File No. 1955
Board Order No. 1955-1

October 23, 2017

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 3 TOWNSHIP 80 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
THE NORTH EAST ¼ OF SECTION 3 TOWNSHIP 80 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Encana Corporation

(APPLICANT)

AND:

Rodney Allen Strasky and
Kim Lori Strasky

(RESPONDENTS)

BOARD ORDER

Heard: By way of written submissions
Appearances: Daron K. Naffin, Barrister & Solicitor, for the Applicant
J. Darryl Carter, Q.C., for the Respondents

Introduction and Issues

[1] The Applicant, Encana Corporation ("Encana"), seeks a right of entry order over the Lands owned by the Respondents, Rodney Allen Strasky and Kim Lori Strasky, to survey and complete archeological and soils work and to construct and operate a proposed pipeline in four segments (the "Pipeline"), not yet permitted by the Oil and Gas Commission ("OGC"). The Respondents question the Board's jurisdiction on the basis that the Pipeline is not a "flow line" within the meaning of the *Oil and Gas Activities Act* and the *Petroleum and Natural Gas Act.*

[2] As the Board's jurisdiction with respect to pipelines is limited to those pipelines that are flow lines as defined in the legislation, the issue is whether the Pipeline is a "flow line".

[3] Encana provided an "Application Supplement" with its application for a right of entry order describing the proposed project and referencing previous decisions of the Board considering the definition of "flow line" to provide the Board with information from which it could determine it had jurisdiction. Encana did this in line with a letter decision of the Board dated June 7, 2017 in Encana Corporation v. Tailwind Properties Ltd. (the "Tailwind Letter", attached to this decision as Schedule "A"). In addition to their substantive arguments on the issue of whether the Pipeline is a "flow line", the Respondents submit that Encana has not submitted evidence for the Board to satisfy itself that the proposed project falls within its jurisdiction. They submit the Board must make a decision in each case based on careful reasoning and that it cannot rely on the assertions of counsel respecting the function of a proposed pipeline or submissions that the Board should rely on its previous cases in

similar circumstances. They submit the Board should require evidence in Affidavit form that may be subject to cross-examination if necessary.

[4] A preliminary issue arises, therefore, as to the nature of the information the Board will require to satisfy itself it has jurisdiction and, in particular, whether it must receive evidence from someone with firsthand knowledge by sworn affidavit to satisfy itself that a proposed pipeline is a "flow line" over which it has jurisdiction.

Information Required by the Board

[5] In the Tailwind Letter I said that "when making an application for a right of entry order, the applicant must provide sufficient information to indicate that the proposed project is one that is within the jurisdiction of the Board to grant a right of entry order." The Straskys submit that Encana must provide evidence to satisfy the onus of proving the proposed Pipeline falls within the definition of a "flow line". They submit that evidence has to be from someone with firsthand knowledge as to the nature and purpose of the proposed project and that the evidence would have to be in affidavit form.

[6] The Surface Rights Board is an administrative tribunal established by the *Petroleum and Natural Gas Act.* In accordance with section 40 of the *Administrative Tribunals Act*, made to apply to the Board by way of section 148 of the *Petroleum and Natural Gas Act*, the Board "may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." The Board is not bound by the rules of evidence as they apply in judicial proceedings. The Board has wide discretion with respect to the information it may accept. Use of the word "information" instead of "evidence" in the *Administrative Tribunals Act* implies that the Board may accept information that would not necessarily be considered proper evidence in a court of law. I find the Board has the discretion and authority to accept whatever information it considers relevant, necessary and appropriate regardless of whether that information would

properly be considered evidence in a judicial proceeding or whether it would be admissible in court.

[7] This is not to say that the Board may not require evidence in any particular form, including a sworn affidavit, where is considers it to be necessary and appropriate. As I said in the Tailwind Letter, "If the Board has concerns or questions it may seek further information..." The Board may require an applicant to provide evidence in affidavit form where, in its discretion, it considers affidavit evidence to be necessary and appropriate, but if it considers information in another form to be satisfactory in the circumstances, it may accept that information.

[8] As discussed in the Tailwind Letter, the Board has now written seven decisions considering the definition of "flow line" dealing with 11 different types of pipeline segments in order to determine the extent of the Board's jurisdiction. None of those decisions has been judicially reviewed. The decisions comprise a body of law upon which stakeholders may rely in assessing whether a proposed pipeline is within the jurisdiction of the Board. As said in the Tailwind letter:

> To the extent the Board has determined that a particular type of pipeline or pipeline segment is or is not a "flow line", stakeholders may rely on those decisions and expect the Board to consistently interpret the term "flow line" to the extent a proposed project is the same type of pipeline or pipeline segment and to the extent new arguments not previously considered have not been raised. If a proposed pipeline presents different circumstances from those previously considered by the Board, or if an argument not previously considered is made, the Board must consider those circumstances or that argument. However, if a proposed pipeline or segments of a proposed pipeline project are the same as those previously determined by the Board to be flow lines within its jurisdiction, unless there is new information or new arguments brought to the Board's attention, the Board may rely on its previous decisions to accept jurisdiction and need not reconsider the merits of each case.

[9] The information that an applicant must provide to satisfy the Board of its jurisdiction does not necessarily need to be evidence according to the law of

evidence. It may be information in any form. If the Board is of the view that further information is required, or that the information should be provided by way of evidence in affidavit form, it may make that request. It need not, however, require the applicant in every case to provide evidence of that nature.

Is the information provided in this case sufficient?

[10] In this case, Encana included with its application for a right of entry a written supplementary document describing the proposed Pipeline and each segment. The information includes whether each segment is uni-directional or bi-directional, what will be carried within each segment from where and to where it will be carried, and where that substance is carried beyond that point. It includes references to previous case law where the Board has considered similar projects. Encana also included a copy of the Application Report to the OGC which also provides information about the direction of each segment, what is carried within each segment, the "from" and "to" locations and other technical information. Encana also included a colour coded schematic drawing of the proposed Pipeline.

[11] The information sufficiently describes the purpose and function of each Pipeline segment to enable an assessment of whether the Pipeline and each segment is a "flowline". The written application supplement is consistent with the information in the Application Report to the OGC and I do not think it is necessary in the circumstances to require Encana to provide evidence in Affidavit form.

Is the Pipeline a "flow line"?

[12] The proposed Pipeline consists of four segments.

[13] Segment 1 is a uni-directional line that will carry raw produced natural gas and liquids from various upstream well sites via a riser (the "9-10 Riser") to a compressor station (the "9-27 Compressor"). The gas will then be transferred either to the

Enbridge Dawson Creek plant or the Enbridge McMahon plant for further processing.

[14] Segments 2 and 3 are uni-directional lines that will carry raw produced natural gas and liquids from various upstream well sites via the 9-10 Riser to the "15-27 Plant", where the gas will undergo separation, compression and dehydration prior to being transferred to the Enbridge Dawson Creek plant for processing. The gas will then be transferred to the TransCanada sales point.

[15] Segment 4 is a bi-directional flow line that will carry produced water from the Water Resource Hub at 16-36-78W6 (the "Water Hub") to various well sites for hydraulic fracturing activities and from the well sites back to the Water Hub. The Water Hub is the same Water Hub that the Board determined was a "facility" in *Encana Corporation v. Ilnisky*, Order 1823-1.

[16] In a letter to Mr. and Mrs. Strasky dated April 25, 2017, Encana advised that upon completion of the project "the license and ownership of the Natural Gas Gathering Pipeline will be transferred to Veresen Midstream General Partner Inc. ("Veresen"). Encana will assign the Right of Way agreements to Encana and Veresen where both companies will retain an interest (pipeline) in the common right of way."

17] [The *Oil and Gas Activities Act* provides the following definition of "flow line":

> "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.

[18] The Board has considered the definition of "flow line" in a number of cases. Those cases are summarized in *Encana Corporation v. Strasky*, Order 1911/1913-1 and I will not repeat them here. Essentially, the Board has found that pipelines that function as part of the gathering system for the production of natural gas are "flow

lines". They need not connect directly to a well head, but may connect well heads indirectly with scrubbing, processing or storage facilities as long as they are part of the gathering system. The Board has found that scrubbing, processing or storage facilities demarcate the extent of the Board's jurisdiction over pipelines.

[19] The information provided by Encana with this application is sufficient for me to conclude that Segments 1, 2 and 3 of the proposed Pipeline will connect well heads with one of two processing facilities. The information satisfies me that it will function as part of the gathering system and that they are similar to other lines that the Board has found to be "flow lines" in *Ilnisky*, *Spectra Energy Midstream Corporation v. London*, Order 1694-3, *Encana Corporation v. Jorgensen*, Order 1852/1853-1, and *Encana Corporation v. Jorgensen*, Order 1939-1, in that they will carry unprocessed raw natural gas from wellsites to processing plants in line with the Board's findings in earlier decisions respecting what constitutes "processing" and a "processing plant". The Straskys have not provided any new arguments not previously considered by the Board to convince me that I should not follow the Board's previous jurisprudence and accept jurisdiction.

[20] The information provided by Encana is sufficient for me to conclude that Segment 4 of the proposed Pipeline is similar to hydraulic fracturing water supply and water return lines found to be flow line in *Ilnisky*. The Respondents submit the Board did not properly consider the words "conveyed substance" in the definition of flow line in coming to the conclusion that the water lines in *Ilnisky* were flow lines. The Straskys' argument is essentially that the "conveyed substance" in the line that connects a well head to a processing plant must be the same as the "conveyed substance" in the subsequent transmission, distribution or transportation line. That is certainly one possible interpretation of the definition. It is an interpretation, however, that the Board found in *Ilnisky* would result in absurd consequences and not conform with legislative intent that the Board have jurisdiction over those pipelines that function collectively as the gathering system. I am not persuaded by

the arguments in this case that the interpretation is incorrect or unreasonable or that I should depart from it.

[21] Mr. and Mrs. Strasky submit that fracking is not part of the gathering system but is akin to suggesting "feeding grain to the hens is part of gathering the eggs". Hydraulic fracturing, also called fracking or fraccing, is a process used to improve the permeability of a gas reservoir thus enabling the gas to be produced or retrieved from the reservoir. It is necessary to the production of natural gas in certain circumstances. The Board found in *Ilnisky* that hydraulic fracturing water supply and water return lines function as part of the gathering system for the production of natural gas. Mr. and Mrs. Strasky's submission in this case does not lead me to a different conclusion.

[22] Finally, Mr. and Mrs. Strasky submit that the fact that a pipeline will be assigned to a midstream company like Veresen Midstream is a matter the Board has never dealt with before. The intended assignment of a pipeline from one company to another is not relevant to the definition of "flow line".

[23] I am satisfied that the Pipeline is a "flow line" and that the Board has jurisdiction.

Conclusion

[24] The information before me sufficiently describes the function of the proposed Pipeline and each of its segments and satisfies me each segment is a "flow line" in accordance with the Board's jurisprudence on the issue. The jurisdictional challenge by the Respondents does not raise new issues not previously considered by the Board that give me cause to request further information, require the applicant to provide evidence in affidavit form, or reconsider the jurisprudence respecting similar pipelines found to be "flow lines".

[25] I am satisfied the Board has jurisdiction. The application for a right of entry order will be referred to the mediator.

DATED: October 23, 2017

FOR THE BOARD

Cheryl Vickers, Chair

APPENDIX "A"
ORDER 1955-1

SURFACE RIGHTS BOARD

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Application Forms and information about the Board are available from any Service BC Centre (Government Agent) and Applications may be delivered to the Board either directly or through Service BC

June 7, 2017

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Re: SRB file 1940; Encana Corporation v. Tailwind Properties Ltd.
THE NORTH WEST 1/4 OF SECTION 34 TOWNSHIP 79 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT (the Lands)

I write further to my correspondence of May 23, 2017 (incorrectly captioned SRB file 1917), and the ensuing email correspondence from : Mr. Carter, May 30, 2017 (two emails); Mr. Myers, May 30, 2017; myself, June 5, 2017; Mr. Carter, June 5, 2017; Mr. Myers, June 6, 2017; and Mr. Carter, June 6, 2017.

Encana Corporation has applied to the Board for a right of entry order to Lands owned by Tailwind Properties Ltd. and occupied by Rod and Kim Strasky to construct and operate a pipeline in four segments as permitted by the Oil and Gas Commission on April 24, 2017.

The area of the Lands for which Encana seeks right of entry include areas to be used for the pipeline right of way, temporary workspace, and a sump.

I asked Mr. Carter to advise if the Respondents took issue with whether any or all of the proposed pipelines are "flow lines" within the Board's jurisdiction, or any other jurisdictional issues prior to the application being referred for mediation. Mr. Carter submitted that the onus is on Encana to demonstrate the proposed pipelines come within the definition of "flow line", "i.e that they are pipelines that connect a well head with a scrubbing, processing or storage facility and that precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line" (emphasis in original), and that Encana had not satisfied that onus in the materials filed with the application. Mr. Carter further noted that:

- "the proposed right of way stops at the south boundary of the proposed padsite covered by SRB Order 1917 so it does not even purport to be connected to a wellhead at that location.
- The application appears to include an area for a proposed sump...The 'Compensation Summary' page attached to the application also refers to a "Remote Sump"...A "sump" would not come within the definition of a pipeline. Also I do not see where a "sump" on the land was approved by the OGC."

Mr. Myers submitted that if the Respondents wished to pursue the issue of the Board's jurisdiction they can make a preliminary application. He submitted that having applied to the Board for the right of entry order, Encana is of the view the pipelines fall within the Board's jurisdiction "and that in the absence of a preliminary jurisdictional application from the Respondents, Encana does not intend to present any further submissions in support of that submission at this stage."

I accept that when making an application for a right of entry order, the applicant must provide sufficient information to indicate that the proposed project is one that is within the jurisdiction of the Board to grant a right of entry order. If the Board has concerns or questions it may seek further information, or if the Respondent challenges the jurisdiction of the Board, the Respondent may make an application to that effect providing the reasons for the challenge. However, the Board need not engage in a jurisdictional inquiry in the absence of concerns or questions it may have from the information provided or an application from the Respondent.

By email dated June 5, 2017, I advised the parties that the Board accepted it has jurisdiction with respect to the proposed pipeline on the basis of the information provided by Encana with its application subject to any specific challenge from the Respondents. I asked Encana to provide more information as to the purpose of the sump.

By email dated June 5, 2017, Mr. Carter advised that he did challenge the Board's jurisdiction. He submitted that "landowners are entitled to a careful analysis by the Board in each case regarding the issue of jurisdiction. Each case must be decided on its own facts and merits." He then provided the following submission:

> "In this case, the proposed segment 2 pipeline is a unidirectional fuel line. There is no evidence that this pipeline will precede the transfer of the conveyed substance (fuel) to or from a transmission, distribution or transportation line. Encana would have to show what .transmission, distribution or transportation line that might be and how the

> conveyed substance (fuel) is transferred to or from it. The same issue arises with respect to the proposed segment 3 and 4 lines. Encana would have to show what transmission, distribution or transportation line the conveyed substance (produced water) will be transferred to or from.
>
> I note too that the Board has not dealt with the fact that the proposed right of way stops at the south boundary of the proposed padsite covered by SRB Order 1917so it does not even purport to be connected to a wellhead at that location."

By email dated June 6, 2017, Mr. Myers advised as to the purpose of the sump as follows:

> "In order to construct the subject pipeline, Encana is required to bore beneath the 245 Road and an existing pipeline and pull the pipeline segments through those crossings. As part of that process, Encana requires the sump for the inert water-based drilling fluid and soil removed from the bores. The sump contents will be mixed with subsoil and then covered with topsoil in order to reclaim the area.
>
> The location of the sump is shown on Individual Ownership Plan 150677NP04R0, which is included in Encana's application and is attached again here for reference. The sump is also specifically contemplated by OGC Permit No. 100101424 (the "Permit") as an oil and gas activity associated with the construction and operation of the subject pipeline and is clearly shown on the construction plan appended to the Permit."

Mr. Carter responded by email dated June 6, 2017 submitting that "just because the sump was shown on a construction plan does not mean it was approved or even considered by the OGC."

The current definition of "flow line" came into effect on October 4, 2010. The Board has now written seven decisions considering the definition of "flow line", dealing with 11 different types of pipeline segments in order to determine the extent of the Board's jurisdiction with respect to pipelines. These decisions are:

i) *Murphy Oil Ltd. v. Shore*, Order 1745-1, September 13, 2012
ii) *Encana Corporation v. Ilnisky*, Order 1823-1, April 11, 2014
iii) *ARC Resources Ltd. v. Hommy*, Order 1837-1, September 26, 2014
iv) *Spectra Energy Midstream Corporation v. London*, Order 1694-3, February 24, 2015
v) *Encana Corporation v. Jorgensen*, Order 1852/1853-1, June 15, 2015 (*Encana v. Jorgensen 1*)
vi) *Encana Corporation v. Strasky and Tailwind Properties Ltd.,* Order 1911/1913-1, October 20, 2016
vii) *Encana Corporation v. Jorgensen*, Order 1939-1, May 31, 2016 (*Encana v. Jorgensen 2*).

The various types of pipelines that the Board has determined to be flow lines within its jurisdiction and those which it has determined not to be flow lines are discussed in *Encana v. Strasky*. In *Encana v. Jorgensen 2* the Board summarized its findings and the Board's jurisdiction with respect to pipelines as follows:

> "Essentially, the Board has found that pipelines that function as part of the gathering system for the production of natural gas are "flow lines". They need not connect directly to a well head, but may connect well heads indirectly with scrubbing, processing or storage facilities as long as they are part of the gathering system for the production of natural gas. The Board has found that scrubbing, processing or storage facilities demarcate the extent of the Board's jurisdiction over pipelines."

In *Encana v. Jorgensen 1* the Board found that the "scrubbing, processing or storage facilities" demarcating the extent of the Board's jurisdiction are "scrubbing facilities, processing facilities, or storage facilities, where scrubbing, processing in the industry sense as the processing of raw natural gas into marketable gas, or storage is the principle purpose of the facility".

Mr. Carter submits that landowners "are entitled to a careful analysis by the Board in each case regarding the issue of jurisdiction" and that "each case must be decided on its own facts and merits." I agree that each case must be decided on its own facts and merits, but to the extent the Board has already considered similar facts and arguments, unless different information or new arguments are advanced, it should be able to rely on its existing jurisprudence defining its jurisdiction.

None of the Board's decisions interpreting the definition of "flow line" and determining the extent of the Board's jurisdiction with respect to pipelines has been judicially reviewed. Together, they provide a body of law interpreting the definition of "flow line" upon which the Board's stakeholders may rely in assessing whether a proposed pipeline project is within the jurisdiction of the Board. To the extent the Board has determined that a particular type of pipeline or pipeline segment is or is not a "flow line", stakeholders may rely on those decisions and expect the Board to consistently interpret the term "flow line" to the extent a proposed project is the same type of pipeline or pipeline segment and to the extent new arguments not previously considered have not been raised. If a proposed pipeline presents different circumstances from those previously considered by the Board, or if an argument not previously considered is made, the Board must consider those circumstances or that argument. However, if a proposed pipeline or segments of a proposed pipeline project are the same those previously determined by the Board to be flow lines within its jurisdiction, unless there is new information or new arguments brought to the Board's attention, the Board may rely on its previous decisions to accept jurisdiction and need not reconsider the merits of each case.

The information provided by Encana with its application in this case indicates the proposed pipeline has four segments. Segment 1 is a 12" uni-directional line to carry natural gas from 13-34-079-17 (13-34) to 16-28-079-17 (16-28). The location 13-34 is the padsite located on the Lands. Segment 2 is a 4" uni-directional fuel gas line from 16-28 to 13-34. Segment 3 is a 6" uni-directional line to carry produced water from 16-28 to 13-34. Segment 4 is a 4" bi-directional line to carry produced water from 13-34 to 16-28.

Each of these segments is a type of pipeline segment that the Board has found to be within its jurisdiction. The Board found lines carrying produced gas from a well head, like Segment 1 in this case, to be within its jurisdiction in *Murphy Oil v. Shore* and *Encana v. Ilnisky*. The Board has found fuel lines, like Segment 2 in this case, to be within its jurisdiction in *Murphy Oil v. Shore, Encana v Ilnisky* and *Encana v. Jorgensen 2*. The Board has found lines

carrying produced water both to and from well sites, similar to Segments 3 and 4 in this case, to be within its jurisdiction in *Encana v. Ilnisky* and *Encana v. Jorgensen 2*.

With respect to Mr. Carter's arguments about the "conveyed substance" as they relate to the fuel line, this argument was considered and rejected in *Murphy Oil v. Shore*. This argument as it relates to the lines carrying produced water was considered and rejected in *Encana v. Ilnisky*.

With respect to Mr. Carter's argument that the right of way stops at the southern boundary of the padsite "so it does not even purport to be connected to a wellhead", a right of way need not extend into an area covered by a well site lease or entry order. Assuming Mr. Carter means to argue that the evidence does not show that the pipeline connects to a well head, the Board has found that a flowline does not have to connect directly to a well head (*Spectra v. London*). The Permit indicates that each of these lines connects to the padsite at 13-34.

The Board has found that a flow line is a pipeline that functions as part of the gathering system for natural gas. The OGC Permit provided by Encana with its application provides sufficient information for the Board to conclude that each of these four segments function as part of the gathering system for natural gas. They function collectively to produce natural gas from the wells at padsite 13-34.

I am satisfied on the basis of the information provided by Encana that the proposed pipeline in four segments is a "flow line" in accordance with previous decisions of the Board, and that the Board has jurisdiction in this application. The information before me and the arguments made by Mr. Carter do not suggest there are different circumstances or new issues in this case that have not already been considered by the Board. Consequently, I am prepared to rely on the body of the Board's jurisprudence on the issue of what is a "flow line" to accept jurisdiction in this case with respect the proposed pipeline.

As for the sump, Mr. Carter argues the sump does not come under the definition of pipeline and submits it has not been approved by the OGC. I agree with Mr. Carter that just because the sump is shown on the construction plan it does not mean it is necessarily covered by the Permit. Indeed, paragraph 6 of the Permit indicates the construction plan is not integral to it.

The issue on a right of entry application for the Board, however, is whether the applicant requires a right of entry order to enter, occupy or use private land to carry out an oil and gas activity. An "oil and gas activity" includes the construction of a pipeline. Encana has provided information indicating how the sump will be used in the construction of the pipeline. To the extent the purpose of the sump is to facilitate construction of the pipeline, just as the purpose of temporary workspace it to facilitate construction of the pipeline, it is an oil and gas activity over which the Board has jurisdiction. The Board may determine whether Encana requires a right of entry order for that purpose.

I am satisfied the Board has jurisdiction and the application will be referred to the mediator.

For the Board

Cheryl Vickers, Chair