File Nos. 1840 and 1847
Board Order No. 1840/1847-2

November 24, 2016

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 78 RANGE 16 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Encana Corporation

(APPLICANT)

AND:

Wilhelmina Lumnitzer and
Fred Ralph Lumnitzer

(RESPONDENTS)

BOARD ORDER

Heard: October 5, 2016 in Dawson Creek
Appearances: Tom Owen, Barrister and Solicitor, for the Applicant
Elvin Gowman and Fred Lumnitzer for the Respondents

INTRODUCTION

[1] Fred Lumnitzer and Wilhelmina Lumnitzer are the owners of the Lands described as: THE SOUTH EAST ¼ OF SECTION 31, TOWNSHIP 78, RANGE 16 WEST OF THE 6TH MERIDIAN, PEACE RIVER DISTRICT (the Lands).

[2] Encana Corporation (Encanca) has rights of entry over portions of the Lands to construct and operate flow lines (Board Order 1840-1amd) and a wellsite (Order 1847-1amd). The parties have been unable to agree on the compensation to be paid by Encana to the Lumnitzers arising from the rights of entry.

[3] When granting the rights of entry, the Board ordered partial compensation to the Lumnitzers of $16,300.00 for the right of entry for flow lines and $13,372.00 for the right of entry for the wellsite. Mr. Lumnitzer seeks compensation of $75,000 for the flow line entry, and an initial payment of $27,000 with annual rent of $10,000 for the wellsite entry. Mr. Lumnitzer's claim for compensation is primarily based on other agreements he has with other companies for a pipeline across the Lands and for a wellsite on an adjoining parcel.

[4] Encana submits other agreements relied on by Mr. Lumnitzer do not establish a pattern of dealings that the Board may rely on to establish compensation in this case. Encana submits the partial payments more than compensate the Lumnitzers for their actual and reasonably foreseeable loss arising from the rights of entry and seeks an order for repayment of a portion of the partial compensation paid on account of both the flowline right of way and the wellsite entry. Encana submits annual rent for the wellsite should be $882.00.

[5] I have determined that the evidence does not support compensation to the extent claimed by Mr. Lumnitzer, but neither does it support compensation below the level of the partial payments already made. Nor does it support rent at the level suggested by Encana. As will be seen later, I find the appropriate compensation for the right of way is $19,000.00. I find the appropriate initial compensation for the wellsite is $15,320.00 with annual rent prior to the drilling of two wells of $4,555.00. I find there should be an additional payment of $2,000.00 when the wells are drilled and the annual rent should be increased by $250.00.

PRELIMINARY MATTER

[6] At the beginning of the arbitration, Mr. Lumnitzer questioned the Board's jurisdiction, submitting the pipelines were not flow lines.

[7] Mr. Lumnitzer raised the issue of the Board's jurisdiction at the first mediation conference call. The Board determined that no further submissions were necessary on the basis that the factual circumstances were the same as in *Encana Corporation v. Ilnisky*, Order 1823-1. Mr. Lumnitzer did not attend the second mediation conference call despite being party to its scheduling. The Board gave Mr. Lumnitzer the opportunity to provide submissions on the jurisdiction issue responsive the Board's decision in *Ilnisky*. The Board indicated that if it did not receive a submission from the Lumnitzers by November 18, 2014, the Board would issue the right of entry order for the pipeline project. Mr. Lumnitzer did not provide a submission addressing the jurisdictional issue and on November 19, 2014, the Board issued a right of entry order (Order 1840-1). The Board cancelled and replaced Order 1840-1 on November 25, 2014 with Order 1840-1amd granting Encana the right to enter a portion of the Lands to construct and operate the pipeline project. No application for judicial review contesting the jurisdiction of the Board was ever filed from the right of entry order.

[8] Mr. Lumnitzer attended a third mediation conference call on December 2, 2014 to discuss compensation. He did not raise any issue with respect to the jurisdiction of the Board.

[9] Mr. Lumnitzer attended further mediation conference calls on January 15, 2015 and January 29, 2015 to discuss compensation. He did not raise any issue with respect to the jurisdiction of the Board. On January 29, 2015, the mediator refused further mediation and referred the compensation issue to the Board for arbitration.

[10] The Board scheduled a pre-arbitration conference call for April 21, 2015. This call was cancelled at Mr. Lumnitzer's request. Following inquiries from the Board, Mr. Lumnitzer confirmed on December 2, 2015 that compensation for both the flow line and wellsite entries had not been resolved and that he intended to proceed to arbitration. The Board scheduled a pre-arbitration conference call for January 13, 2016.

[11] At the pre-arbitration conference call, the Board scheduled an arbitration to determine compensation for April 27 and 28, 2016 and set dates for the production of evidence to be relied on at the arbitration. Mr. Lumnitzer did not raise any issue as to the Board's jurisdiction at the pre-arbitration conference call.

[12] The Board adjourned the arbitration scheduled for April 27 and 28, 2016 to June 7 and 8, 2016 at the request of Mr. Lumnitzer. Mr. Lumnitzer sought a further adjournment, and the Board adjourned the arbitration to June 22 and 23, 2016.

[13] The Board agreed to adjourn the arbitration scheduled for June 22 and 23, 2016, at Mr. Lumnitzer's request, because of severe flooding in Dawson Creek. The Board rescheduled the arbitration for October 4 and 5, 2016. At no time in

any of Mr. Lumnitzer's requests for adjournments did he raise any issue with respect to the jurisdiction of the Board.

[14] Encana exercised its right of entry commencing construction of the right of way on August 15, 2016 and finishing on September 28, 2016. The Lumnitzers did not object to Encana's entry or at any time raise an issue with the jurisdiction of the Board to grant the right of entry order.

[15] It is simply too late to raise the issue that the Board does not have jurisdiction. The Lumnitzers had opportunity to make submissions on that issue but did not. No application for judicial review was taken from the Board's right of entry order and the time for doing so has long since passed. The issue was never raised at any subsequent mediation conferences or at the pre-arbitration conference call. No submissions or any other documentation respecting jurisdiction was produced in advance of the arbitration. The right of entry order has been acted upon and the flow lines are in the ground, presenting significant prejudice to Encana if the Board's jurisdiction to issue the right of entry order is revisited.

[16] I declined Mr. Lumnitzer's request to raise an issue with respect to the Board's jurisdiction with respect to the flow lines and proceeded to hear evidence and submissions respecting the compensation payable for the rights of entry for both the flowlines and the wellsite.

ISSUE

[17] The issue is to determine the compensation for loss payable to the Lumnitzers caused by Encana's rights of entry to the Lands.

FACTS

[18] The Lands are located approximately 16 kms northwest of Dawson Creek. The Lands are comprised of 160 acres, wholly within the Agricultural Land Reserve, and zoned A-2 Large Agricultural Holdings. Approximately 50% of the Lands are cleared and cultivated. The soils are classified 100% as Class 5 under the Canada Land Inventory (CLI) – Soil Capability for Agriculture mapping system.

[19] Fred and Wilhelmina Lumnitzer own the Lands and other adjacent parcels and use the Lands as part of their farming operations. Mr. Lumnitzer's parents purchased the Lands in the late 1970's and their other parcels, including the home quarter, in 1961. Mr. Lumnitzer has lived most of his life on this farm.

[20] From time to time, the Lands have been used for cereal crops and to raise cattle. Most recently, they have been used to grow hay. In 2015 and 2016 the Lands were used to grow hay pursuant to a sharecropping agreement, and hay was harvested in both of those years. In 2014, no hay was harvested because of drought conditions.

[21] The Board issued Order 1840-1amd on November 25, 2014 granting Encana the right of entry to and access across a portion of the Lands to carry out an approved oil and gas activity, namely the construction, operation and maintenance of multiple flow lines and associated works. The right of entry covers 7.17 acres of the Lands for the right of way and 3.28 acres for temporary workspace. The Board ordered partial compensation in the amount of $16,300.00.

[22] Encana constructed the right of way and installed the flow lines during August and September of 2016. The flow lines include two 6" bi-directional water lines to be used for oil and gas activities, and a 4" fuel line. The flow lines are buried to a depth of 1.6 metres in the right of way. Encana will reseed the right of

way and the temporary workspace areas next summer. Once the temporary workspace area has been restored, Encana will not be using it.

[23] The right of way extends east from the western boundary of the Lands along a Nova Gas Pipeline right of way where it overlaps into the wellsite. It then extends south and east inside the wellsite area along the western and southern boundaries of the wellsite, and then extends south along the eastern boundary of the Lands exiting at the southeast corner. The area of the pipeline right of way that overlaps the wellsite area is 1.48 acres.

[24] The Board issued Order 1847-1amd on May 26, 2015 granting Encana the right of entry to and access across a portion of the Lands for the purpose of drilling, completing and operating a multi well padsite. The right of entry covers 7.78 acres for the padsite and .44 acres for temporary workspace. The temporary workspace entirely overlaps the temporary workspace for the flow line right of way. The Board ordered partial compensation in the amount of $13,372.00.

[25] Encana constructed the padsite between July 6 and July 24, 2016. Two water source wells will be drilled in the first quarter of 2017. The wellsite will be gated and locked.

[26] The wellsite is located in the northeast corner of the Lands with access directly from 235 Road along the east boundary of the Lands. The location of the wellsite in the field creates two additional inside corners that are inaccessible to farm equipment comprising .08 of an acre in total.

[27] The wellsite has been fenced along the north and east sides of the right of way lying within the wellsite area. Encana has finished with the area required for temporary workspace other than to reseed it.

[28] The plan is to drill the wells in the first quarter of 2017. The intention is to only bring the drilling apparatus to the site once, and to drill the wells one after the other. It will take 10-15 days to drill the wells. Once the wells are drilled, Encana personnel will visit the wellsite using a lightweight vehicle or pickup truck at least once a week for the first couple of months, then monthly, and eventually yearly for maintenance and safety and operational checks.

EVIDENCE AND ANALYSIS

Legal Framework/Principles of Compensation

[29] The legal framework respecting the rights and obligations associated with the entry to private land for oil and gas activities is set out in the *Petroleum and Natural Gas Act*. In accordance with section 142 of that *Act*, a person may not enter, occupy or use land to carry out an oil and gas activity unless the entry, occupation and use is authorized by a surface lease with the landowner in the prescribed form or an order of the Board. The Board may make an order, pursuant to section 159 of the *Act*, authorizing a right of entry if it is satisfied the right of entry is required for an oil and gas activity. Section 143(2) of the *Act* provides that a right holder, that is the person who holds a right of entry, is liable to pay compensation to the landowner "for loss or damage caused by the right of entry" and, except where the right of entry relates to a right of way for a flow line, to pay rent to the landowner for the duration of the right of entry.

[30] Section 154(1) of the *Petroleum and Natural Gas Act* lists various factors the Board may consider in determining the compensation to be paid to a landowner. They are:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;

(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[31] Not all of these factors will be relevant in every case. There are no factors or criteria established by regulation.

[32] The Board has previously articulated a number of settled principles relating to compensation for entry under the *Petroleum and Natural Gas Act* that it has found to be binding upon it (*ARC Petroleum Inc. v. Piper*, Order 1589-2, December 5, 2008 and *Spectra Energy Midstream Corporation v. London*, Order 1694-3, February 24, 2015).

[33] The first principle is that a landowner's right to compensation is just that – a right to compensation for loss as a result of the entry. The landowner is entitled to the equivalent in money for the loss sustained and not for more than the loss sustained. The compensation does not represent a purchase price or a rental, it does not represent remuneration to the landowner for the use of his land for an oil and gas activity. It simply compensates for the landowner's actual and projected probable future loss arising out of the company's entry, occupation and use of the surface (*Western Industrial Clay Products Ltd v. Mediation and Arbitration Board*, 2001 BCSC 1458.) The Board exceeds its jurisdiction if it orders an amount to be paid that exceeds the loss sustained (*Western Clay, supra*).

[34] The second principle is that a "taking" under the *Petroleum and Natural Gas Act* is not an expropriation, although expropriation principles may apply to determine the appropriate compensation. The landowner continues to hold the fee simple interest in the land and, consequently, it is appropriate that the Board consider the landowner's residual and reversionary interest (*Dome Petroleum Ltd*

v. Juell [1982] B.C.J No. 1510 (BCSC); *Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC)).

[35] Evidence of what compensation is paid to other owners in the area is relevant and should be considered where the evidence indicates an established pattern of compensation exists (*Scurry Rainbow, supra*). The Board must be satisfied that a pattern has been established and that the pattern reflects the various factors set out in section 154 of the *Petroleum and Natural Gas Act.*

[36] The Board may consider the various factors set out in section 154(1) of the *Petroleum and Natural Gas Act* and evaluate each, then step back and consider whether the totality gives proper compensation in any particular case (*Scurry Rainbow, supra*).

[37] These principles of compensation are the law in British Columbia and are binding on this Board in determining compensation under the *Petroleum and Natural Gas Act.* It is not open to this Board to change the law.

[38] It remains to apply these principles to the present case. The Board must ask what is the loss sustained by the Lumnitzer's as a result of Encana's right of entry for the right of way, the well site area and the temporary workspace, and what is the appropriate compensation for that loss? In determining the appropriate compensation, the Board may consider the various factors listed in section 154(1) of the *Petroleum and Natural Gas Act.*

Other Agreements/Pattern of Dealings

[39] As Mr. Lumnitzer's claim for compensation is based primarily on what has been paid in other agreements, I will start with the evidence before me in that regard.

Right of Way Agreements

[40] With respect to the right of way for the flowline, Mr. Lumnitzer provides evidence of four right of way agreements, three for pipelines and one for a BC Hydro transmission line. He submits that a "right of way is a right of way" and it should not matter what industry the right of way is for.

[41] The purpose of looking at other right of way agreements to assist with determining compensation for loss caused by a right of entry for oil and gas activity is to see if they demonstrate a pattern of dealings in the way landowners are compensated for loss in similar situations. An agreement respecting payment to a landowner for a right of way for a different purpose and acquired under different legislative authority is not capable of establishing a pattern of dealings for compensation for loss caused by a right of entry for oil and gas activity. It is evident looking at the BC Hydro agreement provided (Exhibit. 4, Tab 10) that the circumstances and the loss sustained by the landowner are quite different. The agreement contains compensation for factors that are not relevant to the circumstances of this case such as for above ground steel transmission structures and injurious affection to the value of the remaining lands of which there is no evidence in this case. An agreement allowing entry to private land for an overhead high voltage transmission line with above ground transmission structures does not establish a pattern of dealings indicative of the probable loss arising from a right of entry for underground pipelines.

[42] With respect to the right of way agreements in evidence for pipelines, Mr. Lumnitzer testified he has just signed an agreement in the last two month for a new Nova Gas line across the Lands and provided a calculation worksheet (Exhibit 8) respecting the compensation to be paid. The compensation worksheet indicates Nova Gas Transmission Ltd. will pay $2,000 per acre for the right of way and the temporary workspace. Mr. Lumnitzer did not provide a copy of the actual agreement for this right of way.

[43] Mr. Lumnitzer provided copies of two right of way agreements for oil and gas activities. The first is a copy of his 2010 agreement with Nova Gas Transmission Ltd. for a 4.22 acre right of way across the Lands and temporary workspace of 6.13 acres (Exhibit. 4, Tab 8). The agreement indicates the Lumnitzers received a total of $23,787.50 comprised of $4,009.00 for the right of way inclusive of value of the land ignoring residual value, $5,823.50 for the temporary workspace, $13,455.00 for crop loss and $500.00 for "Other". The description of what the "Other" payment is for is not legible in the copy provided to the Board. The payment for the right of way and temporary workspace is calculated at $950 per acre and the payment for crop loss is calculated at $625 per acre.

[44] Mr. Lumnitzer submits the compensation paid under this agreement, allowing for inflation and the increase in land value, is the most accurate reflection of compensation for Encana's pipeline because Encana's right of way follows right alongside this right of way.

[45] The second right of way agreement is a copy of a 2013 agreement with Plateau Pipe Line Ltd. for a 6.97 acre right of way and 3.56 acres of temporary workspace (Exhibit 7). The agreement indicates the landowners received a total of $21,984 comprised of $6,970 for the right of way, $3,485 for the compulsory aspect of the entry, $2,060 for the temporary workspace, $1,725 for crop loss, and additional payments for loss of use of timber area, fence cuts, and a signing bonus. It appears the compensation for the right of way is based on $1,000 per acre. The crop loss is calculated at $250 per acre for 2.3 acres for three years. The right of way appears to be for the most part through timbered land.

[46] I find the two agreements and a worksheet are not enough to establish a pattern of dealings. First of all, the worksheet is not a right of way agreement. Even if the two agreements and the worksheet could establish a pattern of dealings, these do not. They do not reflect any pattern of compensation for categories of loss by compensating categories at the same rates or even by

identifying the same categories of loss. One agreement includes an additional payment for compulsory aspect of the taking, while the other does not. One compensates for crop loss at $625 per acre while the other compensates at $250 per acre. It is not clear from the worksheet whether the $2,000 per acre is intended to compensate for all losses including crop loss.

[47] Mr. Lumnitzer submits that the 2010 Nova Gas agreement "sets the value" for a pipeline right of way across his Lands as the Encana right of way is right beside it, crossing the very same Lands. The evidence is, however, that the right of way for the Nova Gas line was not obtained under the provisions of the *Petroleum and Natural Gas Act* but under those of the *National Energy Board Act*. Different provisions apply to pipelines regulated by the National Energy Board (NEB) with the result that the losses caused by an entry for an NEB pipeline will not necessarily be the same as those caused by the flow lines in this case. The different provisions for entering private land under the *National Energy Board Act* and the *Petroleum and Natural Gas Act* may affect the motivations of the parties and consequently the compensation payable.

[48] Unless a number of agreements for similar projects in similar circumstances demonstrate a pattern of dealings for the categories of loss, the compensation negotiated by one landowner for a particular project is not indicative of the probable loss that will be incurred by another landowner, or even by the same landowner for a different project. Just because Nova Gas was willing to pay Mr. Lumnitzer what it did for its project, does not mean that Encana must pay the same amount for its very different project governed by a different legislative scheme. As this Board has said before, negotiated agreements may compensate for factors beyond actual loss, include payments to incentivize signing such as signing bonuses, or in other respects compensate beyond what agreements demonstrating a pattern of dealings might suggest are typical values to both landowners and companies for the rights taken and received and the losses sustained. Unless a number of agreements can establish a pattern of

dealings, the Board must endeavor to quantify the probable loss caused by the right of entry from empirical evidence of loss.

[49] The agreements relied on by Mr. Lumnitzer do not establish a pattern that reflects the various compensation factors set out in section 154 of the *Petroleum and Natural Gas Act*. They do not establish a pattern indicative of the compensation Encana should be expected to pay in the circumstances of this case.

Lease Agreements

[50] Mr. Lumnitzer provided evidence at Exhibit 5 of 14 leases, five rent review agreements and two consent Board decisions on rent review applications. He did not give evidence as to the criteria for the selection of his agreements. They range in time from 2006 to 2014. The evidence of Heidi Berscht, Senior Surface Land Coordinator for Encana was that they cover a wide geographic area. The agreements provide global amounts for payment and do not indicate how those global amounts were arrived at.

[51] Mr. Lumnitzer relies principally on his 2010 agreement with ARC Petroleum Inc. (Exhibit 5, Tab 8) for a 3.56 acre well site on an adjoining parcel to the Lands. This lease provides an initial payment of $10,000 and an annual payment of $3,700. He submits this lease is comparable as it is on adjacent lands with similar crop production and yields. It is not evident from this agreement how either the initial payment or the annual rent was determined.

[52] Exhibit 1 contains 7 agreements from other companies and 28 Encana Agreements. Ms. Berscht gave evidence as to the methodology for gathering the lease comparables submitted in Exhibit 1. She used a 10 km radius from the Lands in selecting lease agreements and included leases back to 2012. The Agreements from other companies include the global annual rent paid, but do not include any information as to how that global amount was determined. Six of the

agreements include payments for additional wells ranging from $1,500 to $2,000 as an initial payment per additional well and ranging from $350 to $500 annual payment per additional well.

[53] The Encana agreements include information as to the components of payments. Compensation for value of the land ranges from $950 per acre to $1,100 per acre with the majority at $1,000. Temporary workspace is consistently, with one exception, compensated at half of the value per acre for the land. Annual nuisance and disturbance ranges from a low of $1,900 to a high of $2,500. Loss of profit is typically compensated at $250 per acre for bush, hay or pasture and $300 to $350 per acre for cultivated land. Payments for additional wells range from $1,000 to $2,000 per additional well as an initial payment, with the majority at $2,000 per well, and $250 to $500 annual per additional well with the majority at $500 per well.

[54] Ms. Berscht's evidence was that none of the agreements in Exhibit 1 are similar to the subject or to each other. Mr. Lumnitzer was also critical of Encana's lease selection. He went through the leases pointing out the differences with his Lands and the discrepancies between annual lease payments.

[55] I find the totality of the lease agreements in evidence do not establish a pattern of compensation reflective of all of the factors set out in section 154, however, I find they do establish certain expectations for some factors including crop loss, nuisance and disturbance and compensation for additional wells. I will apply some of these factors where there is no empirical evidence of a factor, or where the empirical evidence would result in compensation below expectations evident from the various agreements before me.

Other Section 154 Factors

Compulsory Aspect of the Taking

[56] A right of entry under the *Petroleum and Natural Gas Act* is a compulsory taking in that the landowner is not in a position to oppose the entry if entry is required for an oil and gas activity. There is a consequent loss of rights associated with a right of entry. Compensation for the compulsory aspect of the taking and the associated loss of rights is not capable of precise calculation and is invariably somewhat arbitrary (*Dome Petroleum Ltd. v Juell* [1982] B.C.J. 1510 (BCSC)).

[57] The Board has approached compensation for this factor in various ways, but generally includes compensation for the compulsory aspect of the taking in a per acre amount that considers the value of the land and the owner's reversionary or residual interests in the land (*ARC Petroleum Inc. v Miller*, Order 1633-3, May 24, 2011).

Value of the Land

[58] Jeremy Wasmuth, an accredited appraiser, provided an opinion as to the per acre market value of the fee simple interest in the Lands and the residual value of the rights within the right of way (Exhibit 2). His professional opinion is that the per acre value of the fee simple interest in the Lands as of November 25, 2014, the date of the right of entry for the flow lines, was $1,325. In his opinion, the per acre value as of May 26, 2015, the date of the right of entry of the well site, was $1,365. This opinion is based on an analysis of two current listings and six sales of similar property in close proximity to the Lands in 2014 and 2015. Mr. Wasmuth adjusted for time of sale and presence of improvements. He considered the relative similarity of the comparables to the Lands considering factors such as access, soil classification, and percentage of cleared area.

[59] Mr. Lumnitzer provided evidence of seven reported sales from Ritchie Bros. auction on April 1, 2016. The sales are all of land with Class 2 soil and with higher percentages of cleared acreage than the Lands. At least one of the sales includes improvements such as a bungalow, workshop, dugout and sewage lagoon, but no adjustment is made to estimate the bare land value. No adjustments are considered for time of sale or other dissimilarities with the Lands. Given the time of these sales and other dissimilarities with the Lands, I find these sales are not a likely indicator of the market value of the Lands as of the dates of the right of entry orders, and prefer the professional opinion of Mr. Wasmuth.

[60] Following a review of articles, Mr. Wasmuth concluded the residual value to the landowner in the right of way is 50% of the fee simple per acre value, and in the temporary workspace is 75% of the fee simple per acre value. The value, therefore, of the rights taken by the right of way, in his opinion, is $663/acre and in the temporary workspace for the right of way is $331/acre.

[61] While acknowledging that it is appropriate to consider the residual value to the landowner in a right of way, the Board has often provided compensation for a right of way equivalent to the per acre value of the fee simple interest in the land to acknowledge the loss of rights and to attribute some value to that loss. As the Board said in *ARC Petroleum v. Miller, supra* at paragraph [36]:

> [36] Considering the Court's instruction that the residual and reversionary interests should be taken into account, the acknowledgement that compensation for compulsory aspect of the entry and loss of intangible rights will of necessity be arbitrary, that compensation equivalent to the full value of the land includes compensation for the compulsory aspect of the taking, and that compensation for these factors cannot exceed the value of the land, I find the value of the land provides an appropriate benchmark upon which to determine compensation for the compulsory aspect of the taking and loss of rights. Compensation at this level suggests that the value of the compulsory aspect of the taking and loss of intangible rights equates to the difference between the market value of the fee simple interest in the land and the owners' residual and reversionary interest. I acknowledge that this assumption is not based on any evidentiary foundation, and is likely in fact, incapable of proof. It

> acknowledges however that although the landowner has a residual/reversionary interest, there is still compensation owing for the compulsory aspect of the taking and loss of intangible rights, and provides an objective basis, namely the market value of the land, that can be demonstrated with evidence, upon which to determine compensation for these factors.

[62] The Board has typically acknowledged that the loss of rights associated with temporary workspace, is also temporary and that once the company has finished with the temporary workspace there is no further loss associated with the right of entry for temporary workspace. The Board typically compensates for the loss of rights associated with temporary workspace at 50% of the value of the land. (See for example *Spectra Energy Midstream Corporation v. London*, Order 1694-3, February 24, 2015). Despite Mr. Wasmuth's literature review in this case, which I find does not prove the value of the residual or reversionary interests in this case, I see no reason to depart from what has become the Board's practice in this regard.

[63] I find Encana's submission that the right of way should be compensated at 50% of the land value and the temporary workspace at 25% of the land value does not consider compensation for the compulsory aspect of the taking or for the intangible loss of rights. I will use Mr. Wasmuth's estimate of the value of the land as the objective benchmark to compensate not only for the value of the land but also for the intangible loss associated with the compulsory aspect of the taking and the loss of rights as a result of both the right of way and the well site.

Loss of Profit

[64] Mr. Lumnitzer's evidence was that in 2016, 940 bales of hay were harvested from 190 acres of his farm, which equates to approximately five bales per acre. His evidence was he sells his hay bales for $65/bale. Five bales x $65 equates to gross income of $325/acre, which is higher than the amount typically paid for loss of profit for pasture and hay land in the other lease agreements before me.

[65] Trevor Sheehan, a professional agrologist, estimated farming losses as a result of the rights of entry (Exhibit 3). Mr. Sheehan's evidence was that from inspection, it appeared that no or very little hay had been harvested from the Lands in the last few years. He provided photographs of bales of hay left in the fields at various states of decomposition. He nevertheless conducted an assessment of the probable agricultural damages that would be incurred by a reasonable operator as a result of the well site and right of way.

[66] Mr. Sheehan estimated loss of profit from the well site area on a net basis adjusting for expenses, but based on 7.86 productive acres, which includes 0.08 acres of severed land. He estimated gross revenue based on average yields and prices for good quality mixed hay at $145/acre. Applying average total direct expenses from published data, he concluded actual loss of profit from the lands at $41/acre. He estimated the total loss of profit attributable to the well site at $322 annually.

[67] It is evident from the other lease agreements before me however, that typically loss of profit from crop loss is not compensated on a net basis. The amounts paid for loss of profit between $250 and $400 per acre are significantly higher than the net loss calculated by Mr. Sheehan and reflect an expectation that compensation for loss of profit should be based on gross rather than net revenue from farming activity. Mr. Lumnitzer's evidence of gross revenue from hay in 2016 at $325/acre is above the typical compensation for loss of profit attributable to hay and pasture in the lease agreements before me but within the range typically paid for cultivated land. I will calculate loss of profit at $325/acre based on Mr. Lumnitzer's evidence, for both the wellsite and the right of way.

[68] Applying $325/acre to 7.86 acres results in loss of profit of $2,555 annually from the well site area. Crop loss from the .44 acres of temporary workspace for 2016 equates to $143. As the well site temporary workspace is wholly within the 3.28 acres of temporary workspace for the right of way, crop loss for subsequent

years is compensated in the loss of profit from temporary workspace for the right of way.

[69] Mr. Sheehan initially estimated loss of profit from the right of way and temporary work space area based on 100% loss for 2016 and 2017, 75% loss for 2018, 50% loss for 2019, and 25% loss for 2020. As the evidence is that Mr. Lumnitzer harvested a hay crop in 2016, he revised his estimate to remove the 2016 loss. His estimate of declining loss over the next four years allows time for the hay to re-establish following construction of the right of way. I accept the estimated declining crop loss over the next four years is reasonable allowing for 100% in 2017 declining to 25% loss in 2020. As 1.48 acres of the pipeline right of way is within the well site area, the compensable area of right way for the purpose of calculating loss of income is 5.69 acres (7.17-1.48 = 5.69). The 1.48 acres within the well site area is included in the loss of profit attributable to the well site.

Severance

[70] The well site severs .08 acres. The compensable area for the purpose of calculating loss of profit from the wellsite entry is, therefore, 7.86 acres.

Nuisance and Disturbance

[71] As the wellsite creates an obstruction in the field that must be worked around, Mr. Sheehan estimated the additional time involved due to extra cornering and working additional headlands, providing an empirical estimate of tangible nuisance and disturbance. In calculating the additional time, he made various assumptions favourable to the landowner respecting equipment size and working direction to create the worst-case scenario. He estimated the annual additional cost of extra field working time at $130.

[72] Mr. Sheehan also estimated the additional input costs from working additional headlands at $10 annually and decreased revenues attributable to additional headlands at $49 annually. Mr. Sheehan's total estimate of annual loss attributable to tangible nuisance and disturbance associated with the well site is, therefore, $189.

[73] Mr. Lumnitzer did not provide evidence of either tangible or intangible nuisance and disturbance. It is evident from the lease agreements before me, however, that compensation for nuisance and disturbance ranges from $1,900 to $2,500 annually, an amount that clearly exceeds calculable tangible loss from working around an installation and additional input costs. I find there is an expectation that compensation for nuisance and disturbance will exceed what can be empirically estimated as tangible loss. As the well site in this case is in the corner of a field and as the Lands are not a home quarter, I find compensation for nuisance and disturbance associated with the wellsite should be on the low end of the range and find $2,000 annually to be appropriate.

Compensation for Right of Way and Temporary Workspace

[74] Considering all of the above, I calculate compensation payable by Encana to the Lumitzers arising from the right of entry for the pipeline and temporary workspace as follows:

For loss of rights/compulsory aspect of the taking/value of the land – Right of way	7.17 acres x $1,325	$9,500
For loss of rights/compulsory aspect of the taking/value of the land – Temporary Workspace	3.28 acres x $1,325 x 50%	$2,173
Loss of profit – Right of Way and temporary workspace (5.69* acres + 3.28 acres = 8.97 acres)	2017: 8.97 acres x $325 x 100% 2018: 8.97 acres x $325 x 75% 2019: 8.97 acres x $325 x 50% 2020: 8.97 acres x $325 x 25%	$2,915 $2,186 $1,458 $ 729
		$18, 961

*7.17 acres – 1.48 acres within the wellsite = 5.69 acres

[75] I find appropriate compensation for the loss arising from Encana's right of way and temporary workspace is $19,000.00.

Compensation for wellsite

[76] I calculate compensation payable by Encana to the Lumitzers arising from the right of entry for the wellsite as follows:

		Initial	Annual
For loss of rights/compulsory aspect of the taking/value of the land – wellsite area	7.78 acres x $1,365	$10,620	
Loss of profit – wellsite area and severance (7.78 acres + .08 acres = 7.86 acres)	7.86 acres x $325	$2,555	$2,555
Loss of profit temporary workspace for 2016*	.44 acres x $325	$143	
Nuisance and disturbance (initial padsite construction and ongoing)		$2,000	$2,000
		$15,318	**$4,555**

*compensation for following four years while crop re-establishes is included in the 3.28 acres of temporary workspace for the right of way

[77] I find the compensation payable for loss arising from the wellsite is an initial payment of $15,320.00 and annual rent of $4,555.00.

Compensation for Additional Well

[78] The wells were not drilled when the padsite was constructed but are intended to be drilled in the first quarter of 2017, necessitating another period of construction with associated nuisance and disturbance. I find there should be an additional payment of $2,000 to compensate for the additional nuisance and disturbance when the wells are drilled.

[79] The lease agreements before me indicate that there is an expectation of additional compensation for each well beyond the first well drilled on a multi-well padsite. As the evidence does not suggest there will be significant additional

impact to the landowner for the additional well, I find the additional payment should be at the low end of the indicated range or $250 for the second well annually. When the second well is drilled, the annual rent should be increased by $250 bringing it to $4,805.00.

ORDER

[80] Encana Corporation shall forthwith pay to Fred and Wilhelmina Lumnitzer the sum of $2,700.00 for the right of way being the difference between total compensation owning of $19,000.00 and the partial payment of $16,300.00 already made.

[81] Encana Corporation shall forthwith pay to Fred and Wilhelmina Lumnitzer the sum of $1,948.00 for the well site being the difference between total initial compensation owning of $15,320.00 and the partial payment of $13,372.00 already made.

[82] Encana Corporation shall forthwith pay Fred and Wilhelmina Lumnitzer the sum of $4,555.00 for the annual rent owing as of May 26, 2016, and shall continue to pay annual rent of $4,555.00 on each anniversary date of the wellsite right of entry thereafter.

[83] Upon the drilling of the two wells, Encana Corporation shall forthwith pay to Fred and Wilhelmina Lumnitzer the sum of $2,000.00. Encana Corporation shall increase the annual rent by $250 for the second drill effective on the first anniversary date of the initial right of entry following the drilling of the wells.

DATED: November 24, 2016

FOR THE BOARD

Cheryl Vickers, Chair