

File No. 1697
Board Order # 1697-4

February 22, 2012

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

PARCEL A (P2913) OF SECTION 1 TOWNSHIP 77 RANGE 15
WEST OF THE 6TH MERIDIEN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

George Merrick and Irene Merrick

(APPLICANTS)

AND:

Encana Corporation

(RESPONDENT)

BOARD ORDER

Heard by written submissions closing February 7, 2012	
Appearances:	Leslie J. Mackoff, Barrister and Solicitor, for the Applicants
	Thomas R. Owen, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] This is the Merrick's application for production of documents from Encana Corporation (Encana) in advance of an arbitration to review the annual rent payable for Encana's occupation and use of Lands owned by the Merricks for the operation of a well site.

[2] The Merricks seek:

- a) A complete list of all chemicals that are commonly used in the construction and operation of a well;
- b) A complete list of all chemicals Encana uses to frack;
- c) All epidemiological studies conducted by Encana with respect to the health effects of gas wells;
- d) All studies and the data on which they rely with respect to the health implications of the chemicals it uses, which Encana possesses;
- e) Data concerning the amount of chemicals used;
- f) Data concerning recovery of chemicals;
- g) The method of accounting for chemicals not recovered;
- h) All documents pertaining to studies undertaken with respect to contamination issues, including of soil, air, and water;
- i) Data regarding all spills or blowouts at all well sites operated by Encana;
- j) Whether the spills have been reported to the appropriate authorities;
- k) Data regarding contamination of soil, air, and water around a well site after a spill or blowout; and
- l) Encana's plan/protocol in the event of a spill or blowout.

[3] The Merricks submit the requested documents are relevant to the determination of annual rent, inclusive of damages, payable by Encana arising from their use and occupation of the Merrick's Lands for the operation of a well site. The Merricks submit the documents are necessary to knowing the effect of Encana's operations on the air, soil and water surrounding the well, and assessing the compensation payable to the them.

[4] Encana submits the requested documents are not relevant to a review of the annual rent payable for Encana's use and occupation of the Lands, and that the application should be dismissed.

[5] The legislative authority for the Board to order the production of documents to a party is found in section 34(3)(b) of the *Administrative Tribunals Act* as follows:

34(3) ...at any time before or during a hearing, but before a decision, the tribunal may make an order requiring a person

...
(b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

[6] Rule 12(5)(e) of the Board's Rules of Practice and Procedure similarly authorizes an arbitrator or panel chair presiding at a pre-arbitration conference to require a party to produce to another party any documents or other information which may be material and relevant to an issue in an application.

ISSUE

[7] The issue is whether the all or any of the documents and information requested by the Merricks may be relevant to an issue in the arbitration of the Merrick's application for rent review, and whether they should, therefore, be produced by Encana.

FACTS

[8] On or about July 19, 1997, the parties signed a surface lease providing that Encana pay the Merricks annual rent of \$4,200 for a well site and pipeline built on the Merrick's property.

[9] On September 23, 2006, the parties signed an amendment to the surface lease increasing annual rent to \$6,000.

[10] On or about October 19, 2010, the Merricks applied to the Surface Rights Board for mediation and arbitration services with respect to rent review pursuant to section 166 of the *Petroleum and Natural Gas Act*.

[11] On June 21, 2011, the Board ordered that any newly ordered or negotiated rental provision is retroactive to July 19, 2010.

[12] The parties have been unable to agree on a new rental provision and the matter has been scheduled for arbitration.

ANALYSIS

[13] The Merricks argue that oil and gas operations are "inherently dangerous" and that the petroleum products themselves and chemicals used in their extraction pose risks to human health and to the environment. They argue that the risk of harm to them and their Lands should be reflected in the annual rent, and that the requested information is

necessary to understand the nature of Encana's activities and their potential consequences.

[14] Encana argues that the Board does not have jurisdiction to award compensation for risk, and that a threat or possibility of injury or harm is not compensable.

[15] Section 143(2) of the *Petroleum and Natural Gas Act* provides that a person who holds a right of entry authorized by a surface lease with the landowner or an order of the Board is liable to pay compensation to the landowner for loss or damage caused by the right of entry, and other than where the right of entry relates to a flow line, to pay rent to the landowner for the duration of the right of entry. Encana's liability to compensate the Merricks for the right of entry granted by the surface lease, and the Board's jurisdiction to order compensation, extends to damage or loss caused by the right of entry. To the extent Encana's use and occupation of the Merrick's Lands to operate the well site causes damage to the Lands or loss to the Merricks, Encana is liable to compensate the Merricks for that loss. In the absence of damage or loss, however, there is no liability for compensation.

[16] The Merricks are concerned for their personal safety, health and well-being, and for the safety and wellbeing of their livestock. Their concerns are amplified by Encana's reluctance to divulge information with respect to the use of chemicals and their potential effect on health and the environment. Encana, in turn, submits that oil and gas activity is regulated and their well site has been permitted by the Oil and Gas Commission and must comply with strict regulatory requirements. The Oil and Gas Commission has recently taken steps to require oil and gas companies to disclose chemicals used in hydraulic fracturing (fracking) in response to the announced governmental commitment to "the development of a more open and transparent natural gas sector". As the requirement to disclose the chemicals used in fracking only became effective as of January 1, 2012, it does not address the Merrick's concern to understand the nature of Encana's activities on their Lands prior to that date.

[17] While I can understand the Merrick's concern to know the nature of Encana's activity on their Lands, and agree that initiatives to encourage transparency are in the public interest and may assist with responsible and accountable development of the oil and gas sector, knowing what chemicals Encana has used in fracking this or other wells is not relevant to determining the compensation payable for Encana's use and occupation of these Lands for the construction and operation of this well site in the absence of a specific claim for damage or loss caused by chemical use.

[18] The law of compensation for surface access is clear. The amount is linked to the damage or loss sustained by the landholder. If the Board orders an amount that exceeds the loss sustained, it is no longer providing compensation and exceeds its jurisdiction (*Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458.) To the extent the Merricks actually incur injury or harm as a result of Encana's use and occupation of their Lands, or to the extent their livestock is injured or harmed resulting in loss to the Merricks, they are entitled to be compensated for

those injuries or losses. But concern for safety and health in the absence of actual or reasonably probable loss or damage, is not compensable.

[19] The Merricks argue that rental payments should address the immediate and ongoing impact of Encana's operation to them and the Lands. That is indeed the purpose of an annual payment (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). To be compensable, however, the immediate and ongoing impact must result in actual or reasonably probable loss or damage and not just a fear or concern that loss or damage may occur.

[20] To the extent, therefore, that any of the requested documents or information relates to damage to the Lands or loss to the Merricks as a result of this right of entry, they are relevant to an application for review of the annual rent payable under the surface lease. To the extent the documents or information requested relates to potential rather than actual damage, or does not relate specifically to damage to the Lands or loss to the Merricks, it is not relevant to the review of annual rent payable under the surface lease.

[21] Much of what the Merricks seek is not related specifically to Encana's activities on their Lands or the effect of the well site on their Lands. But to the extent that Encana has information or documentation that may be relevant to determining the effect, if any, on the Merricks or the Lands from the operation of the well site, and the reasonably probable damage that may flow from those effects, that information is relevant to the rent review and should be produced.

ORDER

[22] The Board orders Encana Corporation to produce to George and Irene Merrick within three weeks of the date of this Order the following information or documents in its possession and control:

- a) any information or documents relating to testing for contamination of soil, air or water arising from Encana's use and occupation of the Merrick's Lands for the construction and operation of the well site for which entry is authorized under the surface lease that is the subject of this application;
- b) any information or documentation relating to a spill or blowout at the well site for which entry is authorized under the surface lease that is the subject of this application and any contamination of soil, air or water around this well site after a spill or blowout.

DATED: February 22, 2012

FOR THE BOARD



Cheryl Vickers, Chair