

File No. 1745
Board Order No. 1745-1

September 13, 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
THE NORTH WEST $\frac{1}{4}$ OF SECTION 12 TOWNSHIP 78 RANGE 18 WEST OF
THE 6TH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PARCEL A (F8005)
BLOCK A OF THE SOUTH WEST $\frac{1}{4}$ OF SECTION 12 TOWNSHIP 78 RANGE
18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

MURPHY OIL COMPANY LTD.

(Applicant)

AND:

WILLIS MORLEY SHORE
AND MITCHELL TODD SHORE

(Respondents)

BOARD ORDER

Heard: by way of written submissions and by telephone conference
conducted August 16, 2012
Panel: Cheryl Vickers
Appearances: Rick Williams, Barrister and Solicitor, for the Applicant
Darryl Carter, Barrister and Solicitor, for the Respondents

INTRODUCTION

[1] Murphy Oil Company Limited (Murphy) has applied to the Board under section 158 of the *Petroleum and Natural Gas Act (PNGA)* for mediation and arbitration respecting compensation and terms of access to the Lands owned by Willis Morley Shore and Mitchell Todd Shore (the Shores). Murphy seeks a right of entry order allowing it to enter on and use the Lands to carry out an oil and gas activity, specifically the construction, operation and maintenance of a flow line and all necessary associated activities.

[2] The Surface Rights Board may authorize entry to and use of private land for an oil and gas activity including the construction or operation of a flow line. A flow line is a type of pipeline defined in 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 Board does not have jurisdiction to authorize entry to and use of private land for the construction and operation of a pipeline that is not a flow line, or otherwise to provide mediation and arbitration services respecting compensation payable in relation to the entry to and use of private land for a pipeline other than a flow line. If a company with a permit from the Oil and Gas Commission (OGC) is unable to enter an agreement with a landowner for access to private land to construct or operate a pipeline that is not a flow line, the permit holder may expropriate, pursuant to section 34 of the *OGAA*, as much of the land or interest in it as may be necessary up to 18 meters in breadth, or wider if authorized by the OGC.

[4] The OGC issued a Pipeline Permit (the Permit) authorizing Murphy to construct and operate a pipeline for the purpose of conveying petroleum natural gas or water, in accordance with specific diagrams and construction plans. The authorized pipeline is to be constructed on the Lands owned by the Shores.

[5] The Permit authorizes the construction and operation of a pipeline as described in a construction plan, identifying three segments:

Segment 001 From DLS: 03-13-078-18 To DLS: 16-01-078-18

Segment 002 From DLS: 03-13-078-18 To DLS: 16-01-078-18

Segment 003 From DLS: 16-01-078-18 To DLS: 03-13-078-18

(collectively referred to in this decision as the Pipeline)

[6] The Shores dispute that the Pipeline, or any of its segments, are “flow lines” and that the Board has jurisdiction to issue an entry order or provide mediation and arbitration services in this case.

ISSUE

[7] The issue is whether the Board has jurisdiction. That determination turns on whether the Pipeline, or any of its segments, is a “flow line”.

THE PIPELINE

[8] I received evidence as to the nature of the Pipeline in an Affidavit sworn by Ryan Dick, P. Eng, an employee of Murphy, and in verbal testimony from Mr. Dick when cross-examined on his Affidavit by way of telephone conference.

[9] The well site at 03-13-078-18 (03-13), just north of the Lands, has two wells that have been drilled but are not yet in production. The wells will produce natural gas and water. The water must be separated from the gas at the well site before metering. Liquids must also be removed from the gas by “knock out drums” prior to flaring. The equipment that separates the gas and water before metering and before flaring is located at the 03-13 well site.

[10] All three segments of the Pipeline are authorized by the OGC as a pipeline with a single job number and project number. Segment 001 will be an 8 inch steel pipe to transport natural gas produced by the wells at 03-13 to a tie in point at the well site located at 16-01-078-18 (16-01), just south of the Lands. Segment 002 will be a 3 inch steel pipe to transport liquids from 03-13 to the tie in at 16-01. From 16-01, the natural gas and water will be transported in already constructed pipelines to the Tupper West Plant (the Plant) for scrubbing, processing and storage. Segments 001 and 002 are licensed to transport up to 0.1% H₂S content. From the Plant, water will either be transported to a third party disposal facility or to a water disposal well. Acid gas will be removed from the natural gas and transported to a disposal well to the southeast of the Plant. The processed gas will go into a Murphy sales line and then into Alberta on a TransCanada transmission and distribution line.

[11] Segment 003 will be a 3 inch steel pipe to transport sweet fuel gas, produced at the Plant, from 16-01 to 03-13 to be used for operating onsite equipment including the line heater, the emergency shut down valves, control valves and other instruments at the well site, as well as the site alarm system and remote transmitting unit. Without this equipment, the wells and Pipeline cannot be operated. The equipment requires a power source to operate. If not powered from fuel gas, an alternate power source is required. The fuel line has the same lifespan as the other two lines and once the well is abandoned, it will not continue to operate.

[12] Murphy proposes to construct all three lines comprising the Pipeline at the same time in the same 15 metre right of way to a minimum depth of 1.5 metres.

ANALYSIS

Approach to Statutory Interpretation

[13] Mr. Carter argues the *PNGA* must be interpreted strictly because the legislation is “expropriation type” legislation. The Alberta Court of Appeal rejected this argument with respect to that province’s *Surface Rights Act* with the Court finding the *Surface Rights Act* is not an expropriation statute (*Christensen v. Alberta Power Limited*, 1985 ABCA 83). Similarly, the Supreme Court of British Columbia has determined that the entry and occupation of private land under the *PNGA* is not an act of expropriation. Unlike with expropriation, no land and no legal interest in the land is taken from the landowner (*Dome Petroleum Ltd. v. Juell* [1982] B.C.J. No. 1510). An entry under the *PNGA* is an authorized trespass, and may occur against the wishes of the landowner. The landowner cannot “decide for himself whether or not he wants to see oil and gas exploration and production carried out on his land” (*Dome*). The compulsory nature of a taking under the *PNGA* makes it like an expropriation, but unlike an expropriation, the landowner remains the fee simple owner of the land.

[14] The *PNGA* alters the unfettered common law right of the owner of a subsurface resource to enter private land to extract that resource. At common law, the owner of subsurface minerals has the right to enter upon the surface of private land and to use the land in order to extract the minerals, without compensating the landowner (Todd, *The Law of Expropriation in Canada*, 2nd edition, Carswell 1992). The *PNGA* changes the common law to require that the holder of subsurface rights may not enter private land to develop the subsurface resource without either an agreement with the landowner or authorization of the Board, and that the subsurface rights holder is liable to compensate the landowner for loss arising from the entry. The *PNGA* provides the method by which rights holders can enter private land to develop and produce oil and gas

and a dispute resolution process to determine the compensation payable if the parties cannot agree. To that extent, the statute is remedial, and ought to be given such broad and liberal interpretation as to give effect to its intent.

[15] The principle of statutory interpretation that legislation authorizing expropriation be strictly construed is to protect landowners from expropriation without compensation unless expressly permitted (*The Queen in Right of British Columbia v. Tener*, [1985] 1 S.C.R. 533 relying on *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.)). Also, because expropriation is an ultimate taking of all rights and legal interest in private property, the principle protects a landowner from an interpretation that deprives the landowner of common law rights unless expressly provided. There is no question that the obligation to compensate a landowner flows from an entry under the *PNGA*. There is also no question that, as long as a subsurface rights holder can demonstrate the need for entry to private land to develop or produce oil or natural gas, they have the right to access that land. The only question is, do they access the land using the mechanisms provided under the *PNGA*, or do they access it by an act of expropriation authorized by section 34 of the *OGAA*? In either case, the landowner does not have the right to prevent access to their land so that the subsurface rights holder may develop the resource, and no rights are taken from a landowner that existed at common law.

[16] The question therefore becomes: is it the object and scheme of the legislation and the legislature's intent that where the landowner and rights holder cannot agree to the terms of entry for the purposes permitted by the *OGC* in this case, that the rights holder acquire entry to the land using the method provided by the *PNGA* or by an act of expropriation under the *OGAA*? In interpreting the term "flow line" in order to answer that question, there is no reason to apply any rule other than the modern rule of statutory interpretation enunciated by the Supreme Court of Canada and commonly and consistently applied by Courts across Canada to interpret the words of a statute. The words of an enactment, in this case the term "flow line", must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27).

Is the Pipeline, or any segment of it, a "flow line"?

[17] As indicated above, the term "flow line" must be interpreted harmoniously with the scheme and objects of the legislation, and the intention of the legislature. It cannot be interpreted in isolation of other provisions of the *PNGA* and the *OGAA*, or in isolation of the entire legislative scheme established by both pieces of legislation.

[18] The OGAA establishes the OGC and provides the regulatory framework for the development of the oil and gas industry in the province. It provides that a person may not carry out an “oil and gas activity” without a permit and otherwise in compliance with the OGAA and its regulations. The OGC may issue a permit and must specify the oil and gas activity permitted to be carried out. In this case, the OGC has granted Murphy a permit to construct and operate a pipeline, in three segments, for the purpose of conveying petroleum, natural gas or water.

[19] The legislative scheme of the PNGA is to enable access to private land for an “oil and gas activity” while providing a dispute resolution mechanism to determine the compensation payable to landowners arising from an entry.

[20] “Oil and gas activity” is defined in the OGAA. The relevant portions of the definition, for the purposes of this case, are:

- ...
- (b) the exploration for and development of petroleum, natural gas or both,
- (c) the production, gathering, processing, storage or disposal of petroleum, natural gas or both,
- ...
- (e) the construction or operation of a pipeline

[21] A person who requires a right of entry, or the landowner, may apply to the Board for mediation and arbitration if the person requiring the right of entry and the landowner are unable to agree on the terms of a surface lease. “Surface lease” is expansively defined to include right of way agreement. The mechanisms for entry to private land set out in the PNGA, however, expressly do not apply to entry, occupation or use of land relating to a pipeline other than a flow line (PNGA, section 145(2)). So the Board may only authorize right of entry for an “oil and gas activity”, including the construction and operation of a pipeline, as long as the pipeline is a “flow line”.

[22] A flow line is a type of pipeline. The OGAA defines “pipeline” as follows:

- “pipeline” means...piping through which any of the following is conveyed:
- a) petroleum or natural gas;
 - b) water produced in relation to the production of petroleum or natural gas or conveyed to or from a facility for disposal into a pool or storage reservoir;
 - c) solids;
 - d) substances prescribed under section 133(2)(v) of the *Petroleum and Natural Gas Act*,
 - e) other prescribed substances,

and includes installations and facilities associated with the piping, but does not include

- f) piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the *Gas Utility Act*,
- g) a well head, or
- h) anything else that is prescribed

[23] To be a “flow line”, the disputed lines must also be “pipelines”. Segments 001 and 002 are clearly pipelines. They are piping through which, in the case of Segment 001, natural gas is conveyed, and in the case of Segment 002, water produced in relation to the production of natural gas is conveyed.

[24] Segment 003, however, is not piping through which any of the enumerated substances in (a) to (e) in the definition of “pipeline” are conveyed although it is one of the segments of the Pipeline for which the OGC has issued the Permit. It can only be considered a “pipeline” if it falls into the inclusionary clause of the definition including “installations and facilities associated with the piping” that conveys the enumerated substances.

[25] The OGAA provides the following definition of “facility”:

“facility” means a system of vessels, piping, valves, tanks and other equipment that is used to gather, process, measure, store or dispose of petroleum, natural gas, water or a substance referred to in paragraph (d) to (e) of the definition of “pipeline”

[26] Mr. Dick’s evidence is that the fuel line is used to power various instruments and pieces of equipment required to operate the well. It is, therefore, part of a system of piping and other equipment used to gather, process, measure, store or dispose of natural gas and water. I find the fuel line and associated instruments and equipment is included in the definition of “pipeline”. This interpretation accords with the OGC’s treatment of the fuel line as a segment of the Pipeline for which the Permit has been granted.

[27] The question remains, is the Pipeline or any of its segments a “flow line”? Do they connect “a well head with a scrubbing, processing or storage facility” and precede “the transfer of the conveyed substance to or from a transmission, distribution or transportation line”? For ease of reference, I reproduce the definition of “flow line” again below:

“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.

[28] Mr. Carter argues there is nothing before the Board to show that the segments of the Pipeline connect to a well head. He argues the diagrams show lines “coming and going” but that the well head is just a white space on the plan. Mr. Carter argues that the equipment that scrubs or separates the gas and water at the well site is a “scrubbing or processing facility that precedes the transfer of the conveyed substance to a transmission, distribution or transportation line”. He submits Segments 001 and 002 transmit and transport product and are, therefore, “transmission, distribution or transportation” lines. In Mr. Carter’s submission, the only pipeline that can be a flow line is the line that connects the well to this equipment at the well site. In his submission, a flow line does not extend beyond the well pad or well site area and these lines are “transmission, distribution or transportation lines” within the meaning of the definition of “flow line”. For the reasons set out below, I find this interpretation does not give effect to the scheme and object of the legislation or the intention of the legislature.

[29] First, the term “well head” is not defined in the legislation. “Well” is defined in the *PNGA* as “a hole in the ground ... made or being made by drilling, boring, or any other method to obtain petroleum or natural gas...” The Glossary published by the OGC defines “well head” as “the equipment used to maintain surface control of a well”. The term “well head”, therefore, is not synonymous with “well”, and encompasses more than the hole in the ground drilled to obtain natural gas. If the legislature had intended that a flow line was just the piece of pipeline that connected the well, that is the hole in the ground, to the equipment found at the well site necessary to separate water from the natural gas prior to metering or flaring, it could have used the word “well” and not the term “well head” in the definition of “flow line”. Indeed, the legislature made this choice as evident from the legislative history of the present definition.

[30] In 2008, the legislature amended the definition of “flow line” with the enactment of the *OGAA* to mean “a pipeline connecting a well with a facility or another pipeline”. This definition was never brought into force, and in 2010, the current definition was enacted and brought into force. It is interesting to note the change from the use of the word “well” in the 2008 amendment to “well head” in the 2010 amendment. During legislative debates on the proposed amendment, the Minister at the time suggested the government had “caught that we had made the definition too narrow” and said “we are expanding it again” (Hansard, March 31, 2010).

[31] While the evidence before me does not demonstrate that any of the segments of this Pipeline actually connect to the well itself, that is to the hole in the ground, the evidence does demonstrate that they connect to the equipment at the well site necessary to maintain and operate the well.

[32] Second, with respect to Mr. Carter's submission that Segments 001 and 002 transmit and transport product and are therefore transmission, distribution or transportation lines, they certainly do transmit or transport product in the sense of conveying a substance. The fact that they convey substances, however, does not make them transmission, distribution or transportation lines. The definition of "flow line" makes a distinction between a pipeline that conveys a substance, which is included in the definition, and "a transmission, distribution or transportation line", which would also convey substances but which are not included in the definition. A "flow line" is not intended to be an empty pipeline. It is a type of pipeline and, therefore, piping through which various substances are conveyed. The conveyance of a substance in the pipeline does not turn it into a transmission, distribution or transportation line. A transmission, distribution or transportation line is clearly a different kind of pipeline than a "flow line".

[33] There is no legislative definition of transmission, distribution or transportation line, and these terms are not included in the OGC Glossary previously referred to. Mr. Dick, in his Affidavit, says in his experience "the terms transmission, transportation and distribution lines are used to refer to downstream pipelines that convey product (i.e. gas, oil, liquids) from a processing facility to market for sale or further transport by truck rail or sea". He says these pipelines are generally much larger in diameter and require a larger trench. This understanding seems to accord with the former Minister's understanding reflected in Hansard that the type of pipeline not covered by the definition of "flow line", is "a larger pipeline, more permanent in nature" (Hansard, May 5, 2012). It also fits with the legislative scheme providing for the expropriation of land for a pipeline other than a flow line up to 18 meters in width (or more if authorized by the OGC), compared to the 15 meter right of way required for the three segments of this Pipeline.

[34] Third, the result of Mr. Carter's interpretation that a flow line does not extend beyond a well site area would be that the Board would only have authority to authorize entry to land for the well site or well pad area itself. If the legislative intent was to confine the Board's authority to authorizing entry to land required only for oil and gas activities associated with a well site, there would be no purpose to giving the Board jurisdiction to authorize entry for an "oil and gas activity" including "the construction or operation of a pipeline", but then limit that jurisdiction to a particular type of pipeline. There would have been no need to distinguish between flow lines and pipelines, or provide a definition of "flow line" at all. The Board could simply have been given jurisdiction with respect to activities required for the construction and operation of a well site.

[35] Further, there would have been no need to provide an expansive definition of "surface lease" to include right of way agreement, as use and occupation of land for portions of pipeline within the boundaries of a well site would be covered by the surface lease for the well site. And, as annual rent is payable to a

landowner for continued use and occupation of a well site area, there would have been no need in section 143(3) of the *PNGA* to expressly limit a right holder's obligation to pay annual rent for a right of way for a flow line. The definition of "pipeline" itself expressly excludes "well head" requiring that the use of land for all of the equipment associated with a well head be covered by a surface lease or board order, rather than a right of way agreement, and liable to payment of annual rent. Reading the legislation as a whole, a "flow line" must be intended to extend beyond a well site area, and the Board must be intended to have jurisdiction for pipelines beyond those actually located at the well site.

[36] Mr. Williams argues that the intention of the legislature was to give the Board jurisdiction over the gathering system, as distinct from the distribution system. This intention can be seen in the Minister's remarks recorded in Hansard, where he refers to a flow line and a gathering line as being synonymous (Hansard, May 5, 2010). The "gathering system", according to the OGC Glossary, comprises the pipelines and other infrastructure that move raw gas from the wellhead to processing and transmission facilities.

[37] It is not necessary for the purpose of this decision to determine whether the definition of "flow line" can reasonably be interpreted to cover all pipelines comprising the gathering system. It is sufficient to determine whether the Pipeline and each of its segments in issue in this case, reasonably fall within the definition. I find Segments 001 and 002 clearly fall within the definition. I find they are pipelines that connect a wellhead, namely the equipment associated with the surface control of 03-13, with a processing facility, namely the Tupper West Plant, via the 16-01 well site. The lines precede the transfer of the conveyed substances, i.e. the natural gas and water to a transmission, distribution or transmission line.

[38] As to the fuel line, if it is not a "flow line", then the same right of way required for all three segments of the Pipeline, would have to be acquired twice by separate and duplicative processes. The Board could grant the right of entry for the purpose of constructing and operating Segments 001 and 002, but the land would need to be expropriated for the purpose of constructing and operating Segment 003. This is an absurd result that cannot have been the legislature's intent. Interpretations that lead to absurd consequences should be rejected (*Ontario v. Canadian Pacific Ltd.* [1975] 2 SCR 1031).

[39] As expropriation results in a greater impact on private property rights than a *PNGA* taking, the legislation ought not to be interpreted to require this result if possible. The excerpts from Hansard demonstrate the concern of some Members of the Legislative Assembly that the expropriation authorized by the *OGAA* sounded "draconian and stark" (Hansard, May 5, 2010).

[40] While at first blush, it may seem there is “no possible way” the fuel line can be considered a “flow line”, when the words of the definition are read harmoniously with the scheme and object of the Act, and the intention of the legislature, the fuel line reasonably falls into the definition of flow line. The fuel line in this case is included in the definition of pipeline as “installations and facilities associated with the piping” and is part of the system of vessels, piping, valves, tanks and other equipment that is used to gather, process, measure, store, or dispose of natural gas or water. It too connects a well head, namely the equipment associated with the surface control of 03-13 with a processing plant, namely Tupper West via the 16-01 well site. To interpret the term “flow line” so as to exclude the fuel line would lead to absurd and harsh consequences that cannot have been intended.

[41] Mr. Carter made much of the fact that the fuel line carries processed gas from the Tupper West plant to 03-13. In relation to the direction of flow of the fuel in the line, the well head is downstream of the Plant, and therefore, in his view, it cannot “precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line”. The “conveyed substance”, however, is not the fuel in the fuel line, but the natural gas and water. The fuel line is a segment of this single pipeline project to be constructed and operated for the purpose of conveying petroleum, natural gas or water.

CONCLUSION

[42] The Pipeline, and each of its segments, is a flow line within the meaning of the *OGAA* and the *PNGA*. The Board has jurisdiction with respect to Murphy’s application for a right of entry order and for mediation and arbitration services to settle the compensation payable to the Shores for Murphy’s use and occupation of the Shore’s Lands for the construction and operation of the flow line.

DATED: September 13, 2012

FOR THE BOARD



Cheryl Vickers, Chair