File Nos. 1694, 1792, 1801
Board Order No. 1694-3

February 24, 2015

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:

SPECTRA ENERGY MIDSTREAM CORPORATION
(Applicant File 1694)

JAMES NELSON LONDON AND KEIR MARIE LONDON
(Applicants Files 1792 and 1801)

AND:

JAMES NELSON LONDON AND KEIR MARIE LONDON
(Respondents File 1694)

SPECTRA ENERGY MIDSTREAM CORPORATION
(Respondent Files 1792 and 1801)

BOARD ORDER

Heard:	November 27 and 28, 2014 in Dawson Creek and January 8, 2015 by telephone conference
Appearances:	Rick Williams, Barrister and Solicitor, for Spectra Energy Midstream Corporation Darryl Carter, Q.C., Barrister and Solicitor, for Jay and Keir London

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Background

[1] Jay and Keir London are the fee simple owners of the Lands legally described as: The North East ¼ of Section 10 Township 78 Range 16 West of the 6th Meridian Peace River District (the Lands). On February 14, 2009, the Londons and Encana Corporation (Encana) executed a Right of Way Agreement (the ROW Agreement) granting Encana a right of way over the Lands for the purpose of constructing, operating and maintaining a pipeline or pipelines. In April 2010, Encana assigned the ROW Agreement to Spectra Energy Midstream Corporation (Spectra).

[2] Spectra received a permit from the Oil and Gas Commission (OGC) to construct and operate a pipeline known as the Bissette Pipeline, in part within the right of way covered by the ROW Agreement. Spectra determined it would require additional temporary workspace than that already granted in the ROW Agreement in order to construct the pipeline. As Spectra was unable to negotiate an agreement with the Londons for the additional temporary workspace, it applied to the Board for a right of entry order. On December 23, 2010 as amended on January 31, 2011, the Board granted Spectra the right to enter and use a portion of the Lands as temporary workspace for the construction of a flow line pursuant to section 159 of the *Petroleum and Natural Gas Act* (Orders 1694-1 and 1694-2). The total area authorized by the Board as temporary workspace is 4.55 acres of which 3.61 acres lies within an existing lease on the Lands.

[3] In February and March 2011, Spectra constructed the Bissette Pipeline within the right of way granted by the ROW Agreement and using the temporary workspace granted by the Board's right of entry orders. The parties have been unable to resolve the compensation payable to the Londons for Spectra's use of the temporary workspace area authorized by the Board.

[4] In October 2012, the Londons applied to the Board under section 163 of the *Petroleum and Natural Gas Act* for loss and damages allegedly caused by Spectra's exercise of their right of entry under the ROW Agreement. In this application, the Londons alleged that the Bissette Pipeline was not a "flow line". In January 2013, the Londons applied to the Board under section 164 of the *Petroleum and Natural Gas Act* claiming that the Bissette Pipeline approved by the OGC is substantially different from the oil and gas activity that was contemplated during the negotiation of the ROW Agreement, and asking the Board to amend the ROW Agreement "to make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the land is not authorized." Spectra sought to have both of these applications summarily dismissed on the grounds that the Board did not have jurisdiction to hear the applications or grant the remedies sought, or that the Londons were otherwise barred from advancing the claims. The Board found it had jurisdiction to hear the applications and declined to summarily dismiss them (Orders 1792/1801-1 and 1792/1801-1Cor).

[5] The Board found that the Londons could not challenge that the Bissette Pipeline is a flow line if they wished to pursue a claim pursuant to section 163 of the *Petroleum and Natural Gas Ac*t for damages. As the Londons had not challenged that the Bissette Pipeline was not a flow line when Spectra applied for the right of entry order, and as they did not seek judicial review of the Board's right of entry orders, the Board said it was "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". The Board found that it had jurisdiction to hear the application under section 163 on the basis that the ROW Agreement was for a right of entry to construct and operate a flow line,

Spectra purportedly exercised that right of entry in constructing the Bissette Pipeline, and Spectra's exercise of that right of entry allegedly caused damage. The Board questioned its jurisdiction under section 163 to provide a remedy unless the Bissette Pipeline is a flow line.

[6] The Board scheduled Spectra's application to resolve the compensation payable for the right of entry for the temporary workspace (file #1694), the Londons' application under section 163 of the *Petroleum and Natural Gas Act* for damages (file #1792), and the Londons' application under section 164 of the *Petroleum and Natural Gas Act* (file #1801) for arbitration, all three applications to be heard at the same time. In accordance with the Board's order, the parties produced a summary of their claims and the documents they intended to rely on in support of their respective positions on each claim. Spectra advanced that the Londons should receive $2,750.00 as compensation for the right of entry for temporary workspace. The Londons requested compensation of $25,000 for the loss of rights and other losses resulting from the Board's right of entry orders. The Londons sought an amendment of the ROW Agreement to make it clear that the construction and operation of a 16" sour gas transmission pipeline on the land is not authorized by that agreement and damages of $100,000, or as determined by the Board, for unauthorized use of the Lands. Spectra submitted there was no "substantial difference" between the oil and gas activity contemplated during negotiation of the ROW Agreement, Spectra's use of the Lands was not unauthorized, and no damages were owing.

[7] At the arbitration, counsel for the Londons withdrew the application under section 163 of the *Petroleum and Natural Gas Act* asserting that the Bissette Pipeline is not a flow line, and agreeing that the Board would, therefore, have no jurisdiction to provide a remedy under section 163. Counsel for Spectra objected to the Londons once again raising the jurisdictional question of whether the Bissette Pipeline is a flow line. In our review of the evidence and submissions following the arbitration, we determined that in light of counsel's submissions we should satisfy ourselves that

the Board either has or does not have jurisdiction. As the arbitration had not originally been for the purpose of determining whether the Bissette Pipeline is a "flow line", we sought further Affidavit evidence on that issue and provided the opportunity for cross-examination on the Affidavit and further argument.

Issues

[8] The issues are:

I. Is the Bissette Pipeline a "flow line" within the meaning of the *Petroleum and Natural Gas Act*?

II. Is the Bissette Pipeline substantially different from the oil and gas activity contemplated during negotiation of the ROW Agreement within the meaning of section 164 of the *Petroleum and Natural Gas Act*, and if so, should the Board amend the ROW Agreement "to make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the land is not authorized"?

III. If the Bissette Pipeline is a "flow line", what is the appropriate compensation payable by Spectra to the Londons for loss or damage caused by the right of entry for use of temporary workspace?

I. Is the Bissette Pipeline a "flow line" within the meaning of the *Petroleum and Natural Gas Act*?

Procedural Objections

[9] Before turning to the submissions and our analysis on the substantive issue of whether this pipeline is a "flow line", we wish to address both counsels' procedural objections with respect to the Board's handling of this issue.

[10] Mr. Williams, on behalf of Spectra, objects to the Board opening this issue at this time. He argues that the Londons did not question the Board's jurisdiction when Spectra filed its application for right of entry, and have never applied for reconsideration. He submits it is completely improper for the Board to deal with the issue now. Mr. Carter, on behalf of the Londons, submits the landowners were not represented by counsel when the right of entry orders were made and could not be expected to raise the issue of jurisdiction. He submits the Board ought not to simply rely on a company's assertion that a project is a flow line but should satisfy itself of its jurisdiction before proceeding to grant right of entry. Both counsel raise valid procedural arguments. Mr. Carter says the Board should have asked questions with respect to its jurisdiction earlier; Mr. Williams says it can't ask those questions now.

[11] Although the Londons were not represented by counsel at the time the right of entry orders were made, they have been represented by counsel since October 2012, but still have never sought reconsideration of the entry orders squarely bringing the issue of jurisdiction before the Board. Counsel raised the issue of jurisdiction in connection with the applications brought under section 163 and 164 while at the same time invoking the jurisdiction of the Board to grant a remedy. It was not until closing argument following the arbitration, that counsel once again raised the issue. We understand completely Spectra's frustration at the Board now conceding to consider the issue.

[12] On the other hand, although this is an adversarial as opposed to inquisitorial process, we agree that the Board could have and probably should have at least raised the issue itself earlier on to see if any of the landowners took issue with the Board's jurisdiction. If the Board does not have jurisdiction, it does not have jurisdiction. In the context of this Board where landowners are frequently not represented by counsel, we agree the Board may need to be more mindful of potential issues of jurisdiction and takes steps to satisfy itself early on that it indeed has the jurisdiction to proceed.

[13] In light of the continued objections in this case, we decided we had no choice but to seek additional evidence relevant to the issue of jurisdiction, hear argument, consider the issue with an open mind, and make a determination.

Facts

[14] At the arbitration, we heard evidence relevant to this issue from Joel Lavers, Spectra's Project Manager for the Bissette project, from Bruce White, Encana's surface land representative at the time the ROW Agreement was entered with the Londons, and from Rod Locke, the Manager of Field Operations with Spectra. The Board received additional affidavit evidence from Joel Lavers. On the basis of this evidence, we find the following facts:

[15] Spectra is in the business of gathering, processing and transmitting natural gas. It does not drill natural gas wells as part of its business.

[16] The Bissette Pipeline is 16" in diameter. It carries raw, unprocessed, sour natural gas originating from third party producer owned wells in the Sunrise Field, southwest of Dawson Creek, to Spectra's Dawson Processing Plant (the "Dawson Plant"). At the Dawson Plant, the gas is processed and then transported via a third party, sweet gas transmission pipeline to market.

[17] The natural gas that is carried in the Bissette Pipeline is first transported from producer wellheads through producer flowlines to the Encana Gathering Compressor Site at 9-15-77-W6M (the "Compressor"). The gas is compressed to increase pressure to establish the flow rates necessary to allow the gas to travel the remaining distance through the Bissette Pipeline to the Dawson Plant. Once the gas reaches the Dawson Plant it undergoes initial scrubbing and processing, including separation, sweetening, dehydration, refrigeration and condensing to ensure it

meets the specifications for transfer through the Nova Groundbirch Transmission Pipeline to downstream markets.

[18] The Bissette Pipeline does not physically connect directly to any wellheads. It is part of the upstream gathering process necessary to convey gas to scrubbing and processing facilities.

[19] Encana is the only producer with wells tied into the Bisette Pipeline at present. Spectra is soliciting other customers. Any new customers would need to meet the design specifications for the Bissette Pipeline in order to be able to have their gas flow into it.

[20] Encana has a non-producing well on the Lands. This well could be tied into the Bissette Pipeline if Encana ever changed its mind about bringing this well into production.

[21] Spectra applied to the OGC for a permit to construct the Bissette Pipeline in May or June of 2010. The OGC issued a permit in September 2010, but on the coming into force of the *Oil and Gas Activities Act* and amendments to the *Petroleum and Natural Gas Act* on October 4, 2010, the OGC rescinded the permit to require Spectra to reapply and engage in the consultation process provided for in the *Oil and Gas Activities Act*. Spectra reapplied for a permit pursuant to the newly enacted *Oil and Gas Activities Act* and on December 17, 2010, the OGC issued a new pipeline permit.

[22] Prior to the first OGC permit being rescinded, Spectra initiated proceedings to expropriate land required for the right of way for the Bissette Pipeline where it did not have right of way agreements with landowners. It did not carry through with this process, but instead initiated applications under the newly amended *Petroleum and Natural Gas Act* to require access to land where agreements with landowners could not be reached.

Analysis

[23] Section 1 of the *Oil and Gas Activities Act* defines "flow line" as follows:

> "flow line" means a pipeline that connects a well head with a scrubbing, processing or storage facility and that precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line.

[24] There are two parts to the definition. A "flow line" must 1) connect a well head to a facility; and it must 2) precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line.

[25] Emphasizing the first part of the definition, Mr. Carter submits that to be a "flow line" the pipeline must connect directly to a well head. As the Bissette Pipeline does not connect directly to well heads, but starts from a compressor station, and as Spectra is not in the business of producing natural gas, he submits it cannot be a flow line. He argues the "rest of the definition doesn't matter".

[26] The definition does not say a "flow line" is a pipeline that connects to a well head. It says it is a pipeline that "connects a wellhead with a scrubbing, processing or storage facility…". This pipeline functions to connect well heads operated by Encana to Spectra's processing plant, and therefore functions to connect well heads to a processing facility. There is no evidence that the gas is processed prior to entering the Bissette Pipeline. It is compressed to increase its pressure, but does not undergo scrubbing and processing, including separation, sweetening, dehydration, refrigeration and condensing until it reaches the Dawson Plant.

[27] Nor does the definition imply that a pipeline connecting a well head with a scrubbing, processing or storage facility must be operated by the same entity that operates the well head, or the same entity that operates the scrubbing, processing or storage facility for that matter. The "flow line" is but one part of the upstream

gathering system that moves raw gas from wellheads to processing facilities, prior to the transmission of the processed gas to market.

[28] The Board has considered this definition of "flow line" on three previous occasions.

[29] In *Murphy Oil Company v. Shore*, Order 1745-1, September 13, 2012, the Board found that a pipeline in three segments including a segment to transport natural gas from a well head, a segment to transport produced water separated from the natural gas at the well site, and a fuel line was a "flow line". In *Encana Corporation v. Ilnisky*, Order 1823-1, April 11, 2014, the Board found a pipeline in four segments including a line to transport produced gas from a well site, a fuel line, a hydraulic fracturing water supply line and a hydraulic fracturing water return line was a "flow line". In *ARC Resources Ltd. v. Hommy*, Order 1837-1, September 26, 2014, the Board found three segments of a pipeline in four segments, including a 16 inch line to transport produced gas from a well site, a hydraulic fracturing water supply line also licensed for bidirectional use to carry natural gas, and a fuel line were a "flow line" The Board found that a fourth segment to be used to carry produced water from storage facilities at a processing plant to a well head for disposal was not a "flow line".

[30] With respect to Mr. Carter's argument that the first part of the definition requires that a "flow line" connect directly to a well head, the Board's previous decisions have found various types of pipelines that function as part of the gathering system to be "flow lines" regardless of whether the pipeline actually connects directly to the well head. For example, in *Encana* v. *Ilnisky, supra*, the water pipelines in issue connected to tanks at the well site which were in turn connected to the well head by hydraulic fracturing equipment. The pipelines connected well heads to a water hub and functioned as part of the gathering system for the production of natural gas. In *ARC v. Hommy*, *supra,* the proposed pipeline included a 16 inch diameter segment that would connect to a pre-existing 12 inch diameter line, which in turn connected to

the 3 inch diameter lines that actually connected to the producing well heads. There was no issue in that case that the 16 inch segment, which did not directly connect to the well head, was not a "flow line".

[31] Considering both parts of the definition, the Board has found that it carves out a subset of pipeline depending on its location as part of the gathering system (*Encana v. Ilnisky, supra*) but only includes pipelines used as part of the gathering system (*ARC v Hommy, supra*). The Bissette Pipeline is part of the gathering system in that it carries raw natural gas to a processing plant for processing and precedes the transfer of the natural gas to a transmission, distribution or transmission line to downstream markets.

[32] Mr. Carter points to the evidence of Spectra's initiation of expropriation procedures to argue that Spectra knew the Bissette Pipeline was not within the jurisdiction of the Board. The current definition of "flow line" came into force on October 4, 2010. Whether Spectra felt it needed to use the expropriation process before that time is not relevant to an interpretation of the current definition.

[33] Mr. Carter argues that "no one in the industry" would ever think of this pipeline as a "flow line". We have no evidence of what people in the industry think. In any event, the issue of whether a particular pipeline is a "flow line" is a matter of statutory interpretation and legislative intent, not a question of what people in the industry think. The legislature has created two classes of pipelines; one over which the Board has jurisdiction and one over which the Board does not. The intention of the legislature is to be derived from the ordinary meaning of the words of the enactment read in their entire context and in the context of the legislative scheme as a whole. The legislative intent is to give the Board jurisdiction over pipelines that comprise the gathering system, but not pipelines that comprise the transmission, distribution or transportation system downstream of a processing facility. The arguments in this case do not persuade us that the Board's analysis in its previous decisions leading to this conclusion of the legislature's intent was wrong.

[34] The evidence is clear that the Bissette Pipeline is part of the gathering system. It functions to connect well heads to a processing plant and it precedes the transfer of the processed natural gas to a transmission line for distribution to market. We find the Bissette Pipeline is a "flow line", and the Board has jurisdiction.

II. Is the Bissette Pipeline substantially different from the oil and gas activity contemplated during the negotiation of the ROW Agreement, and if so, should the Board amend the ROW Agreement "to make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the land is not authorized"?

Introduction

[35] Section 164(1) of the *Petroleum and Natural Gas Act* provides that a party to a surface lease may apply to the Board for mediation and arbitration with respect to …

> 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.

[36] The term "surface lease" is expansively defined to include right of way agreement.

[37] Section 164(3) provides that in an application under section 164(1)(b), the Board may make an order amending the terms of the surface lease (or right of way agreement) from the effective date set out in the order.

[38] The Londons ask the Board to amend the ROW Agreement to "make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the land is not authorized".

[39] Mr. Carter submits the Bissette Pipeline is substantially different from the pipeline proposed by Encana during negotiations and that Mr. London would not have signed the ROW Agreement if he thought a 16" sour gas pipeline would be installed in the right of way. He submits the discussions between the parties support that Mr. London did not agree to a 16" pipeline on his Lands. Mr. Williams submits the intention of the parties must be discerned from the language of the ROW Agreement itself as a matter of contractual interpretation. He submits the ROW Agreement is clear and unambiguous and that resort to parole evidence as to the parties' intent is not necessary.

[40] The first question, therefore, in resolving this issue is whether and to what extent, in considering an application under section 164(1)(b) of the *Petroleum and Natural Gas Act*, the Board may rely on extrinsic evidence to the words of the surface lease or right of way agreement itself to determine whether the oil and gas activity approved by the OGC is substantially different from that proposed during the negotiation of the agreement.

[41] The answer to that question is, once again, an issue of statutory interpretation to determine the legislative intent of section 164 of the *Petroleum and Natural Gas Act*.

Legislative Context

[42] Part 17 of the *Petroleum and Natural Gas Act* provides a scheme to enable entry to private land where entry is required for an oil and gas activity, and it provides a dispute resolution process to determine the compensation payable to a landowner arising from a right of entry. The *Act* provides that a person may not enter, occupy or use private land to carry out an oil and gas activity unless the entry, occupation and use is authorized by a surface lease or right of way agreement with the landowner or an order of the Board (section 142). The *Act* provides that a person with a right of entry authorized by the Board or by an agreement with the

landowner is liable to compensate the landowner for loss or damage caused by the right of entry (section 143(2)).

[43] A right of way agreement creating a grant in favour of a pipeline permit holder for the operation of its undertaking is an instrument created under the authority of section 218 of the *Land Title Act*. In accordance with section 218(3) of the *Land Title Act*, registration of the right of way in the Land Title Office "confers on the grantee the right to use the land charged in accordance with the terms of the instrument".

[44] It is in this legislative context that section 164 provides for an application to the Board in respect of a disagreement respecting whether a surface lease or right of way agreement should be amended based on a party's claim that the oil and gas activity approved by the OGC is substantially different than that proposed during negotiation of the surface lease or right of way agreement. The legislative scheme, on the one hand, authorizes the entry to private land through the vehicle of a statutory right of way, registration of which gives the grantee the right to use the land charged in accordance with the terms of the agreement, and on the other hand gives the Board the authority to amend the terms of the agreement if the oil and gas activity approved by the OGC is "substantially different" from that proposed during the negotiation of the agreement. The Board's authority under section 164 of the *Petroleum and Natural Gas Act* must be interpreted harmoniously with the whole of the legislative scheme including that for the provision, registration, and effect of statutory rights of way.

[45] When interpreting a statutory right of way agreement the Board must have regard primarily to the words of the agreement in determining the intention of the parties (*Avanti Mining Inc. v. Kitsault Resort Ltd*. 2010 BCSC 1181). Interpreting the terms of the right of way agreement are subject to the usual rules of contractual interpretation in that it is only if the intent of the parties cannot be objectively determined from the words of the contract itself, such that there is an ambiguity, that

consideration may be given to extrinsic evidence (*Avanti, supra*). As registration of a right of way agreement confers on the grantee the right to use the land in accordance with the terms of the agreement, the right that is conferred must be discerned from the terms of the agreement, unless the terms give rise to an ambiguity.

[46] The Board's remedial authority to amend the terms of an agreement if the activity on the land is "substantially different" from that proposed during negotiation of the agreement must have some purpose, however. In the context of the legislative scheme described above setting out the liability of a right holder to compensate a landowner for loss and damage caused by a right of entry and the dispute resolution mechanisms to resolve compensation, that remedial authority must be for the purpose of considering whether the terms of an agreement should be amended because the impact on the land or a landowner is "substantially different" from that originally contemplated, regardless of whether the actual use of the land is authorized by the agreement So even where the clear terms of a surface lease or right of way agreement authorizes the use of land, the Board could be asked to consider whether terms of the agreement should be amended because the use, although authorized by the agreement, is "substantially different" from that proposed when the agreement was negotiated. While extrinsic evidence may not be necessary to interpret the terms of an agreement itself, it may be considered to determine whether the impact of the agreed activity is substantially different and whether the agreed terms adequately compensate for the anticipated loss.

[47] In this case, the Board was simply asked to amend the ROW Agreement "to make it clear that the construction and operation of a major 16" sour gas transmission pipeline on the land is not authorized". Whether a particular activity is authorized by the terms of the ROW Agreement is a matter of interpreting the ROW Agreement itself. Unless the words of the Agreement create an ambiguity, extrinsic evidence is not necessary to determine the parties' intent.

Interpreting the ROW Agreement

[48] The ROW Agreement contains the following grant at clause 1:

> The Grantor does hereby grant, convey, transfer and set over to the Grantee its successors 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 to 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.

[49] Clause 3 of the ROW Agreement limits the right of way to 18 meters. Clause 11 permits assignment of the ROW Agreement and clause 20 provides that "[a]ny additional terms, express or implied shall be of no force or effect unless made in writing and agreed to by the Grantor and Grantee."

[50] We find the words of the grant are clear and unambiguous. The Londons grant a right of way over an 18 meter wide strip of the Lands to construct, operate and maintain a pipeline or pipelines and for any other purpose preparatory or incidental thereto. The OGC issued a permit authorizing Spectra to construct and operate a pipeline. Other than to restrict the width of the right of way and to require that construction of more than one pipeline be completed in a single operation, the words of the agreement do not contemplate other specifications as to the nature of the pipeline to be constructed. The ROW Agreement specifically allows for its assignment.

[51] The ROW Agreement was registered in the Land Title Office conferring on Encana and then Spectra through assignment the right to use the land as expressed by the terms of the right of way namely to construct, operate and maintain a pipeline. In constructing, operating and maintaining the Bissette Pipeline, Spectra has exercised the right conferred. There is no need to amend the ROW Agreement as

requested by the Appellant, therefore, to “make it clear that the construction and operation of a 16” sour gas transmission pipeline on the land is not authorized by that agreement”. The ROW Agreement clearly authorizes Spectra’s activity on the Lands.

Is the Bissette Pipeline substantially different in its impact to the Lands and the landowners than the project proposed during negotiation of the ROW Agreement?

[52] We were not asked to amend any other terms of the ROW Agreement to ensure that the impact to the landowner and the Lands arising from the oil and gas activity approved by the OGC was substantially different from the impact anticipated during negotiation of the ROW Agreement. We heard evidence from Mr. London and Mr. White as to their discussions during the negotiation of the ROW Agreement, and from Mr. London and Mr. Locke with respect to discussions about the Bissette Pipeline and will nevertheless consider whether the Bissette Pipeline is substantially different in its impact to the landowners and the Lands than the project proposed by Encana during negotiation of the ROW Agreement.

[53] The evidence is that Encana’s proposed project was for a 16 inch sour gas pipeline and a 4 inch fuel line. It was to run between a compressor at 9-15-77-15 to a compressor at 5-26-78-17 and then to another compressor at 9-27-79-17. It would tie in several wells, but not the well site on the Lands known as 10-10. The proposal was to construct a riser with various instruments on the 10-10 site. Mr. London was not privy to the engineering plans.

[54] We accept that Mr. London may have thought Encana’s proposed pipeline would tie in the 10-10 well site, although that was not the intention, as there had been some previous discussions between Mr. London and Mr. White about proposals to tie in the 10-10 well site.

[55] We accept that Mr. London did not know Encana's proposed pipeline would be 16 inches in diameter. Mr. London asked Mr. White about the size of the proposed pipeline. Mr. London's evidence is that he was told "maybe 6 inches maybe 8 inches". Mr. White's evidence is that he told Mr. London the pipeline would be probably "somewhere between 8 inches and 12 inches" but that he "didn't know for sure". We find Mr. London was never told the proposed pipeline would be 2 inches to 4 inches in diameter, as originally alleged in his application, but neither was he told it would be 16 inches in diameter.

[56] Regardless of whether Mr. London thought Encana's proposed pipeline would tie into the 10-10 well site or other well sites, or what he thought about the size of the pipeline, he knew Encana's proposed pipeline would carry sour gas and that it would be buried in an 18 foot right of way.

[57] Mr. London's evidence was that the reason he was concerned about the size of the pipeline was because he was concerned about setbacks. The evidence is however, that regulations require a setback of 10 meters from a pipeline regardless of the size of the pipeline. The fact that the pipeline constructed may have been larger than Mr. London may have been expecting did not change the setback. Regardless of the size of the pipeline, the impact to the London's use of the Lands as a result of any required setback would be the same. Any concern that Mr. London may have had with respect to required setback as a result of the size of the pipe was misinformed, as the impact on his use of the Lands arising from any setback would not change depending on the size of the pipeline. The evidence is, further, that Spectra offset the pipeline within the right of way so that there is a clear 10 meters from the edge of the pipe to the edge of the right of way with the result that there is no additional setback into the Lands beyond the edge of the right of way itself.

[58] Although we accept that Mr. London asked about the size of the pipeline, we do not accept that the size of Encana's proposed pipeline was a significant factor in

signing the ROW Agreement because Mr. London's evidence as to his concern with the size of the Encana's proposed pipeline is not consistent with his response to the information provided by Spectra about the Bissette Pipeline.

[59] Mr. Locke's evidence is that someone from Spectra first met with the Londons in early March of 2010 to discuss the project. His evidence is that all of the landowners on the proposed route, including the Londons were given an Information Sheet about the project (Exhibit 2, Tab 12). His understanding of the March discussions was that the London's did not raise any concerns about the project. In April or May of 2010, all of the landowners on the route, including the Londons, were provided with an updated Information Sheet on the Bissette project (Exhibit 2, Tab 14). Mr. London did not dispute receiving either of these Information Sheets.

[60] Both of the information sheets indicate the Bissette Pipeline would be a 16 inch sour gas pipeline. Mr. London did not raise any concern about the size of the Bissette Pipeline upon receipt of these information sheets. Nor did he raise any concerns about the Bissette Pipeline when Spectra made its first application to the OGC for a permit.

[61] Mr. London's evidence is that he was originally approached with respect to the Bissette Pipeline by Brian Dunn, a landman representing Spectra. His evidence is he told Mr. Dunn "he was not interested" and that "things got heated" and he told Mr. Dunn to leave. He says he reiterated that this was not why he agreed to the right of way and that he had not agreed to the size of the pipeline. Mr. Locke's evidence is, however, that Mr. Dunn never worked for Spectra on the Bissette Pipeline, but that he worked for Spectra in the past on a different project. While Mr. London may have had a heated conversation with Mr. Dunn about a proposed Spectra project on the Lands, we accept Mr. Locke's evidence that any such conversation was not with respect to the Bissette Pipeline.

[62] Spectra delivered an Invitation to Consult to the Londons on October 18, 2010. The Invitation to consult advised of the size of the Bissette Pipeline and included a map showing the Emergency Planning Zone (EPZ), which covers the Lands. The evidence is that the new consultation regulations required the permit applicant to provide information about the EPZ for a proposed project. Previously, permit applicants were not required to provide landowners with information about the EPZ. The evidence is that there would have been an EPZ for Encana's proposed pipeline, but that it would not have been shared with the Londons or other landowners. We accept that Mr. London did not realize the extent of the EPZ until he received Spectra's Invitation to Consult.

[63] Mr. London submitted a Stakeholder Written Submission Form to the OGC dated November 19, 2010. The evidence includes a copy of Spectra's response to this submission dated December 1, 2010. It does not appear from this response that Mr. London had raised a concern with the size of the Bissette Pipeline. Mr. Locke and Mr. London met on December 13, 2010 to discuss Mr. London's concerns. Spectra made various commitments in response to Mr. London's concerns, which are set out in a letter dated December 13, 2010. Spectra met all of the commitments set out in that letter.

[64] As previously indicated, the Bissette Pipeline extends from a compressor station at 9-15-77-15 to the Dawson Plant, and does not currently tie in any well sites. Although one of the end points of the pipeline is different from that proposed by Encana, there is no difference in the impact to the Londons or to the Lands as a result of this change. The fact that it does not directly tie-in to well sites does not change the impact to the Londons or to the Lands. The route of the right of way through the Lands did not change. The setbacks impacting the London's use of the Lands did not change. The Lands would have been subject to an EPZ for both projects.

[65] We find the project approved by the OGC is not "substantially different" in its impact to the Lands or to the landowners than the project proposed by Encana during negotiation of the ROW Agreement.

III. What is the appropriate compensation payable by Spectra to the Londons arising from Spectra's entry to the Lands for temporary workspace?

Facts

[66] By Order dated December 23, 2010, the Board granted Spectra the right to enter a .94 acre area of the Lands as temporary workspace for pipeline construction. The .94 acres is comprised of two meter wide and five meter wide sections along the entire length of the right of way granted under the ROW Agreement. By Order dated January 31, 2011, the Board amended the right of entry order to grant Spectra the right to enter an additional 3.61 acres as temporary workspace. The 3.61 acres of additional temporary workspace is within an existing Encana lease for a well site and access road signed in 2007.

[67] Spectra constructed the Bissette Pipeline on the Lands, and used the temporary workspace for that purpose beginning in the first week of February 2011. Spectra completed construction on the Lands at the end of March or in the first week of April 2011. Clean-up crews returned to do clean up in September of 2011. Spectra has not completed reclamation as Mr. London has denied access. Some limited access to the temporary workspace is still required to complete the necessary environmental assessment, but then Spectra will no longer require access to the temporary workspace and the right of entry order can be terminated. Spectra would have completed reclamation of the temporary workspace in 2012 if Mr. London had not denied access.

[68] The Londons reside on the Lands and have a cow calf operation. They use the Lands to grow hay and forage for the cattle.

[69] The Lands comprise 159 acres in total. Approximately 130 acres are used for hay and forage production or grazing. The remaining area is comprised of the residence and residential yard site, livestock feeding and handling areas, creek and bush areas, and the Encana surface lease of 9.71 acres along the western boundary and in the southwest corner.

[70] The Lands are located approximately seven kilometers from Dawson Creek and are accessible from the Old Hart Highway. The Lands are designated A-2 (Large Agricultural Holdings Zone) under the Peace River Regional District Zoning Bylaw No 1343, 2001 and are wholly within the Agricultural Land Reserve (ALR). The soil is classified as Class 3c.

[71] The ROW Agreement grants use of 6.916 acres for the right of way itself and 3.207 acres for temporary workspace. Compensation for the taking and loss associated with these areas was agreed to and has been paid.

[72] The temporary workspace in issue comprises a total of 4.55 acres, 3.61 acres of which are within the Encana surface lease and the remainder of which is immediately adjacent to and extends along the entire length of the area granted by the ROW Agreement on its eastern and northern edges.

Legal Framework

[73] Section 143(2) of the *Petroleum and Natural Gas Act* provides that a right holder is liable to pay compensation to the landowner “for loss or damage caused by the right of entry”.

[74] Section 154(1) of the *Petroleum and Natural Gas Act* lists various factors the Board may consider in determining the compensation to be paid to a landowner. They are:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[75] Not all of these factors will be relevant in every case. There are no factors or criteria established by regulation.

[76] There are a number of settled principles relating to compensation for entry under the *Petroleum and Natural Gas Act*. The Board has articulated these principles before in *ARC v. Piper*, Order 1589-2, December 5, 2008. In light of arguments made this case, we review and reiterate some of those principles

[77] The first principle is that a landowner's right to compensation is just that – a right to compensation for loss as a result of the entry. The landowner is entitled to the equivalent in money for the loss sustained and not for more than the loss sustained. The compensation does not represent a purchase price or a rental, it does not represent remuneration to the landowner for the development of subsurface resources under his land, and it does not compensate the landowner for the fact that a resource company has acquired the rights to subsurface resources. It simply compensates for the landowner's actual and projected probable future loss arising out of the company's entry, occupation and use of the surface (*Western*

Industrial Clay Products Ltd v. Mediation and Arbitration Board, 2001 BCSC 1458.) The Board exceeds its jurisdiction if it orders an amount to be paid that exceeds the loss sustained (*Western Clay, supra*).

[78] The second principle is that a "taking" under the *Petroleum and Natural Gas Act* is not an expropriation, although expropriation principles may apply to determine the appropriate compensation. No land and no legal interest in the land is taken from the landowner. The landowner continues to hold the fee simple and, consequently, it is appropriate that the Board consider the landowner's residual and reversionary interest (*Dome Petroleum Ltd v. Juell* [1982] B.C.J No. 1510 (BCSC); *Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC)).

[79] While compensation does not represent a rental or a purchase price, one of the factors the Board may consider under section 154(1) of the *Petroleum and Natural Gas Act* is "the value of the land". "Value of the land" means value to the owner of the land, not the value to the taker (*Dau v. Murphy Oil Company Ltd.*, [1970] S.C.R. 861; applied in BC in *Dome Petroleum, supra*; *Scurry Rainbow; supra*; *Western Clay, supra*). The Board should consider whether there are any special factors which give a greater value to this owner for this particular piece of land beyond that shown by the average value of similar land indicated by sales (*Scurry Rainbow; supra*).

[80] Evidence of what compensation is paid to other owners in the area is relevant and should be considered where the evidence indicates an established pattern of compensation exists (*Scurry Rainbow, supra*). The Board may consider the various factors set out in section 154(1) of the *Petroleum and Natural Gas Act* and evaluate each, then step back and consider whether the totality gives proper compensation in any particular case (*Scurry Rainbow, supra*).

[81] These principles of compensation are the law in British Columbia and are binding on this Board in determining compensation under the *Petroleum and Natural Gas Act*. It is not open to this Board to change the law.

[82] It remains to apply these principles to the present case. The Board must ask what is the loss sustained by the Londons as a result of Spectra's right of entry for the temporary workspace and what is the appropriate compensation for that loss? In determining the appropriate compensation, the Board may consider the various factors listed in section 154(1) of the *Petroleum and Natural Gas Act*. In this case, damages are not in issue, so compensation will be for loss of rights and loss of profit.

Evidence and Analysis

Loss of Rights

[83] As indicated above, a taking by a right holder of private land for an oil and gas activity is compulsory in that a landowner does not have the right to resist. As Justice Berger said in *Dome Petroleum v. Juell, supra,* the landowner loses the right "to decide for himself whether or not he wants to see oil and gas exploration and production carried out on his land". A right holder's liability to compensate a landowner for loss caused by the right of entry includes liability to compensate for the loss of rights. The challenge is to put a monetary value on that loss. Mr. Carter argues that "no amount of money" can replace what is taken from the landowner in loss of rights. We are nevertheless charged with the task of putting a monetary value on the Londons' loss of rights including their loss of any right of choice with respect to the use of their land for an oil and gas activity, and their loss of rights with respect to the quiet enjoyment of their land. In doing so, we must apply the law that is binding up on us and the evidence before us.

[84] In *Western Clay, supra,* Chief Justice Brenner reviewed the legal meaning of compensation and articulated the mandate of the Board in awarding compensation as follows:

> The Board, then is to provide to the landowner the equivalent in money for the loss sustained. The compensation to be paid does not represent a purchase price or rental. It is compensation for loss or damage. The amount is linked to the damage sustained by the landowner. (See ***Dome Petroleum Ltd. v. Juell*** [1982], B.C.J. No. 1510.) If the Board orders an amount to be paid that exceeds the loss sustained, it is no longer providing compensation and has exceeded its jurisdiction.

[85] Chief Justice Brenner went on to say:

> Where the owner of the surface rights is being paid an amount equal to the value of the property itself, it is not appropriate to make an award for the compulsory aspect of the taking. In my view, where an owner receives the full value of the Property, he has been fully compensated.

[86] Mr. Carter argues that *Western Clay* is distinguishable on the basis that it involved the taking of the whole of a parcel of land for mining purposes. He argues that the Court's conclusion that a landowner cannot recover more than the total value of the property does not apply in this situation where a small portion of land is taken for the operation of an underground pipeline for an indeterminate amount of time as opposed to the situation in that case involving right of entry to the entire parcel of land for mining purposes. He submits that the Board needs to value the rights that are pulled apart from the total bundle differently than on the basis of looking at the total bundle of rights, or fee simple interest. The argument suggests that the loss of a part of the total bundle of rights is worth more on a per acre basis than the per acre monetary value of the total bundle of rights.

[87] The first problem with this argument is that it is not supported by evidence to substantiate that the monetary value of a part of a bundle of rights may exceed the monetary value of the total bundle. Certainly, a right of entry involves the loss of rights. But, it is not a loss of the total bundle of rights. In this case, the Londons lose the use of the temporary workspace area for a limited time, following which they

may continue to use the area as they did before the taking. If the value of the fee simple interest in land represents the value of the total bundle of rights, in the absence of evidence to substantiate that the value of partial rights exceeds the value of the total bundle, we are left to apply the law as expressed in *Western Clay*, that any compensation for the taking of rights cannot exceed the fee simple value of the land. This is not to say that a right holder's liability to compensate a landowner for loss and damage arising from a right of entry is limited to the market value of the fee simple interest in the lands taken, only that compensation for the loss of rights inclusive of the compulsory aspect of the taking cannot exceed the market value of the fee simple interest in the lands taken.

[88] *Western Clay, supra,* is binding upon us and there is no reason to distinguish it on the basis that it dealt with a right of entry over an entire parcel of land for mining purposes. The legal schemes for compensation for a compulsory taking for mining purposes and for an oil and gas activity are the same. The factors that the Board may consider as set out in section 154 of the *Petroleum and Natural Gas Act* apply to determining compensation in the mining context and in the oil and gas context. As far as any compensation for loss of rights goes, if the landowner receives the full market value of the fee simple interest in the land that is subject to the right of entry, the landowner has been fully compensated for loss of all the rights associated with the fee simple interest. In the context of a partial taking, where a landowner retains residual and reversionary rights, the value of the full bundle of rights represented by the value of the fee simple will over compensate the landowner for the rights taken.

[89] Mr. Carter submits that the practice in Alberta is not to differentiate between the value of the loss of rights with respect to temporary workspace and permanent right of way. He submits that the same compensation agreed for the right of way in the ROW Agreement, or $1,900 per acre, should be applied to the temporary workspace inclusive of recognition for the compulsory aspect of the taking. There is no evidence to support that the loss of rights in relation to the temporary workspace equates to $1,900 per acre, and as will be seen in our discussion of the evidence

respecting the value of the land below, $1,900 exceeds the fee simple value of the lands. Further, the practice in Alberta does not apply in British Columbia. In British Columbia the law is that compensation must not exceed the value of the loss, that compensation reflecting the value of the fee simple fully compensates for loss of the total bundle of rights, and that it is appropriate to consider the residual and reversionary value where only a partial interest in land is being taken.

[90] The loss of rights arising from a taking of temporary workspace is not the same as the loss of rights arising from the taking of a permanent right of way. A right holder's need for temporary workspace is limited to the time required for construction of the pipeline and restoration of the land. Once reclamation is complete, right of entry to land for temporary workspace is no longer required. The evidence in this case is that if Mr. London had not denied Spectra access to complete reclamation, Spectra's right of entry to the temporary workspace could have been terminated in 2012.

[91] The British Columbia Courts have confirmed that it is appropriate to consider a landowners residual and reversionary rights to land that is subject to a right of entry (*Dome v Juell, supra; Scurry Rainbow, supra*). In the case of temporary workspace, those residual rights are substantial given the landowner regains full use of the area within a short time.

[92] Mr. Locke's evidence is that Spectra compensated other landowners along the Bisette Pipeline route $450-$475 per acre for loss of use of temporary workspace. This figure reflects 50% of the value Spectra applied to the land in the right of way itself of $900-$950 per acre. There is no evidence before us, however, of how the figure of $950-$975 was arrived at. Mr. Locke's evidence was that Spectra paid an additional $500 per acre to the right of way area for the compulsory taking, bringing the right of way compensation, exclusive of income loss or other damage, to $1,400-$1,450 per acre.

[93] We will determine what monetary value to place on the loss of rights after considering the evidence before us on the value of the land.

Value of the Land

[94] John Wasmuth, a professional appraiser and designated AACI, provides an appraisal of the bare land per acre market value of the fee simple interest in the Lands as of January 31, 2011. In his opinion, the highest and best use of the Lands, including the right of way and temporary workspace areas is for continued agricultural production. In his opinion, the highest and best use has not changed as a result of the installation and operation of the Bissette Pipeline and will remain the same into the foreseeable future.

[95] Mr. Wasmuth reviews seven sales, occurring between January 2009 and September 2011, of bare land properties of similar size to the Lands, used for agricultural purposes and entirely within the ALR. The unadjusted sale prices range from $997 to $1,386 per acre. After adjusting for location (in one sale) and soil and topography (in six sales) Mr. Wasmuth's evidence is that the sales indicate a per acre value range of $997 to $1,247. In his opinion, the per acre market land value of the fee simple interest in the Lands as of January 31, 2011 was $1,200 per acre. He applies this per acre value to estimate the fee simple bare land value of the land in the right of way. He notes that the $1,200/acre does not consider any reduction or value discount to account for the value of the residual interests retained by the Londons within the right of way area. Mr. Wasmuth does not provide an estimate of the residual value within the right of way. It is his opinion, however, that if he did account for residual value he would expect a reduction to the land value in the right of way from the fee simple value.

[96] Mr. Wasmuth takes two approaches to value the temporary workspace. The first is to estimate value on the basis of market rents. In this approach Mr. Wasmuth uses a rent of $30 per acre based on rents for pastureland in the Peace Region of

Alberta, over three years. He estimates the value of the short term interest in the temporary workspace at $90/acre, or $409.50 in total ($30/acre x 3 years x 4.55 acres = $409.50)

[97] Using what Mr. Wasmuth calls the fairly common convention of industry and landowners to pay/receive 50% of the per acre amount paid for pipeline right of way relative to temporary workspace areas, he estimates the value of the temporary workspace area at $2,730 ($1,200 x .50 x 4.55 = $2,730).

[98] Mr. Carter is highly critical of Mr. Wasmuth's approach to valuing the Lands and the temporary workspace arguing that it equates to a per acre value of a fictional bare land quarter section and does not reflect what the Londons could expect to realize if they put the Lands, inclusive of their improvements, on the market. He also argues that the value of the small acreage comprising the pipeline right of way cannot be equated to the value on a per acre basis of a whole quarter section. Despite these criticisms, the Londons did not provide their own evidence of land value or any contrary expert opinions to those of Mr. Wasmuth as to how to estimate either the value of the Lands or the land value of the temporary workspace areas. We therefore accept Mr. Wasmuth's conclusion that the value of the temporary workspace is in the range of $90 to $600 per acre depending on the approach used as it provides the only evidence with respect to land value before us. In the absence of other evidence, we accept Mr. Wasmuth's opinion that the value of the land within the right of way would likely be less than the indicated fee simple value to account for the landowners' residual interest.

[99] It is Mr. Wasmuth's opinion that the Bissette Pipeline right of way will not cause any reduction to the market value of those portions of the Lands outside of the right of way. This opinion is based on consideration of the highest and best use of the Lands, Spectra's liability for potential contamination and obligation to compensate the landowners for loss and damage, conclusions drawn from various studies and articles, and his own experience of 40 years appraising agricultural land.

[100] Again, while critical of Mr. Wasmuth's opinion that the Bissette Pipeline would not cause any reduction to the market value of the Lands, the Londons did not provide any evidence in support of a contrary view.

[101] As the loss of rights associated with the taking of temporary workspace does not deprive a landowner of the complete bundle of rights, and typically only lasts up to three years leaving the landowner with significant residual and reversionary rights, there is no need to compensate a landowner for the full market value of the area taken. Mr. Wasmuth's evidence is that it is common industry practice to compensate for loss associated with temporary workspace at 50% of the rate applied to a pipeline right of way but does not provide an opinion of what the discount to the fee simple value should be to account for the Londons' residual interest in the right of way to enable the Board to award 50% of that rate. Mr. Williams argues compensation should be $475 per acre for the temporary workspace on the basis that this was the amount accepted by other landowners or ordered by the Board for other takings for temporary workspace along the Bissette Pipeline route. He argues that this figure is supported by Mr. Wasmuth's evidence.

[102] Mr. Wasmuth's evidence of industry practice to compensate for temporary workspace at 50% of the compensation for a right of away itself together with his opinion that he would expect a reduction to the fee simple value of a right of way, suggests that compensation for the temporary workspace should be less than $600 per acre. But Mr. Wasmuth's evidence does not quantify the amount of any discount to the fee simple value of the right of way lands to account for the landowners' residual interest. Nor does the evidence that some other landowners accepted $475 inform us as to how that figure was calculated or what it was intended to represent.

[103] Mr. Williams refers to previous cases suggesting the discount to fee simple value of right of way lands should be discounted by 50% to 75% where a landowner may continue using the land in a right of way as before. See for example, *Gulf*

Canada Resources Limited v. Moore (1982), 27 L.C.R. 174, where the Alberta Court of Queen's Bench discounted the *en bloc* value of land in a right of way by 50% to account for the landowner's residual value. Mr. Carter argues that the Court's conclusion in this regard was not supported by the evidence, and on our reading of that decision, we are inclined to agree. In any event, there is no evidence in this case to substantiate the amount of the discount to the fee simple value to account for the landowners' residual interest.

[104] We have considered Mr. Wasmuth's market rent approach to value the temporary workspace, but find that the application of a market rent for three years is actually an alternative to valuing the loss of income from the area of land taken, and not a reflection of the value of the rights taken.

[105] We conclude that the value of the loss of rights associated with a taking for temporary workspace must be considerably less that the value of the fee simple interest. We accept Mr. Wasmuth's evidence of industry practice to compensate for temporary workspace at 50% of the compensation for the taking of the right of way. This evidence is supported by Mr. Locke's evidence of the compensation paid to other landowners for temporary workspace on the Bissette Pipeline route. In the absence of evidence to actually quantify the value of the rights taken, we find that compensation for the loss of rights in this case, inclusive of the compulsory aspect of the taking, is adequately represented by applying 50% to the fee simple value of the Lands. That value is $2,730.

Crop Loss or Loss of Income from the Lands

[106] Mr. Wasmuth, also a professional Agrologist, estimates the forage crop loss from the temporary workspace areas using two scenarios. In the first scenario, he assumes the whole of the temporary workspace area was used for hay production and that the land produced above average yields of 2.0 tons per acre at above average quality and price of $0.048 per pound ($96/ton). He estimates loss on the

basis of gross rather than net income. His evidence is that generally in the Peace River Region a seeded forage crop typically requires two to three years to become fully established and reach full yield potential, but assumes 100% loss for 2011 and 2012, and allows for three years of declining yield loss for forage re-establishment thereafter, estimating crop loss over a five year period as follows:

2011 – 100%
2012 – 100%
2013 – 75%
2014 – 50%
2015 – 25%

[107] On this basis, Mr. Wasmuth estimates total gross income loss from the temporary workspace area at $3,058.

[108] In the second scenario he estimates loss based on the carrying capacity of the land for livestock grazing. Again, he assumes the whole of the temporary workspace area was used to graze livestock. Using data from the Peace Region of Alberta, he estimates one animal unit month (AUM), or the amount of forage required to sustain a cow calf pair, is 915 pounds of forage per month, and the estimated average yield assuming the top end of the AUM per acre range is 3,020 pounds per acre. Again estimating loss over five years on the same declining basis applied above, but using 3,500 pounds per acre at $0.042 per pound ($84/ton), Mr. Wasmuth estimates loss from the temporary workspace area at $2,341 using this scenario.

[109] The Londons did not provide any evidence with respect to their loss of income arising from Spectra's use of the temporary workspace area. We therefore accept Mr. Wasmuth's estimates of probable income loss for the whole of the temporary workspace area.

[110] The Londons were already compensated, however, for income loss with respect to the 3.61 acres of temporary workspace within the Encana lease, and are paid an annual rental for this area to compensate for anticipated ongoing losses from this area arising from Encana's continuing right of entry. There is no evidence that the Londons incurred any additional income loss beyond that already compensated for as a result of Spectra's use of the 3.61 acres of temporary workspace within the Encana lease. Any income loss arising from Spectra's use of the temporary workspace area only arises from Spectra's use of .94 acres. On the basis of Mr. Wasmuth's highest per acre estimate of income loss, and assuming loss over five years on the same basis assumed by Mr. Wasmuth, we calculate the Londons' loss of income from Spectra's use of the temporary workspace area at $630 as follows:

Year	**Acres**	**% of Loss**	**Est. Yield (lbs./ac.)**	**Est. Price ($/lbs.)**	**Est. Total Crop Loss**
2011	.94	100	4,000	0.048	$180
2012	.94	100	4,000	0.048	$180
2013	.94	75	4,000	0.048	$135
2014	.94	50	4,000	0.048	$90
2015	.94	25	4,000	0.048	$45
				Total	**$630**

Conclusion

[111] Compensation is the equivalent in monetary terms for the loss sustained arising from a right of entry. We have concluded the monetary equivalent of the loss of rights inclusive of the compulsory aspect of the taking associated with the temporary workspace is $2,730 and that the loss of income or profit from Spectra's use and occupation of the temporary workspace is $630, for a total of $3,360. Considering all of the circumstances and the evidence before us, we find payment of

$3,360 provides the monetary equivalent to the Londons' for the loss caused by Spectra's right of entry to 4.55 acres of the Lands for temporary workspace.

ORDER

[112] The Board Orders Spectra Energy Midstream Corporation to pay James Nelson London and Keir Marie London compensation in the amount of $3,360, less any amounts already paid as partial compensation pursuant to the Board's Orders of December 23, 2010 and January 31, 2011, for loss caused by Spectra's right of entry to the Lands for temporary workspace.

[113] The Londons' application under section 164 of the *Petroleum and Natural Gas Act* (file 1801) is dismissed.

[114] The Londons' application under section 163 of the *Petroleum and Natural Gas Act* (file 1792) is withdrawn.

DATED: February 24, 2015

FOR THE BOARD

Cheryl Vickers, Chair

Howard Kushner, Member