

**File No. 1599
Board Order 1599-2**

July 23, 2008

MEDIATION AND ARBITRATION BOARD

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

**AND IN THE MATTER OF SE ¼ Section 12 TWP 77 Range 15 W6M
(The "Lands")**

BETWEEN:

Encana Corporation

("APPLICANT(S)")

AND:

Irene and George Merrick

("RESPONDENT(S)")

BOARD ORDER

INTRODUCTION

[1] Encana Corporation (Encana) applied to the Board for mediation and arbitration pursuant to section 16(1) of the *Petroleum and Natural Gas Act (PNG Act)* on the grounds that they required access to land owned by George and Irene Merrick for the purpose of constructing a flowline. Encana and Mr. and Mrs. Merrick had been unable to negotiate the compensation payable for the right of entry.

[2] On February 19, 2008, the Board made an Order granting right of entry to the Lands by Consent, and requiring Encana to pay a security deposit and partial payment to the Merricks. The matter of compensation was scheduled for mediation.

[3] The parties agreed that they wanted to take the time during the mediation process to research the question of the compensation payable for a right of way, and to properly turn their minds to the factors that should go into a determination of the amount payable. The parties agreed that in the event they were able to successfully negotiate compensation, the Board could document their agreement in a consent order, including the rationale for the agreement, in the hope that the agreement may provide assistance to other companies and landowners negotiating compensation for right of entry to construct a flowline.

[4] The parties met three times in mediation. Additionally, they each spent time researching the issues with respect to compensation for rights of ways and reviewing past decisions of both the Mediation and Arbitration Board and the Alberta Surface Rights Board. The parties have settled the issues of compensation between them and have asked the Board to record the terms of their settlement in a Consent Order.

FACTS

[5] Mr. and Mrs. Merrick own the Lands, a quarter section located approximately 13 kms south of Dawson Creek within the Agricultural Land Reserve. They reside on the Lands and use the acreage for pasture for horses and to grow hay. The taking for the construction of the flowline comprises 4.579 acres. The right of way extends east-west straight across the quarter section close to the northern lot line, within visual and hearing distance from the residence.

[6] Initial negotiations and meetings between the Merricks and Encana and/or their agents, and ongoing contact between Encana and/or their agents, and the Merricks during the construction and installation of the pipeline, consumed approximately 25 hours.

[7] Encana obtained an appraisal of the Merrick's property by a professional appraiser. The appraised market value of the property as of March 4, 2008 is \$860 to \$900/acre.

ISSUES

[8] Section 21 of the *PNG Act* provides that in determining an amount to be paid under section 16(1) the Board may consider:

- a) the compulsory aspect of the entry, occupation or use
- b) the value of the land and the owner's loss of a right or profit with respect to the land,
- c) temporary and permanent damage from the entry, occupation and use,
- d) compensation for severance,
- e) compensation for nuisance and disturbance from the entry, occupation or use,
- f) money previously paid to an owner for entry, occupation or use,
- g) other factors the board considers applicable, and
- h) other factors or criteria established by regulation.

[9] The parties agreed to the amount payable for crop loss as a result of the entry so an amount for crop loss or loss of profit in relation to the entry was not an issue in the mediation. They also agreed that severance was not a factor in this taking.

[10] In determining the amount to be paid to the Merricks, the parties could not agree on how to account for the compulsory aspect of the taking, the value of the land and the owner's loss of rights with respect to the land, and compensation for nuisance and disturbance. The discussions in mediation focussed on these factors and treated these factors as "heads of compensation".

DETERMINATION OF AMOUNT OWING

[11] The parties agreed to compensation in the amount of \$7,960.00. What follows is an explanation of how this amount was determined including the parties' agreement of the rational behind that determination.

[12] The parties agreed that an amount should be paid for the compulsory aspect of the taking. This amount is acknowledged to be an arbitrary figure that is intended to recognize that the landowner can not say "no" when the holder of subsurface rights requires access to the surface for the purpose of exploring for, developing or producing a subsurface resource. The payment for compulsory aspect of the taking represents an amount that simply acknowledges that surface

access itself is not negotiable, only the compensation for it, and that the landowner does not necessarily enter negotiations willingly. The parties noted that an amount for compulsory aspect of the taking is established by Regulation in the Province of Alberta, but that while the compulsory aspect of the taking is specifically enumerated as a factor to be considered in British Columbia, no specific amount is prescribed. In the absence of a prescribed amount in British Columbia, the parties agreed that the amount of \$500/acre prescribed in Alberta was fair. In the context of this case a payment for compulsory aspect of the taking is $4.579 \text{ acres} \times \$500 = \$2,289.00$

[13] The parties agreed that compensation for nuisance and disturbance is primarily accomplished by compensating the landowner for the landowner's time and inconvenience in dealing with the company in the initial negotiations and through the phase of construction and installation of the flowline. Additionally, in circumstances where landowners experience nuisance and inconvenience from the traffic and noise associated with the pipeline construction, an additional amount for this added nuisance may be appropriate.

[14] With respect to the nuisance and disturbance associated with the landowners' time, the landowners have been affected by the project in having to spend their own time that otherwise could have been spent on other activities of their choice. Mrs. Merrick kept track of her activities associated with the company's entry, occupation and use of the lands and estimated the time taken by her in these activities to be, approximately 25 hours from the Fall of 2007 through the Spring of 2008. The activities that are compensated for as part of nuisance and disturbance include meetings and telephone calls with Encana's agent to discuss the pipeline and negotiate compensation and on site discussions and telephone calls with employees and contractors of Encana about the work in progress. The parties agreed that an appropriate rate to be applied to the landowner's time as compensation for nuisance and disturbance to the landowner as a result of the entry, occupation and use by the company of their land is \$50/hour.

[15] With respect to the nuisance and disturbance associated with traffic and noise, the landowners experienced inconvenience as a result of traffic and noise but acknowledge the inconvenience was minimal due to the distance of the project from their residence. The parties agreed that increasing the time estimate by 6 hours adequately acknowledges the additional nuisance of traffic and noise. In the context of this case, compensation to the landowner for nuisance and disturbance, which includes compensation for time spent and traffic and noise, is $31 \text{ hours} \times \$50/\text{hour} = \$1,550$.

[16] The balance of the compensation, \$4,121.00, considers the value of the land, the loss of rights with respect to the land and any future nuisance and disturbance as a result of the entry occupation and use. The parties considered that there is both a loss of rights and residual rights to the landowner. They

considered that a right of way does not have the same impact on an owner as a wellsite in that once the surface of the right of way is restored, the owner may continue to use the surface for farming, in this case pasture and hay. They considered that although the landowners may continue to use the surface of the land for farm purposes, there is, nevertheless, some loss of right with respect to the use of that land. In particular, certain activities that may interfere with the pipeline or cause the pipeline to be unsafe including excavating within the right of way and building on the right of way are restricted. Consequently, while the owner's present use of the surface may continue, an alternate future use of the surface may be impaired. The parties considered that once the pipeline has been properly abandoned, the encumbrance on title can be removed.

[17] With respect to future nuisance and disturbance, the parties considered that there may be some ongoing, although probably minimal, nuisance and disturbance to the landowner over the life of the pipeline in dealing with the company including advising the company of any problems or concerns should they arise.

[18] Considering both the loss of rights and the residual rights to the landowner, and considering the potential future nuisance and disturbance to the landowner throughout the life of the pipeline, the parties agreed that adequate compensation equated to 100% of the appraised value of the land, applying the appraised value per acre of the quarter section to the amount of land covered by the right of way. In the context of this case, that payment is 4.579 acres x \$900/acre = \$4,121.00.

[19] The amount to be paid to the landowners as compensation for the right of way is:

For the compulsory aspect of the taking: 4.579 acres x \$500/acre	\$2,289
Considering the value of the land, the loss of rights and future nuisance and disturbance: 4.579 acres x \$900	\$4,121
For nuisance and disturbance in the construction and installation of the pipeline: 31 hours x \$50/hour	<u>\$1,550</u>
Total compensation for the right of way	\$7,960
Less partial payment	<u>\$4,000</u>
Amount owing:	\$3,960

COSTS

[20] Encana agreed to the payment of costs in the amount of \$6,000. This amount acknowledges that Mrs. Merrick spent approximately 100 hours in research and preparation for the three mediation sessions. Encana encouraged Mrs. Merrick to spend the time to properly research the issues and agreed up front that she would be compensated for her time. As both parties entered this process in the hope that they might come to an agreement that would provide some assistance to future parties, both parties felt it worth their time, and Encana was prepared to make the investment in Mrs. Merrick's time in the hope that an agreement might provide guidance to the community.

ORDER

[21] BY CONSENT, the Mediation and Arbitration Board orders that Encana Corporation shall pay to Irene and George Merrick the sum of \$9,960 being \$3,960 as the balance owing for the right of way and \$6,000 for costs. Upon payment of this amount, Encana may apply for return of the security deposit held by the Board in this matter, and the security deposit shall be returned.

Dated: July 23, 2008

FOR THE BOARD



Cheryl Vickers
Chair