

*SURFACE RIGHTS ACT*  
RSA 2000  
Chapter S-24  
(hereinafter “the Act”)

Before:

SURFACE RIGHTS BOARD  
(hereinafter “the Board”).

IN THE MATTER OF certain lands described in Plan 0520308, Block 1, Lot 1 (SE ¼-20-39-7-W5M), in the Province of Alberta, as described in Certificate of Title No. 052 021 039 (“the Land”).

Excepting thereout all Mines and Minerals.

B E T W E E N:

BP CANADA ENERGY RESOURCES COMPANY,

Operator,

- and -

RANDOLPH ALLAN HILL,

Lessor.

DECISION

Upon application by the Lessor for review of the rate of compensation payable in respect of the operation of pipeline facilities by the Operator in and on the Land, the Board held a hearing on September 24, 2007, at Rocky Mountain House, Alberta.

PRESIDING BOARD:

- D. A. Sibbald, Presiding Chair
- Rodney Fong
- N. Allen Maydonik, Q.C.

APPEARANCES:

For the Operator:

- Don Grossberndt, Director of Stakeholder Relations, BP Canada Energy Resources Company; and
- David M. Wood, of the law firm Stikeman Elliott LLP, Legal Counsel.

For the Lessor:

- Randolph Allan Hill, Landowner;
- Roy W. Elander of Roy W. Elander Law Office, Legal Counsel; and
- Doug MacKenzie of Shermac Farm Developments Limited, Consultant.

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**BACKGROUND:**

BP Canada Energy Resources Company (“the Operator”) constructed pipelines across lands and railway track owned by Canadian Pacific Railway Company (“CP”) pursuant to two agreements between the Operator and CP (the “CP Agreements”). CP subsequently sold to the Lessor a portion of its land which contained the pipelines. At the time of the sale of the Land CP also assigned to the Lessor certain encumbrances under the two CP Agreements and relating to the Land. As a result of the sale the Operator’s pipelines run under the Lessor’s land and an access roadway and pump station (valve site) is operated on the Land. The Lessor has applied under the *Act* for review of the compensation payable by the Operator under the CP Agreement dated September 13, 1977 (the “1977 CP Agreement”) for the operations of the Operator under and on the Land. A hearing was held in Rocky Mountain House, Alberta on September 24, 2007.

Subsequent to the hearing, on October 17, 2007 the Board requested counsel for the parties to provide written submissions on the following issues:

1. whether the Partial Assignment is of an interest in land and subject to the provisions of the *Law of Property Act* and/or the *Land Titles Act*; and
2. what impact the *Environmental and Enhancement Act* may have on the Partial Assignment.

Further subsequent to the hearing, on January 11, 2008 the Board requested counsel for the parties to confirm in writing whether the application for compensation by the Lessor pursuant to section 27 of the *Act* was with respect to both CP Agreements or only to the 1977 CP Agreement.

**ISSUES:**

1. Should the Board consider both CP Agreements or only the 1977 CP Agreement referenced in the application?
2. Was the assignment from CP to the Lessor valid?
3. Does (do) the CP Agreement(s) qualify as a surface lease?
4. Is the Lessor a lessor as defined in Section 27 of the *Act*?
5. Does the Board have jurisdiction to hear the application for compensation?

**RELEVANT LEGISLATION:*****Surface Rights Act, RSA 2000, Chapter S-24******Definitions******1. In this Act,***

- (o) “surface lease” means a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation;

***Right of Entry******12(1) No operator has a right of entry in respect of the surface of any land***

- (a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,

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- (b) *for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,*
- (c) *for or incidental to the construction, operation or removal of a pipeline,*
- (d) *for or incidental to the construction, operation or removal of a power transmission line, or*
- (e) *for or incidental to the construction, operation or removal of a telephone line,*

*until the operator has obtained the consent of the owner and the occupant of the surface of the land or has become entitled to right of entry by reason of an order of the Board pursuant to this Act.*

### ***Review of rate of compensation***

**27(1)** *In this section,*

- (a) *“lessor” means a party to a surface lease who is entitled to receive compensation under that surface lease*
- (b) *“operator” means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;*
- (c) *“parties” means,*
  - (i) *with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and*
  - (ii) *with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;*
- (d) *“rate of compensation” means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).*

**(2)** *For the purposes of this section,*

- (a) *the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and*
- (b) *the term of a surface lease shall be computed from the effective date of the lease.*

**(3)** *This section applies to compensation orders and surface leases*

- (a) *that provide for the payment of compensation on an annual or other periodic basis, or*
- (b) *that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.*

**(4)** *An operator shall give a notice to the lessor or respondent, as the case may be,*

- (a) *on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or*
- (b) *where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.*

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(5) A notice under subsection (4) shall state

- (a) that the operator wishes to have the rate of compensation reviewed,
- (b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or
- (c) there no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,

in respect of the compensation years of the term subsequent to the year in which notice is given.

(6) If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.

(7) When the parties agree on a rate of compensation

- (a) under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and
- (b) under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.

(8) If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for a hearing to determine the rate of compensation.

(9) An application pursuant to subsection (8) shall set out

- (a) the name and address of the operator,
- (b) the name and address of the lessor or respondent, as the case may be,
- (c) the rate of compensation under the surface lease or compensation order, and
- (d) the amount the applicant believes to be a reasonable and fair rate of compensation,

and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.

(10) On receipt of an application pursuant to subsection (9), the Board shall fix a date for the hearing of the application and notify the parties of the date so fixed.

(11) The Board shall hear the application and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).

(12) An order under subsection (11) may be appealed as though it were a compensation order under section 23.

(13) With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.

(14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.

(15) If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case

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- (a) *subsections (6) to (13) apply,*
- (b) *the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and*
- (c) *the Board may make any order regarding the payment of interest that it considers appropriate.*

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***Environmental Protection and Enhancement Act, RSA 2000, Chapter E-12******Definitions******134 In this Part,...***

- (g) *“surface lease” means a lease, easement, licence, agreement or other instrument granted or made before or after the coming into force of this Part under which the surface of land has been or is being held;*
- (h) *“surrender” means surrender, relinquishment, quit claim, release, notice, agreement or other instrument by which a surface lease is discharged or otherwise terminated as to the whole or part of the land affected by the surface lease;*
- (i) *“termination” means the termination of a right of entry order by an expropriation board as to the whole or part of the land affected by the order;*

***144(1) Notwithstanding anything in any other Act or any surface lease or right of entry order,***

- (a) *no surrender of a surface lease is effective or binding on any person, and*
- (b) *no expropriation board shall order the termination of a right of entry order*

*insofar as the surrender or termination relates to any interest of the registered owner, until a reclamation certificate has been issued in respect of the specified land affected by the surrender or termination.*

**PRELIMINARY MATTERS:**

1. Mr. Elander raised an objection to the Operator’s written submission having been provided to the members of the panel prior to the hearing and without the consent of the Lessor. Mr. Elander argued that if the panel members read the Operator’s material prior to the hearing that the members would be biased in favor of the Operator.

Mr. Wood argued that providing the material to the panel was in the best interests of the hearing by eliminating any surprises. He argued further that as long as the Lessor has an opportunity to present its case and to respond to the Operator’s submission there is no bias by the panel.

After deliberation the Board decided that the reading of the Operator’s submission prior to the hearing did not create any bias by the panel since the Lessor would have every opportunity to present its case and to respond to the Operator’s submission.

2. Mr. Wood argued that the Board does not have jurisdiction to provide the relief sought by the Lessor. The Board proceeded to hear evidence and argument from both parties on this preliminary issue.

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EXHIBITS FILED:

- Exhibit 1: The Operator's survey plan of easements through the Land.
- Exhibit 2: Agreement dated September 13, 1977, between CP and Dome Petroleum Limited.
- Exhibit 3: Partial Assignment of Unregistered Permitted Encumbrances (Including Leases If Applicable) and Indemnity Agreement between CP and the Lessor dated December 1, 2004.
- Exhibit 4: Grant of Easement between the Lessor and BP Canada Energy Company, dated January 11, 2005, not fully executed.
- Exhibit 5: The Operator's survey plan of easements through the Land.
- Exhibit 6: Lease Agreement (for L.S. 7) between Henry Iwaschuk and Western Leaseholds Ltd. dated July 7, 1950.
- Exhibit 7: Lease Agreement (for L.S. 1) between Henry Iwaschuk and Western Leaseholds Ltd. dated July 7, 1950.
- Exhibit 8: Lease Agreement between Helen Merna McMechan and Canada-Cities Service Petroleum Corporation dated February 14, 1958.
- Exhibit 9: Surface Lease between William Orey and Imperial Oil Limited dated November 10, 1949.
- Exhibit 10: Surface Lease between John William Orey and Elsie Mary Ullman and Imperial Oil Limited dated April 4, 1975.
- Exhibit 11: Utility Corridor Management Policy issued by the Ontario Ministry of Natural Resources dated January 1, 2002.
- Exhibit 12: Agreement between CP and Baytex Energy Ltd. dated June 18, 1999.

Exhibit numbers 1 to 5, inclusive, were filed for the Operator. Exhibit numbers 6 to 12, inclusive, were filed for the Lessor.

WRITTEN SUBMISSIONS:

The Board received a submission from counsel for both parties in response to the Board's request dated October 17, 2007.

The Board received a written response from both counsel in response to the Board's request dated January 11, 2008.

POSITION OF THE OPERATOR:

On behalf of the Operator, Mr. Wood submitted that the Lessor does not fall under the provisions of Section 27 of the *Act* and therefore the Board has no jurisdiction to deal with the application for compensation. Through the evidence of Mr. Grossberndt, the Operator argued that the agreements between CP and the Operator were unique, that their terms were not assignable to the Lessor and the Lessor is therefore not a party to those Agreements. It is the Operator's further position that the Operator's operations are governed by the CP Agreements, that the CP Agreements are not surface leases as defined in the *Act* and the Lessor is therefore not a lessor as defined in the *Act*. Further, the CP Agreements do not provide for a rate of compensation as defined in the *Act* and therefore there is nothing for the Board to review.

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In response to the Board's request dated January 11, 2008, counsel for the Operator confirmed to the Board that the Operator's position is that the application for compensation relates to both CP Agreements.

POSITION OF THE LESSOR:

On behalf of the Lessor, Mr. Elander submitted that pursuant to the Assignment the Lessor became a party to the CP Agreements as they applied to the Land which was subdivided from the CP lands. He argued that the CP Agreements constitute a surface lease since they are an "other instrument" as provided under Section 1 (o) of the *Act*. Further, through the evidence of Mr. MacKenzie, the Lessor argued that the payments under the CP Agreements qualify as a rate of compensation. The Lessor also argued that the Operator's operating rights were granted by the Alberta Energy and Utilities Board which established provincial jurisdiction on the Land. Also, from a purely practical perspective, the Lessor's right to relief is properly served by the Surface Rights Board rather than at the Canadian Transportation Agency.

In response to the Board's request dated January 11, 2008, counsel for the Lessor confirmed to the Board that the application for compensation relates only to the 1977 CP Agreement.

FINDING OF FACTS:

1. The Operator is BP Canada Energy Resources Company.
2. The Operator obtained access to the Land through the 1977 CP Agreement.
3. The Operator constructed and operates two pipelines under the Land and a pump station on the Land.
4. The Lessor purchased the Land from CP in 2004.
5. The Assignment provided to the Lessor by CP restricted assignment of the 1977 CP Agreement by the Operator in conjunction with the sale of the Land but did not restrict assignment of the 1977 CP Agreement by CP.
6. The Lessor assumed all the rights of CP under the 1977 CP Agreement applicable to the Land, including the right to payment under clause 10 in the 1977 CP Agreement.

DECISION:

1. The Board will consider only the 1977 CP Agreement.
2. The assignment of the 1977 CP Agreement was valid.
3. The 1977 CP Agreement qualifies as a surface lease pursuant to the *Act*.
4. The Lessor qualifies as a lessor pursuant to Section 27 of the *Act*.
5. The Board has jurisdiction to hear the application for a review of the rate of compensation pursuant to s.27 of the *Act*.

REASONS FOR DECISION:

1. The application of the Lessor refers only to the 1977 CP Agreement and the Lessor has confirmed that only that agreement is intended to be considered by the Board. Because both CP Agreements were referred to and discussed throughout the hearing they will both be referenced in this decision but the final decision will only relate to the September 13, 1977 Agreement.

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2. The assignment from CP to the Lessor was valid.

The Operator argued that the 1977 CP Agreement was unique and the Operator would not have entered into such agreement with any other party than a railway company. Therefore the 1977 CP Agreement was not assignable to any other party except another railway.

Clause 12 in the 1977 CP Agreements provides:

“12. That the Applicant shall not assign, transfer or dispose of this agreement or of the rights and privileges conferred thereby, without the consent in writing, first obtained, of the Railway Company.”.

That clause is the only provision in the 1977 CP Agreement which addresses the issue of assignment, and it does not in any way prohibit or restrict any assignment by CP. Neither does the 1977 CP Agreement in any way indicate that the Agreement is unique to and restricted to railway companies. Nor do the CP Agreements contain any provision which requires CP to obtain the consent of the Operator in order for CP to make any such assignment. The effect of the Assignment is that the 1977 CP Agreement is still in effect between CP and the Operator with respect to the Operator’s pipelines under CP tracks, but the 1977 CP Agreement is also in effect between the Lessor and the Operator with respect to facilities under and on the Land. It is only through the Assignment of the 1977 Agreement that the Operator has a right to enter the Land and to operate the facilities under and on the Land.

The Board concludes that in contract law the Assignment was proper and valid and resulted in the legal assignment to the Lessor of rights and privileges relating to the Land.

The Board also considered the Assignment as it relates to an interest in land and reclamation obligations, and requested the parties to provide submissions to the Board on this issue subsequent to the hearing.

The 1977 CP Agreement provides for use of the Land and such use creates an interest in the Land. The principle of privity of estate provides that the covenants in the 1977 CP Agreement concerning the Land run with the Land and are binding and enforceable against the assignee of the interest in the Land.

Therefore, even if the Assignment was not valid in contract law and the covenants under the 1977 CP Agreement were not assigned to the acquirer of the Land, in accordance with the law of privity of estate the covenants relating to the Land are binding on the new owner of the Land.

The Board also considered the effect on the Operator’s interest in the Land of the *Environmental Protection and Enhancement Act*, RSA 2000, Chapter E-12 (“EPEA”). Pursuant to the provisions of that legislation the Operator is not relieved of its obligations respecting its use of the Land until a reclamation certificate has been issued. Therefore even if the assignment of the covenants under the 1977 CP Agreement is not valid, as argued by the Operator, the Operator’s use of the Land creates an interest in the Land which is subject to the provisions of EPEA.

The Board concludes that the Assignment is valid both in contract law and as an interest in land.

3. The 1977 CP Agreement qualifies as a “lease or other instrument” as contemplated by Section 1 (o) of the *Act*.

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Firstly, in order to determine whether the 1977 CP Agreement is a lease the Board considered whether the following elements are present:

- (a) a description of the leased land which is sufficient to identify the Land;
- (b) a grant of exclusive possession of the Land to the lessor;
- (c) a certain term; and
- (d) a rental payment.

After reviewing the evidence the Board has concluded that all those elements are present in the 1977 CP Agreement. Although the 1977 CP Agreement is entitled “Agreement For The Laying of Pipe Lines, Water Pipes, Sewers, Conduits, Etc., Under Railway Lands”, and is not described as a lease, the Board finds that it contains all the elements necessary for a lease. In any event, there is no doubt that the 1977 CP Agreement qualifies as “other instrument”, whether it is categorized as a license to enter or as an easements or as a right of way agreement.

Secondly, the Board must determine whether the 1977 CP Agreement is for any purpose for which a right of entry order may be granted. Pursuant to the 1977 CP Agreement the Operator was granted the right to:

construct, maintain and repair its pipeline and to enter on the lands at such times as may be necessary for the purpose of the construction, maintenance, inspection, removal and repair of the pipeline.

Section 12 (1) of the *Act* provides the purposes for which the Board may grant a right of entry order. The Board finds that those purposes for entry onto the CP land by the Operator constitute purposes for which a right of entry order would be granted by this Board.

Thirdly, the Board considered whether under the 1977 CP Agreement there is a requirement for payment. Clause 10 in the 1977 CP Agreements provides:

“10. That the Applicant shall pay to the Railway Company as compensation for the permission hereby granted the sum of TWENTY DOLLARS (\$20.00) per year, in advance, on the 1st day of October, in each year, during the continuance of this agreement, provided that on the termination of this agreement by either party hereto during any contract year, there shall be no prorata adjustment of such sum.”.

The Board finds that the compensation payable pursuant to the 1977 CP Agreement constitutes a rate of compensation as contemplated by the definition of surface lease in the *Act* and defined in Section 27 (1) (d) of the *Act*.

The Board finds that the 1977 CP Agreement qualifies as a “lease or other instrument” as contemplated by Section 1 (o) of the *Act*.

4. The Lessor qualifies as a lessor pursuant to Section 27 of the *Act*.

The 1977 CP Agreement, as a lease or other instrument is a surface lease. The Lessor became a party to the 1977 CP Agreement pursuant to the Assignment and under the provisions of the 1977 CP Agreement the Lessor is entitled to receive compensation on an annual basis. The Lessor is therefore a lessor as contemplated under Section 27 (1) (a) of the *Act*.

5. Having concluded that:

- (a) the assignment of the 1977 CP Agreement is valid;
- (b) the 1977 CP Agreement is a lease or other instrument pursuant to the *Act*;
- (c) the Lessor is a lessor pursuant to the *Act*;
- (d) the compensation payable pursuant to the 1977 CP Agreement constitutes compensation payable under a surface lease, the Board concludes that it has jurisdiction to hear the Lessor’s application to review the rate of compensation payable under the 1977 CP Agreement.

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COSTS:

Counsel for the parties shall provide the Board and each other with written submissions on costs in accordance with the following schedule:

1. the Lessor shall deliver its submission within 21 days of the date of this decision;
2. the Operator shall deliver its decision within 14 days of receipt of the Lessor's submission; and
3. the Lessor shall deliver its reply, if any, within 7 days of receiving the Operator's submission.

Dated at the City of Edmonton in the Province of Alberta this 24th day of January, 2008.

SURFACE RIGHTS BOARD

MEMBER