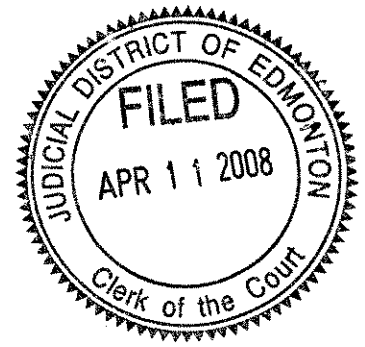


Court of Queen's Bench of Alberta



Citation: EnCana Corporation v. Campbell, 2008 ABQB 234

Date: 20080411
Docket: 0803 00944
Registry: Edmonton

Between:

EnCana Corporation

Applicant

- and -

Shawn Robert Campbell, Ronalie Glenda Campbell, The Toronto Dominion Bank, Real Resources Inc., Imperial Oil Resources Limited

Respondents

**Reasons for Decision
of the
Honourable Madam Justice M.G. Crighton**

Introduction

[1] The Surface Rights Board (the SRB) granted a Right of Entry Order (the Entry Order) to the Applicant, EnCana Corporation, in relation to the Respondent Campbells' land (the Land). The Entry Order included a number of conditions. EnCana applies to this Court for an order quashing certain of those conditions on grounds the SRB exceeded its jurisdiction.

Facts

[2] The Campbells own the Land referred to in the Entry Order.

[3] The Campbells and Real Resources Inc. entered into a Surface Lease on March 13, 2003. The Energy Resource Conservation Board (the ERCB) granted a Well License (the License) to

Real for an oil well on the Land subject to the condition that Real as the licensee comply with the Oil and Gas Conservation Act and Regulations, the Oil Sands Conservation Act and Regulation and all applicable guides and interim directives published by the ERCB. The ERCB approved Real's transfer of that License to EnCana on February 14, 2006.

[4] Real tried to assign the Surface Lease to EnCana, but the Campbells insisted EnCana accept an interpretation of Condition 9 in the Addendum to the Surface Lease that required EnCana to conduct hydrocarbon water testing before the new gas operations began. EnCana refused to accept that interpretation.

[5] EnCana was prepared to accept the conditions outlined in the Addendum to the Surface Lease and to add a water testing condition consistent with Energy and Utilities Board (EUB) Directive 035 requiring such testing if and when EnCana decided to pursue coal bed methane drilling.

[6] The Campbells considered that would be too late to establish adequate baseline data and address their concerns about the negative effects of hydrocarbon gases on the integrity of their domestic home's water supply. The Campbells refused their consent to Real's assignment.

[7] Consequently, EnCana applied to the SRB for a right of entry order in relation to the oil well. The Campbells objected and the SRB held an Objection Hearing. On November 22, 2007, the SRB issued with reasons the Entry Order that is the subject matter of this review application.

The Standard of Review

[8] As a consequence of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, there are only 2 standards of review: correctness and reasonableness.

[9] EnCana argues the question is one of jurisdiction and therefore, the standard of review is correctness. EnCana does not identify the standard of review analysis it applied to arrive at that standard.

[10] The Campbells argue it is reasonableness. They say the SRB clearly has the discretion to impose conditions. The only limitation on that discretion is that any conditions the SRB imposes cannot be inconsistent with EnCana's license.

[11] The SCC in *Dunsmuir* determined the standard of review analysis must be contextual.

The Standard of Review Analysis

A. Privity Clause

[12] There is no privity clause and therefore, no statutory indication a standard of

reasonableness is applicable.

B. Expertise

[13] The Respondents provided Alberta authority that specifically recognizes SRB members are experts who have extensive knowledge of policy, the industry and its requirements, acceptable practices in the industry and the concerns of landowners. In those cases, Alberta Courts have concluded that because of its considerable expertise in such areas as quantifying land values, inconvenience, weed control, damage to topsoil and oil company techniques, the SRB is entitled to considerable deference and should not be overturned unless the decision is found to be unreasonable. See *Legal Oil and Gas Ltd. v. Alberta (Surface Rights Board)*, 2001 ABCA 160; *Devon Canada Corp. v. Surface Rights Board*, 2003 ABQB 7; and *Provident Energy Ltd. v. Alberta (Surface Rights Board)*, 2004 ABQB 650.

[14] EnCana's counsel correctly pointed out those cases are all compensation cases. He argued that s. 15 (6) requires the SRB to interpret ERCB legislation and it has no greater expertise than the Court to interpret other legislation. He also directed the Court to an article written by Brian O'Ferrall (as he then was) describing the SRB's role as rubber stamping the ERCB's permit for a particular facility (*The Energy Resources Conservation Board, the Surface Rights Board and the Relationship Between the Two*, (1987) Mid - Winter Meeting of the Alberta Branch Canadian Bar Association). That may be so with respect to the Entry Order, but the SRB's discretion to impose conditions is express and limited only by the particular well license, permit or other authorization.

[15] The SRB is empowered to consider imposing conditions with every right of entry order it grants. In every case it is therefore required to consider the well license, permit or authorization and determine if the condition it seeks to impose is inconsistent with the well licence. There is no rational reason to suppose a lesser degree of expertise and accordingly to ascribe a different degree of deference to the SRB's decisions under s. 15 (6) than the Courts have done in relation to SRB decisions regarding compensation.

C. Purpose of the Act

[16] An application for a right of entry order under s. 15 (6) arises where the owner will not consent to the operator entering onto the owner's land. The interests of landowner and operator on the those lands are in conflict. On a plain reading of s. 15 (6), the section is designed to ensure the SRB balances the landowner's concerns against the operator's need to enter onto those lands to carry out its specific operations. As Brian O'Ferrall stated, every time the SRB makes a decision it is arbitrating between industry and the land owner. Where the operator requires a license, permit or approval, the SRB can request a copy of that license, permit or approval together with any other information relevant to the right of entry application. If the SRB grants a right of entry order, it then has a statutory discretion to impose appropriate conditions on that

right of entry so long as those conditions are not inconsistent with the license, permit or other authorization. The Alberta Court of Appeal described the SRB's role as being ancillary and in aid of the oil well activities authorized by the ERCB. It noted s. 15 (6) of the *Surface Rights Act* prioritizes the existence of the well license such that the SRB could not exercise its jurisdiction to deny entry to the well site and in doing so frustrate the ERCB's jurisdiction to grant that license (see *Windrift Ranches Ltd. v. Alberta (Alberta Surface Rights Board)*, [1986] A.J. No. 581). That is not the case here. In this case, the SRB has granted the Right of Entry Order but in doing so, has imposed certain conditions as it has the jurisdiction to do so long as they are not inconsistent with EnCana's License.

D. Nature of the Issues

[17] The issue is whether the SRB's decision to impose the impugned conditions was reasonable.

Conclusion on the Standard of Review

[18] Having regard to all 4 factors, the standard of review in this case is reasonableness.

[19] I consider the SRB's expertise in the areas of industry and policy to be especially significant in the standard of review analysis where the SRB must balance the interests of landowners where those interest are in conflict with oil and gas operators who are conducting their operations on private land pursuant to permits or licenses granted by the ERCB.

Conclusion on the Application to Quash Conditions 5, 7, 9, 10, 12 and 13

[20] Condition 5 should be struck as being unreasonable. Conditions 7, 9, 10, 12 and 13 are not inconsistent with EnCana's license and the SRB's decision to impose them was therefore reasonable.

The SRB's Decision

[21] The SRB granted an Entry Order, but in doing so, imposed a number of conditions. EnCana seeks an Order quashing the following conditions:

Condition 5 - The Operator shall prevent noxious, nuisance and restricted weeds from growing on the subject parcel.

Condition 7 - The Operator shall not apply any chemical, soil sterilizing material, pesticide and/or herbicide without the Respondent's written consent.

Condition 9 - The Operator shall not dispose of any sump fluids, toxic chemicals, hazardous substances, radioactive materials, rocks and/or garbage on the subject parcel without the Respondent's written consent.

Condition 10 - The Operator shall permit the Respondents to use and cross over the access roadway of the subject parcel to gain access to their lands.

Condition 12 - The Operator shall adequately berm the subject parcel prior to the drilling operations to contain and to prevent the migration of hydrocarbons, drilling fluids, dissolved chemicals and / or any other polluting substances, which may contaminate the lands and / or the waterways and / or water bodies near and / or adjoining the subject parcel. No topsoil shall be used to construct berms and / or dikes on the subject parcel;

Condition 13 - The Operator shall conduct the following tests and reports:

- (a) Conduct and complete tests and provide test results to the Respondents of detailed water well testing of the water well located at 15-13-43-28-W4M, before the start of any gas operation on the parcel subject to the present Right of Entry Order;
- (b) The tests will include the following: static water level; draw and recovery; flow rate determination; and water quality analysis as per the Canadian Drinking Water Quality Guidelines, as well as include the tests described in other clauses herein;
- (c) During the tests, the hydro-geological contractor shall note on each pump report the presence or absence of gas encountered during the testing period;
- (d) If free gas is present and in sufficient quantity to allow, a representative sample of gas shall be collected and analysed at a qualified and accredited laboratory. Analytic tests shall be conducted to determine the gas composition.
- (e) All testing and analysis shall be the sole responsibility of the Operator.

[22] Conditions 5, 7, 9, 10 and 12 were all included in the Addendum to the Surface Lease between the Campbells and Real Resources. Condition 13 was included in a more restricted

manner in pre hearing correspondence between the Campbells and EnCana before negotiations to assign the Surface Lease failed.

[23] The SRB said the following about the impugned conditions it imposed on EnCana:

Because the Board is convinced of the benefits of doing so, Right of Entry Orders routinely issue with conditions as safeguards and as guidance to conduct by which operators and their agents can manage their practices and their interactions with landowners at and around the subject parcel. The emotions and anxiety often experienced by landowners when operators wish to enter their lands can be assuaged by conditions, and a listing of conditions is common practice, whether in a Surface Lease Agreement or in a Right of Entry Order.

The Board both heard and received in Exhibits and file documents many indications of the deep significance attached by the present Respondents to the conditions found in the Addendum to the Surface Lease Agreement with Real Resources. The continuance, by Encana's adoption, of these conditions (as well as a specific interpretation of one of them) has been the central hope of the Respondent Landowners. These conditions clearly have functioned to provide some security and assurances deemed valuable to the Landowners.

The present case arises with the migration from an oil operation under a Surface Lease Agreement to a gas operation under a Right of Entry Order and the Board seeks to ensure that the obligations on the parties migrate as well as the opportunities. The Board sees benefit and merit in a continuance of the arrangements that govern the subject parcel and sees a loss to the Respondents were they discontinued. The Applicant, both in the discussions and correspondence with the Respondents and also in the statements at the Hearing, remained willing to adopt the existing Surface Lease Agreement including its Addendum of conditions. EnCana received rights from Real Resources; it showed willingness to receive the attendant obligations as well. The Board is persuaded there is benefit and merit in doing so, therefore the Board determines the conditions of the Addendum will be adopted into the present Right of Entry Order insofar as they are adaptable to a Right of Entry Order.

[24] The SRB included Condition 13 because it concluded such a condition was not inconsistent with Energy and Utilities Board (EUB) directive 035. The Campbells, now faced with a gas operation on the Land, wanted testing to establish a current profile, a "baseline", indicating the presence of significant or negligible amounts of hydrocarbons in a water well adjacent to the site. The SRB noted that EnCana had offered a new condition to the Campbells when they were trying to secure the Campbells consent to Real's assignment of the Surface Lease. That condition contemplated testing in accordance with EUB directive 035 such that EnCana would test if and when it decided to pursue Coal Bed Methane or Natural Gas in coal from the subject well bore. The SRB noted the array of tests approved by Alberta Environment

both before and after the new operation itself becomes active reflected EnCana's appreciation as well as the EUB and Alberta Environment's appreciation of the array of conditions that might satisfy a landowner's concern about hydrocarbons. The SRB appreciated those tests were usually deployed in the industry in conjunction with Coal Bed Methane operations, but the tests were not necessarily specific to Coal Bed Methane operations. When it imposed the more general testing condition, the SRB relied on the Introductory comments in EUB directive 035 that encouraged oil and gas companies to continue current practices of collecting baseline water quantity and quality data for water wells in close proximity to any energy development well prior to drilling and to submit these data to Alberta Environment. Because that was encouraged, the SRB considered such a condition was not inconsistent with Directive 035.

Are the Conditions Reasonable?

Conditions 5 and 7

[25] EnCana argued the *Weed Control Act* is a complete code and therefore, any condition that purports to address weed control, including the use of chemicals for that purpose is *ultra vires* and should be quashed. Condition 5 expressly requires EnCana to prevent weeds. Condition 7 prohibits EnCana from applying chemicals, soil sterilants, pesticides and or herbicides without the Campbells' written consent.

[26] The question for this Court is not whether it agrees with the conditions, but rather whether the conditions are reasonable.

[27] By virtue of s. 16 of the *Surface Rights Act*, a right of entry order vests in EnCana the exclusive right, title and interest in the surface of the land in respect of which the order is granted other than a certificate of title and the right to carry away sand, gravel etc. It also vests an exclusive right to excavate or otherwise disturb minerals within, on or under the land without land owner permission or compensation. The SRB's Entry Order creates a section of land within the owner's land over which EnCana will have exclusive rights. It should be expected the SRB would consider whether it should be necessary to clarify competing views on how weeds on those lands might be controlled.

[28] The Campbells argued these conditions were in the Surface Lease and in the attached Addendum of conditions. The Surface Lease is a standard form and EnCana indicated at the hearing it was prepared to accept those conditions and therefore it was reasonable for the SRB to impose those same conditions on EnCana. The SRB made that same observation at the hearing and considered the Campbells would lose something if EnCana received the rights from Real through the license transfer but did not get the obligations that were an Addendum to the Surface Lease. The difficulty with that argument is the Surface Lease contains 2 different weed control obligations: one in the standard form conditions and one in the Addendum. The SRB selected the higher obligation. Imposing a higher standard does not necessarily make unreasonable the SRB's decision to include Condition 5, but the SRB selected the higher standard in the Addendum over the lower standard in the standard form clauses without expressing any rationale

for doing so. Absent some rationale for imposing that higher standard, there is no basis upon which to conclude the SRB's decision to impose Condition 5 was reasonable. The condition should be quashed.

[29] Condition 7 can stand on its own, however, if Condition 5 is quashed. The *Weed Control Act* permits an Inspector to give a notice to an owner or occupant requiring that person to control noxious weeds. *Control* is defined and includes chemical and non chemical means. The SRB by imposing Condition 7 has determined the Campbells will have the final say on EnCana's ability to use chemical means. That does not contradict the *Weed Control Act* as EnCana argues it does. The weed inspector does not have an unfettered discretion to direct an occupier to use chemicals. If the inspector considers it appropriate to do so, the inspector can give notice to control noxious weeds. Only if the occupant fails to comply is the inspector then authorized to go in and take whatever steps are appropriate to carry out the notice. A Condition that preserves the Campbells' right to decide when chemicals are used on the surface of their land is therefore a reasonable condition.

Conditions 9, 12 and 13

[30] These conditions all relate to matters EnCana says are within the ERCB's exclusive jurisdiction. EnCana argues the impact of these conditions if they are permitted is that EnCana can comply with its License and still be in breach of its Entry Order if it fails to do those things required in each of the impugned conditions.

[31] It is true there is an exclusive jurisdiction clause in the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6. That jurisdiction relates to the development of oil and gas resources and to their exploration. That does not preclude SRB jurisdiction in relation to the surface of the land for those matters ancillary or in aid of oil and gas operations. S. 15 (6) expressly contemplates the SRB imposing conditions that might overlap into areas the ERCB could and does regulate so long as those conditions are not inconsistent with the well license, permit or other authorization the ERCB has granted.

[32] It is true ERCB Directive 050 requires the operator to obtain the land owner's consent to dispose of drilling waste only if that disposal occurs offsite. Condition 9 requires EnCana to obtain the Campbells' consent to dispose of drilling waste where that disposal occurs onsite. The question is not whether the ERCB requires something different. Rather, the question is whether Condition 9 is inconsistent with EnCana's License. The Supreme Court of Canada considered the meaning of *inconsistent* in the context of two laws. It held two laws are deemed to be inconsistent where compliance with one law involves breaching the other (see *Smith v. R.*, [1960] S.C.R. 776 at 800).

[33] Requiring EnCana to secure the Campbells' consent before disposing of certain specifically enumerated waste products on the Land will not cause EnCana to be in breach of its License. The ERCB directive requires land owner consent for offsite disposal. The SRB's directive does not address offsite disposal. It imposes a higher standard in relation to specific

waste products where EnCana intends to dispose of those on the Land. That list consists of waste material that would or could negatively affect the Campbells' land surface and is not inconsistent with the well license. Condition 9 is therefore reasonable.

[34] Condition 12 requires that EnCana adequately berm the subject lands to prevent the migration of hydrocarbons and other fluids and chemicals which may contaminate the lands, waterways or water bodies or adjoining lands. *Oil and Gas Conservation Regulation 8.060* only requires berming if the well or facility is located within 100 metres of the normal high water mark of a body of water. EnCana argues the condition is inconsistent with Regulation because its effect would create the situation where EnCana would be in compliance with its License if it does not berm in accordance with the SRB condition and still risk having its Entry Order terminated for noncompliance with the SRB's conditions. The argument is compelling, but that does not address the discretion that is conferred upon the SRB in s. 15 (6). The SRB must consider if the conditions it imposes are inconsistent with EnCana's License. The SRB imposed Condition 12 because of the Campbells' expressed concern about the potential for hydrocarbon gases damaging the integrity of their drinking water. The SRB noted this condition, as well as Conditions 5, 7 and 9, was included in the Addendum to the Surface Lease between the Campbells and Real Resources and that EnCana was at all times willing to accept those conditions. In essence, the SRB determined there was merit in continuing those arrangements to ensure the obligations migrated along with the benefits where Real Resources transferred the well license to EnCana. To require EnCana to comply with Condition 12 will not cause EnCana to be in breach of its License. The Condition simply imposes a higher standard given the SRB's concern about land and domestic water contamination.

[35] ERCB Directive 035 requires water testing before and after an Operator begins coal bed methane drilling operations. In Condition 13 the SRB requires water testing before EnCana commences its operations, whether or not they intend to do Coal Bed Methane drilling. The SRB specifically addressed Directive 035 and the condition EnCana offered prior to the Objection Hearing. The SRB noted the array of Alberta Environment approved testing EnCana referred to in its offer was not specific to Coal Bed Methane operations notwithstanding ERCB Directive 035 typically deploys water testing in accordance with those operations. The SRB specifically referenced the following express encouragement that appears in the introduction to Directive 035:

The EUB encourages oil and gas companies to continue current practices of collecting baseline water quantity and quality data for water wells in close proximity to any energy development well prior to drilling and to submit these data to AENV

[36] The SRB noted Directive 035 was last revised on May 8, 2006 and therefore reflected a statement of current expectations about good industry practice. The SRB considered the Condition to be appropriate to address the land owners' concerns about the potential for hydrocarbons to contaminate their domestic water supply and the water used for their livestock. The SRB considered their concern to be a real concern and because of the expressed

encouragement that industry continue its practice of water testing, it did not consider Condition 13 to be inconsistent with EnCana's License. In any event, Directive 035 imposes a standard at one point in time. That does not preclude water testing at other points and the SRB's condition imposing water testing at a different operational point is not inconsistent with that Directive. Accordingly, Condition 13 is not inconsistent with the License and the SRB's decision to impose it is reasonable.

Condition 10

[37] EnCana agrees the standard of review regarding the SRB's decision to impose this condition is reasonableness. EnCana argues the condition is not reasonable because it is irreconcilably inconsistent with Clause 2 in the Entry Order.

[38] Clause 2 says the following:

The owner and any person claiming by, through or under the owner shall have the right to use the area shown outlined in red on the said Plan

- (a) if necessary to gain access to the parts of his land severed or otherwise affected thereby, and
- (b) for livestock at large,

subject to the Operator's right to use the said area for its operations and to fence its tanks, stations and structures thereon.

[39] EnCana argues that Clause 2 asserts rights with priority to the Operator whereas Condition 10 asserts rights with priority to the Campbells. I disagree. It is a standard principle of construction that the drafter of a document intended each provision to have meaning. The drafter is presumed not to have intended any internal inconsistency. Clause 2 allows the Campbells to use the outlined portion to gain access to their land or their livestock and the Operator is required to provide crossings and other works to facilitate that access. That access is subject to the Operators need to carry out its operations and to fence its tanks and structures. Clause 2 addresses the creation of crossings to facilitate access, but to the extent they are outside the area in red, Clause 2 does not specifically allow the Campbells to use that access notwithstanding that is likely implied. Condition 2 simply clarifies the Campbells' right to use EnCana's access road to access their land. That access is already limited by Clause 2. In my view they are not inconsistent with each other. Condition 10 may or may not be necessary, but it is not unreasonable.

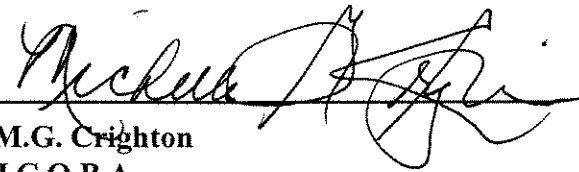
Costs

[40] The Campbells asked this Court to award costs on a solicitor client basis in accordance with the Surface Lease. EnCana is not a party to that Surface Lease and the Campbells' refusal

to consent to Real's assignment of that Lease to EnCana precipitated EnCana's application for the Entry Order. The Campbells cannot rely on the Surface Lease as a basis for solicitor and client costs. There is nothing in the conduct of the parties that would justify this Court exercising its jurisdiction to award solicitor client costs. The Campbells shall be entitled to costs pursuant to Schedule C, Item 8, under Column 1 plus all reasonable disbursements.

Heard on the 9th day of April, 2008.

Dated at the City of Edmonton, Alberta this 11th day of April, 2008.


M.G. Crighton
J.C.Q.B.A.

Appearances:

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