Mediation and Arbitration Board
 # 114, 10142 - 101 Avenue
Fort St. John, BC V1J 2B3

FILE NO. M 1549

Date: February 24, 2006 **Board Order No. 400**

BEFORE THE ARBITRATOR:	IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C. 1996, c. 361 as amended; THE MINERAL TENURE ACT, R.S.B.C. 1996 c. 292 as amended; AND THE MINING RIGHT OF WAY ACT, R.S.B.C. 1996, c. 294 as amended **(THE ACTS)**
	AND IN THE MATTER OF SW ¼, Sec 13, TWP 23, W6M PIN 014 478 3581 (**THE LANDS)**
BETWEEN:	ENCANA CORPORATION. **(APPLICANT**)
AND:	DENNIS MACLENNAN **(RESPONDENT)**

Background

On August 15, 2005, the Applicant, Encana Corporation ("Encana" or the "Applicant"), made an application to the Mediation and Arbitration Board (the "Board") under Section 16(1) of the Petroleum and Natural Gas Act for a right-of-way related to the construction of a pipeline across the Lands, owned by Mr. Dennis MacLennan, to its well-site located on the Lands.

On July 21, 1997, a predecessor to Encana obtained an order from the Board for a right-of-entry for the purpose of developing a well-site and access road on the Lands (*ACE*

West Ltd. v. McLennan, MAB Order No. 283A, amended by Order No. 283-1A). The order provided for compensation to Mr. MacLennan in the amount of $6,800.00 for the first year and $3,000.00 per year thereafter. The order further stated:

> "3. Upon payment of the sums awarded under Numbers 1 and 2 of this Order, ACE West Ltd. shall be entitled to all rights of an operator, to enter, occupy or use land granted under the provisions of the Petroleum and Natural Gas Act …, upon the lands referred to on the Individual Ownership Plan attached to the Application."

By agreement, the parties subsequently increased the payments to Mr. MacLennan.

Encana decided to move the well-site into production. Hence this application related to the construction of a pipeline to the well. The pipeline is (or is to be) connected to other wells in the area. Initially, the Applicant's proposal called for construction of the pipeline in an area immediately adjacent to the access way to the Applicant's well site. In the application before me the construction and location of the pipeline is within the access road, i.e. within the existing right-of-entry granted by Board Order No. 283A (Attached to the Decision is a copy of Schedule "A", showing the proposed pipeline). The access road leading to the well-site is approximately 150 meters long and 10 meters wide, and the area affected of the proposed pipeline right-of-way is 0.15 ha or 0.37 ac. To accommodate the landowner, the Applicant also proposed to construct the pipeline via boring as opposed to excavation.

The Board convened a mediation session on November 21, 2005, but the parties failed to reach an agreement with respect to the issues between them. In the result, on November 21, 2005, the Mediation and Arbitration Board issued an order. A term of the order was:

> This matter shall proceed to arbitration for final resolution of all issues pursuant to Section 20(1) of the *Petroleum and Natural Gas Act*,.

On January 30, 2006, as scheduled in the pre-hearing conference, the Board convened the arbitration hearing at Fort St. John, British Columbia. The Applicant was represented by Mr. Chad Moffat, Mr.Christopher M.akker and Mr. Tom Hourahine. Mr. Bakker and Mr. Hourahine did not attend until approximately 12:00 noon due to a delay in Calgary airport, but Mr. Moffat stated that he had authority to represent the Applicant and that he was prepared to proceed. The Respondent, Mr. Dennis MacLennan represented himself.

Preliminary Issues

Under the terms of the pre-hearing order, the Applicant was required to provide a copy of its submission, setting out the issues for resolution together with the documents it would be relying on by January 18, 2006, to the Board and the Respondent. The submission and the documents were required to be provided in a binder, tabbed and paginated.

By letter to the Board, dated Sunday January 29, 2006, and the hearing Mr. MacLennan sought to exclude the submission and documents filed by the Applicant. Mr. MacLennan asserted that he did not receive the Applicant's binder until January 19, 2006. He said that the envelope had been "broken" and it had not been forwarded by certified mail, and, therefore, the Applicant could not prove that he had received the binder within the time ordered by the Board. He also complained that the binder was broken and materials may have been missing. He did not, however, bring the binder to the hearing. He said he had left it with lawyer. He asserted that the Applicant could not rely on the submission and document. In any event, he "did not accept" the Applicant's submissions and documents.

At the hearing, Mr. MacLennan also complained that he did not receive the Board's Order, dated January 5, 2006, until January 14 and, therefore, that he did not have time to prepare a submission and documents to meet the timeline set out in the Order. He stated, somewhat cryptically, that it had been delivered to his mother by a woman and that his mother had been greatly upset by the delivery.

Mr. Moffat candidly explained he was not in a position to take issue with much of Mr. MacLennan's factual allegations. He said that as far as he was aware the Applicant's binder had been "shipped" no later than January 16, 2006 and to the address provided by the Board.

The Board's process is designed to provide a timely and efficient mechanism for resolving disputes between surface rights holders and sub-surface rights holders based on fundamental principles of natural justice. I considered Mr. MacLennan's submissions and rejected his application. Mr. MacLennan admits that he did, in fact, receive the Applicant's binder on January 19, 2006. While it was not clear when it had been delivered to Mr. MacLennan's address on file with the Board, there was no doubt, even on his submissions, that he, in fact, had received the materials. He did not explain when it was delivered to the address. He said it was up the Applicant to prove, because it had to "dot the i's and cross the t's." Assuming for the moment that Mr. MacLennan did not, in fact, receive the Applicant's binder until January 19, 2006, in all of the circumstances of this case, I am of the view that it would not be proper to exclude the Applicant's submissions and documents. If in fact there was a delay, as stated, the delay is a minor one. There is no suggestion that the Respondent has suffered any prejudice from the delay. I am also concerned that Mr. Maclennan chose to bring up this issue in a letter to the Board dated and faxed to the Board January 29, 2006, a Sunday, when the Board's offices are closed, and at the commencement of the hearing, rather than at the first opportunity. Mr. MacLennan did not provide any explanation for this.

Mr. MacLennan also asserted that the binder was not complete. He did not provide any meaningful particulars of this assertion. He did not bring the binder to the hearing. Rather, he had left it with his counsel. If, as stated, the binder was incomplete, it would have made sense to bring it to the hearing. On balance, I do not accept Mr. MacLennan's assertions.

I have similar concerns with respect to Mr. MacLennan's assertion that he did not receive the Board's January 5 Order until January 14, 2006. He claimed that he did not have sufficient time to prepare his case for the arbitration. Again, this matter was not raised with the Board at the first opportunity. There was, again, no explanation for this. Moreover, the assertion was cast in some doubt because he did , in fact, file a submission with the Board dated January 24, 2006. In that submission he argued that the Applicant's application amounted to an expropriation and that he should be compensated. The amount he had in mind was in excess of $20,000,000. Despite the fact that this submission was provided to the Board after the deadline set out in the Board's January 5 Order, I, nevertheless, allowed Mr. MacLennan to enter this document.

After I ruled against Mr. MacLennan, he left the hearing. Before he left he provided a brief statement, dated January 29, 2006, to the Board and the Applicant. In the letter, he stated that he was prepared to resolve the matter for $50,000 before 11:00 AM, and $100,000 after 11 AM on January 30, 2006, the day of the hearing.

Issue(s)

The application raises two issues. The first is whether the proposed pipeline is included in the previous order of the Board such that no further decision or agreement is required for the applicant to proceed and construct the pipeline to the well site. The second is, if I rule against the Applicants on the first issue, the appropriate level of compensation under Section 21 of the *Petroleum and Natural Gas Act.*

Decision

The Applicant's first argument is that the pipeline proposed to be constructed is included in the Board's previous order and, in other words, it can proceed with the construction without Mr. MacLennan's agreement and without paying compensation. Encana says that it has the surface rights, the right-of-entry, to the access road and, as well, by virtue of its sub-surface rights, and the Petroleum and Natural Gas Lease under the entire area in question. The pipeline will be constructed entirely within the area of the access road and will be bored. In the result, there will be no impact on the surface at all.

Turning to Encana's first argument, I am not, in the circumstances, satisfied that Encana has met the burden to persuade me that this is a proper disposition of the application. While this may be an interesting legal issue, the first leg of that argument is, in my view, whether I have jurisdiction to deal with the substance of the Applicant's sub-surface rights. The Applicant did not argue this point in any detail (or at all) and, in fact, seemed to assume that I did. It is not for me as an independent decision maker to research and find jurisprudent in support of one position or another. That would be entirely incompatible with the Board's neutrality as between the parties. The Applicant did not provide me with any authorities or precedent in support other than the earlier decision of this Board between the parties (or their predecessors, *ACE West Ltd. v. McLennan*), quoted out above, to the effect that it has "all rights of an operator, [sic.] to enter, occupy or use land granted under the provisions of the *Petroleum and Natural Gas Act*." The

core jurisdiction of the Board is terms of access and compensation. In so far as the previous decision of the Board may be taken to stand for the proposition that the Board has the jurisdiction to determine sub-surface rights -- and on a fair reading of the decision as a whole I do not think that it does -- I respectfully disagree. In my view, the first leg of this argument was not, I think, well-thought out and I reject it.

The second (and, in my view, independent) leg of the argument is whether the access to well site through a pipeline is covered by the previous Board order to the effect that it has "all rights of an operator, to enter, occupy or use land granted under the provisions of the *Petroleum and Natural Gas Act*." The term "operator" is not defined in the relevant legislation. The previous order dealt with the right-of-way to the well-site and the access road. This application concerns the access road. The Applicant says that there will be no interference with the surface and the pipeline will run underneath the existing access road at a depth of between 1.5 and 2.1 meters. At first glance, this is an attractive proposition. All the same, my reading of the previous order is that the Applicant was granted right of entry, occupation and use of an access road. The construction of a pipeline will, in my view, inevitably and invariably interfere with the landowner's enjoyment and use of the land. In other words, the earlier Board order was granted for a certain purpose, namely access to and from a well-site. The construction of a pipeline, a permanent facility, although it promises little interference with the surface is something entirely different. In short, I am unable to agree with Encana's argument.

Turning now to the issue of compensation and the factors set out in the legislation, I am at a disadvantage in this case. The land owner, Mr. Maclennan basically refused to participate in the hearing. As I hopefully clearly and unequivocally explained to the parties, the decision will be based on the evidence before me. In this case, regretfully, the land owner did not present any evidence. Encana did. I am bound to consider the evidence before me.

The factors I must consider are those provided in the legislation, more precisely Section 21 of the *Act*:

> 21 (1) In determining an amount to be paid periodically or otherwise on an application made under section 12 or 16 (1), the board may consider
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> (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) the value of the land and the owner's loss of a right or profit with respect to the land,
> (d) temporary and permanent damage from the entry, occupation or use,
> (e) compensation for severance,
> (f) compensation for nuisance and disturbance from the entry, occupation or use,
> (g) money previously paid to an owner for entry, occupation or use,

(h) other factors the board considers applicable, and
(i) other factors or criteria established by regulation.

As mentioned, the only evidence before me was presented by the Applicant. The pipeline is to be constructed via boring to the well-site. The production schedule is some 17 days with little or no interference with the surface of the land, within the existing access road. The area affected by the construction of the pipeline is .37 acres. Mr. Bakker testified that the standard compensation in the Peace River region for a pipeline right of way is $950 per acre, including the value of the land, nuisance and disturbance and an entry fee. Added to that can be compensation for temporary work area and interference with other areas. The latter bases for compensation are not relevant here because the drilling for the pipeline will be carried out from outside the Lands, eliminating the need for temporary work areas.

Having considered all of the factors, I make the following orders:

Upon payment by the Applicant to the Respondent of $400.00, the Applicant shall have right to enter, use and occupy the portion of the Lands described on Appendix "A" as the access road for the purpose of constructing a pipeline to the Applicant's well site.

MEDIATION AND ARBITRATION BOARD
UNDER THE MINING RIGHT OF WAY ACT

DATED THIS 24TH DAY OF February, 2006

IB S. PETERSEN, CHAIR