**File No. 2066**
**Board Order No. 2066-3**

**November 29, 2019**

**SURFACE RIGHTS BOARD**

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

AND IN THE MATTER OF

THE SOUTH EAST ¼ OF SECTION 31 TOWNSHIP 79 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Encana Corporation

(APPLICANT)

AND:

Olaf Anton Jorgensen

(RESPONDENT)

**BOARD ORDER**

Heard by written submissions closing October 29, 2019

## INTRODUCTION

[1] By way an Order 2066-2 dated May 31, 2019, the Board granted the Applicant, Encana Corporation (Encana) right of entry to the Lands owned by the Respondent, Olaf Jorgensen (the "Landowner"), for the purpose of constructing and operating a pipeline in four segments for which the Oil and Gas Commission (OGC) had issued a permit.

[2] The Board's jurisdiction over pipelines is limited to those pipelines that fall within the definition of "flow line" as defined in the *Petroleum and Natural Gas Act* (the "*PNGA* ") with reference to the *Oil and Gas Activities Act* (*OGAA*) 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.

[3] The Landowner disputed the Board's jurisdiction over the subject pipeline. On May 31, 2019 by way of Order 2066-1, the Board determined that it had jurisdiction and that the disputed segments were "flow lines" (the "Decision"). The Landowner now applies for reconsideration of this Decision and says two of the four segments are not within the Board's jurisdiction as "flow lines".

## BACKGROUND

[4] In the Decision, the Board outlined the following facts:

[5] The proposed pipeline has four segments. Segments 1 and 2 are uni-directional lines that will transport raw produced natural gas and liquids from 16-36-79-18W6M pad (the 16-36 Pad) to 05-32-79-17W6M (the 5-32 Pad). The Landowner did not

dispute that Segments 1 and 2 of the proposed pipeline are flow lines within the jurisdiction of the Board.

[6] Segment 3 is a bi-directional line to transport produced water from the 5-32 Pad to the 16-36 Pad for hydraulic fracturing. It will also carry produced water from the 16-36 Pad back to the 5-32 Pad. At the 5-32 Pad the water line will connect with existing water infrastructure to flow water to and from Encana's Water Resource Hub (the Water Hub).

[7] Segment 4 is a uni-directional fuel line to move processed purchased fuel gas across the Saturn field including to the 16-36 Pad. The fuel is used to power various instruments and equipment required to operate the 16-36 well site and associated pipelines, including emergency shut down valves and control valves.

[8] The Landowner had argued that the Board did not have jurisdiction with respect to Segments 3 and 4 on the basis that they are not "flow lines" within the meaning of the *PNGA*. As set out in its Decision, the Board disagreed.

## THE RECONSIDERATION APPLICATON

[9] The power to reconsider a decision is discretionary. The reconsideration process is not intended to provide parties with a forum to re-argue their appeals. Rule 17 of *Board's Rules of Practice and Procedure* describes certain situations where the Board may exercise its discretion to reconsider a decision.

[10] Rule 17 states that the Board may reconsider an order if:

a) "there has been a change in circumstances since the making of the Board's order" ;

b) if "evidence has become available that did not exist or could not have been discovered through the exercise of reasonable diligence at the time of the making of the Board's order", or

c) if "the Board made a jurisdictional error including a breach of the duty of procedural fairness, or patently unreasonable error of fact, law or exercise of discretion".

[11] The Landowner applies for reconsideration of the Decision on the basis the Board erred in law in misconstruing its jurisdiction and made findings of fact without evidentiary basis leading to a misapplication of the appropriate jurisdictional test. Encana argues the application should be dismissed as the Decision contains no error of law or of mixed fact and law.

## STANDARD OF REVIEW OF RECONSIDERATION

[12] The Landowner says the standard of review on a reconsideration review should be correctness while Encana says it should be reasonableness.

[13] Rule 17 provides that the standard of review on a review for errors of law or fact is whether the errors are "patently unreasonable". In *Venturion Oil Limited* (Board Order 1848-1855), the Board adopted an interpretation of "patently unreasonable" to mean whether the impugned decision made findings of fact without evidence or the decision is "openly, clearly and evidently unreasonable."

[14] The Landowner not only alleges the Board made findings of fact without evidence but misconstrued its jurisdiction by misinterpreting definitions in the *Act.* In a review for jurisdictional error, Rule 17 does not expressly indicate the standard of review.

[15] Section 148 of the *PNGA* provides that section 59 of the *Administrative Tribunals Act* applies to decisions of the Board. Section 59 provides that, in a "judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural

justice and procedural fairness." Section 59 clearly applies to judicial review proceedings, not reconsiderations by the Board and therefore, is not determinative of the standard of review required in this instance.

[16] Rather, reconsiderations are dealt with by section 155 of the *PNGA* that provides the Board with discretion to "reconsider an order of the board, and may confirm, vary or rescind the order". Subsection (2) provides that "(t)he board may make rules (a) specifying the circumstances in which subsection (1) applies; (b) respecting practice and procedure relating to the exercise of the authority of the board under subsection (1)".

[17] The Decision in question makes a determination based on the Board's interpretation of "flow line" in the Act, the Board's enabling legislation. The Courts have held that the standard of review for a tribunal's interpretation of its own statute, or statutes closely connected to its function and which it is familiar with, will be presumed to be a question of statutory interpretation subject to deference by the application of a reasonableness standard of review (see the seminal Supreme Court of Canada decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.) I note that the Court in *Dunsmuir* indicated that the correctness standard on judicial review would apply in "true questions of jurisdiction" which includes breaches of the duty of procedural fairness as indicated by Rule 17 and which has not been alleged here.

[18] This is consistent with the Board's discretionary authority in a reconsideration application under Rule 17 and section 155 of the *PNGA*. Rule 17 provides that the Board "may" reconsider in certain circumstances. Also, in a reconsideration application, the Board does not re-weigh the evidence, second guess the conclusions or findings drawn from the evidence or the application of the legislation by the panel and substitute different findings of fact or inferences from findings, or rely on evidence being insufficient. Therefore, in a reconsideration review for a

jurisdictional error, it makes sense to apply a reasonable standard of review rather than a correctness standard that may apply in a judicial review.

[19] The functional definition of the reasonableness standard is set out in *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that … certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] Therefore, I will review the Decision for patently unreasonable errors of fact or law or mixed fact/law or for unreasonable jurisdictional defects.

## PARTIES' SUBMISSIONS

### ***Landowner's Submissions***

[21] First, the Landowner argues that the Board's interpretation of "flow line" in *Murphy Oil Company Ltd. v. Shore*, Order 1745-1 that was applied in the Decision has not been the subject of proper review by an entity other than the Board. He submits that *Murphy* erred by ignoring the language of the relevant legislation, regulation and official glossaries and by using extrinsic evidence improperly to "overwhelm" the clear language of the statute in favour of achieving an "industry centric result" at the expense of the fee simple owner.

[22] He argues the line of cases that follow *Murphy* are internally inconsistent and lack principled reasons. For example, the emphasis in the decisions change from "what is in the pipe" to "how the substance is used at the wellhead" without an

underlying rationale; also, in some cases, byproducts from production are accepted to be upstream of processing but excluded in others because they do not form part of the gathering system while recycled water is permitted. As result, the test of whether a pipeline functions as part of a gathering system is applied inconsistently.

[23] The Landowner submits that the Board, in its statutory interpretation analysis, searched for legislative intent by placing almost exclusive weight on what he says is an ambiguous portion of Hansard which indicated that the definition of “flow line” was originally “too narrow”.

[24] He argues that *Murphy* misstates several legal principles and fails to fully appreciate or address resulting errors such as the owner of subsurface rights be able to disturb the surface without compensation, the finding that no interest in land is taken in a right of entry, the finding that expropriation has a greater impact to the rights of the owner and therefore to be avoided.

[25] Second, the Landowner submits that equipment at a well head is not included in the definition of “flow line” pursuant to *Drilling and Production Regulation*, BC Reg. 282/2010 , which regulation had not been addressed in the Decision and caselaw including *Murphy.* Therefore, regarding Segment 4 of the pipeline, the Landowner says it carries refined fuel from a processing plant (5-27 NCLH) to be used in the operation of <u>equipment</u> at the well head and carries product from a processing plant. As such, it is not a flow line.

[26] Regarding Segment 3, the Landowner says the conveyed substance is water used for oil and gas activities, transported to an end user, and produced water (a byproduct) transported to a water processing facility. As such, it is not a flow line.

[27] He submits that there is no basis to expand the definition of “flow line” to include fuel gas for the operation of well head equipment or to find water recycling/circulation systems different from byproducts.

[28] Finally, the Landowner submits that Segments 3 and 4 are not “necessary” for operation of the well head.

***Encana’s Submissions***

[29] Encana submits the Decision is reasonable as the Board provided cogent reasons and did not make any findings of fact (with respect to the necessity of Segments 3 and 4 or otherwise) that were not supported by the evidence before it. The Decision is neither openly, clearly or evidently unreasonable. In response, the Landowner argues the standard of review in considering questions of jurisdiction is correctness.

[30] Encana says the Board has articulated a three part analytical framework for assessing whether a given pipeline segment is a “flow line” which involves determination of i) whether the segment at issue satisfied the OGAA definition of “pipeline”, ii) whether the segment connects a well head to a scrubbing, processing or storage facility and iii) whether the segment precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line.

[31] Encana submits the Board’s approach in interpreting the statutory definition of “flow line” in *Murphy* and other decisions is consistent with the modern approach and principles of statutory interpretation. The Landowner responds that the Oil and Gas Commission Glossary gives meaning to the words under review and should not be disregarded in the statutory interpretation analysis.

[32] Encana argues that the Landowner's submission that the definition of well head in the *Drilling and Production Regulation* is baseless because this definition was only added to the regulation May 17, 2019, 14 days before the Decision. In any event, Encana says this definition does not change this analysis as the definition merely clarifies that flow lines do not form part of the well head. In response, the Landowner says the recent amendment of this Regulation makes reconsideration necessary and needs to be addressed.

[33] As for the use of extrinsic evidence, Encana submits that the use is admissible and form an integral part of the legislative context required by the modern approach to statutory interpretation. Here, the Board used extrinsic evidence to understand the actual intent of the legislature when it enacted the definition of flow line. Further the Board's interpretation avoids absurd results and facilitates efficient and effective rights of entry processes before the Board. The Landowner disagrees and says the Landowner's proposed result is not absurd.

[34] In response, the Landowner submits that if the legislature had meant for a flow line to mean any "pipeline connecting a well with a facility or another pipeline", it would have used that language but Encana and the Board has used language from legislative debate to override clear language in the legislation.

[35] Encana argues that the Board's decisions are not inconsistent as the Board applies the three part test but the outcomes are different as the facts are different.

[36] Regarding Segment 3, Encana says it connects the well heads (i.e. equipment installed above the uppermost portion of the surface casing) at the 16-36 Pad to the Water Resources Hub, which is a processing and storage facility, and it precedes the transfer of conveyed substances to or from a transmission, distribution or transportation line and conveys substances as part of the upstream gathering

system. Finally, Encana says the Landowner's submission that Segment 3's function can be replaced by trucking is incorrect.

[37] Regarding Segment 4, it is a pipeline through which natural gas is conveyed and connects wellheads at the 16-36 Pad with the Veresen Plant, at which gas processing takes place. Encana says this fuel gas line is integral to the project. It would be absurd to treat this segment differently than the other segments of the pipeline. Encana says that the natural gas conveyed by Segment 4 serves a number of important functions and this segment is also integral to the project's operations.

[38] In response, the Landowner says the necessity of the segments to the project does not determine jurisdiction and that a private owner's rights are being used for public purposes that is a *de facto* expropriation absent a proper statutory basis. Also, he cautions against Encana's failure to put forward sworn evidence and reliance on opinion evidence absent the use of experts and objects to Encana providing unsworn evidence and expert evidence from an advocate to support its submission that the pipes are necessary.

## BOARD'S RECONSIDERATION DECISION

[39] As indicated above, the Board has discretion to reconsider a decision in certain circumstances. In particular, the Board may reconsider if there is no evidence to support the findings or the decision is "openly, clearly, evidently unreasonable" in which instances the decision is "patently unreasonable" (see *Venturion, supra.*). The other circumstances a decision can be reconsidered is if the Board was unreasonable in determining the Board's jurisdiction in the matter.

[40] I find that the Board did not make findings of fact or mixed fact/law that were "patently unreasonable" or committed an unreasonable jurisdictional defect in the

Decision. In making these findings, I need not consider any additional evidence produced as part of the reconsideration submissions. The Board had some evidence and submissions before it in making its findings. The Board had provided the parties with the opportunity to produce submissions and evidence which they did. The Board relied on the written material to make its findings. It is generally not bound by the rules of evidence in making these findings.

[41] In terms of statutory interpretation in the Decision, the Board reviewed the definitions of "flow line" and "pipeline" in the OGAA and "wellhead" in the *Drilling and Production Regulation* BC Reg 282/2010 as it stood at the time of the Decision. The Board also reviewed the *Oil and Gas Activities Act Regulation* (BC Reg. 274/2010) that prescribes certain substances for the purposes of the definition of "pipeline", including "(a) water or steam used for geothermal activities or oil and gas activities…and (2) Piping used in a gas distribution main…"

[42] The fact that the definition of "wellhead" was amended after the Decision does not warrant a reconsideration as there is nothing to indicate that the amendment to the definition should be applied retroactively. Nor does the amendment change the analysis or test to be applied in applying the definition of "flow line".

[43] In the Decision, the Board reviewed previous cases that interpreted and applied the definition of "flow line. It applied the modern rule of statutory interpretation to interpret the words of the definition in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the legislation and the intention of the legislature. After reviewing the statutory interpretation process, it recognized that the analyses and considerations set out in *Shore* and *Ilnisky* have been adopted and applied in subsequent decisions of the Board.

[44] The Board also recognized the difficulty in applying the statutory language of the definition of “flow line” to either of Segment 3 or Segment 4 if the words of the definition and each of those segments is considered in isolation. The Board held that the words are to be considered in the context of the whole of the legislative scheme which it reviewed along with the relevant caselaw.

[45] Therefore, the Board held that previous decisions that concluded that pipelines that are located within the upstream or gathering part of the system, and that function as part of the gathering system are flow lines (*Ilnisky*; *ARC Resources Ltd. v. Hommy*, Order 1837-1, September 26, 2014) and that gathering system comprises the pipelines and other infrastructure that move raw gas from the well head to processing facilities (*Shore*), were all consistent with the words of the definition and the statutory scheme as a whole, and interpretive aids. The Board then applied these analyses and findings to the disputed segments at hand.

[46] There is nothing in the Board’s reasons to indicate that the Board used extrinsic evidence improperly to “overwhelm” the clear language of the statute in favour of achieving an “industry centric result” at the expense of the fee simple owner as submitted by the Landowner. This presumes “clear language” in the statute which I do not accept. If there was such clear language, there would be no need for the Board to interpret the definition in as many cases as has been required. Nor would there be need for the Board to outline a three part test in determining what is a “flow line” based on principles of statutory interpretation. The use of extrinsic evidence is admissible and part of the analysis of legislative context and intent required by the modern approach to statutory interpretation. In the Decision, the Board explained that its interpretation avoided absurd results as well as was consistent with the legislative scheme. In doing so, the Board reviewed the purpose of the proposed pipeline and the four different segments.

[47] As such, the Board's interpretation of the definition of "flow line" in the Decision was reasonable based on the modern approach to statutory interpretation and was consistent with the Board's previous jurisprudence that have considered the meaning of "flow line" (see *Encana Corporation v. Strasky*, Order 1911/13-1, October 20, 2016 (*Strasky 1*)). The finding that Segment 3 is a flow line is consistent with prior decisions that found water lines similar to Segment 3 are flow lines (see *Encana Corporation v. Ilnisky*, Order 1823-1, April 11, 2014 (*Ilnisky*); *Encana Corporation v. Jorgensen*, Order 1939-1, May 31, 2016 (*Jorgensen 2*); *Encana Corporation v. Strasky*, Order 1955-1, October 23, 2017 (*Strasky 2*); *Encana Corporation v. Derfler*, Order 1973-74-1, May 22, 2018 (*Derfler*). The finding that Segment 4 is a flow lines is consistent with prior decisions that found that similar fuel lines are flow lines (*Murphy Oil Company Ltd. v. Shore*, Order 1745-1, September 13, 2012 (*Shore*); *Ilnisky*; *Jorgensen 2*). These findings on Segments 3 and 4 is within a reasonable range of outcomes available to the Board. I do not see that the there is an inconsistency in the interpretation of the legislation in these decisions as outcomes in the application of the interpretation would necessarily be different as the facts of each case are different.

[48] Finally, I find that the Decision is not "openly, clearly evidently unreasonable". The Board considered and weighed all the evidence and submissions before it made its findings and conclusions. It had some evidence to support its findings in its Decision (evidence and submissions provided by the parties and the Oil and Gas Permit and in the application). As indicated above, the Board will not reconsider a decision on the basis of the insufficiency of the evidence nor will the Board re-weigh the evidence or second guess findings of fact (see *Venturion*).

**ORDER**

[49] I dismiss the application to reconsider.

DATED: November 29, 2019

For the Board

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Simmi K. Sandhu

Vice-Chair