was in September, 2006.

[19] If the legislature intended that the four years would start from the date that the last renegotiation was "effective" then it would have used the same wording in section 11(3)(a) as it does for section 11(3)(b) when it refers to the effective date of an order. As stated in *Driedger on the Construction of Statutes*, third edition, there is a statutory presumption of consistent expression, namely that it is presumed that the legislature uses language carefully and consistently so that the same words have the same meaning and different words have different meanings. Given the presumption of consistent expression, it is possible to infer an intended difference in meaning from the use of different words. That is the situation here. The legislation has used different words in sections 11(a) and (b) when setting out when the four years is to elapse: for orders of the Board it is four years from the effective date, and for renegotiations, it is four years from the completion of the last renegotiation. As different wording is used, the reasonable presumption, in face of contrary evidence, is that the legislature intended a different calculation of when the four years would elapse for renegotiations between parties.

[20] This is unfortunate for landowners because it puts a higher burden on them to be familiar with the requirements of the legislation in terms of when notice can

or cannot be provided and potentially allows companies to drag out negotiations to completion longer than may be necessary so that the clock for renegotiation starts further in time. However, the Board is bound by the language of the legislation and until the legislation is changed, the Board does not have the discretion to ignore the clear wording of the *Act.*

Application to the Board under section 12(1)

[21] Section 12(1) says that if rental provisions are not renegotiated under section 11 within 6 months after the expiration of the 60 day notice, the landowner may apply to the Board.

[22] As the Form 2 Notice of Rent Renegotiation was given on January 30, 2008, instead of in September, 2010, it is premature and not validly made under section 11. The Board does not have jurisdiction, therefore, to entertain an application under section 12(1) of the *Act.*

[23] The rental provisions cannot be renegotiated under the requirements of section 11 of the *Act* until four years have elapsed from the completion of the last rental renegotiation in September, 2006. Those four years will not elapse until September, 2010 and the application to the Board cannot take place until 6 months after the expiration of the 60 day notice. Therefore, an application to the Board cannot be made earlier than 8 months after September, 2010, which is May, 2011. Until that time, the Board does not have jurisdiction.

ORDER

[24] The application of June 24, 2009 is dismissed as the Board does not have jurisdiction in the matter because the Form 2 Notice of Rent Renegotiation dated January 30, 2008 is premature and invalid pursuant to section 11 of the *Act.*

Dated February 23, 2010

FOR THE BOARD

Simmi Sandhu, Member