File No. 1633
Board Order 1633-1

May 5, 2010

MEDIATION AND ARBITRATION BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
NE ¼ Section 17, Township 79, Range 14, W6M Peace River District;
NW ¼ Section 17, Township 79, Range 14, W6M Peace River District;
NW ¼ Section 21, Township 79, Range 14, W6M Peace River District except Plan H782;
NE ¼ Section 16, Township 79, Range 14, W6M Peace River District;
SW ¼ Section 5, Township 80, Range 14, W6M Peace River District;
NW ¼ Section 5, Township 80, Range 14, W6M Peace River District;
SW ¼ Section 8, Township 80, Range 14, W6M Peace River District;
NW ¼ Section 16, Township 79, Range 14, W6M Peace River District except Plan H782
(The "Lands")

BETWEEN:

ARC PETROLEUM INC.

(APPLICANT)

AND:

JOHN MILLER AND MARY MILLER

(RESPONDENTS)

BOARD ORDER

Heard by way of written submissions closing May 3, 2010

Rick Williams, Barrister and Solicitor, for the Applicant
Anne Clayton and Elvin Gowman, for the Respondents

INTRODUCTION

[1] ARC Petroleum Inc. ("ARC") has applied to the Board for mediation and arbitration of access to lands owned by John and Mary Miller (the "Millers") and compensation for that access. The applications concern two wellsites (ARC HZ Dawson C9-17-79-14 and ARC HZ Dawson D9-17-79-14) on NE ¼ of S. 17, Twp 79, R 14, W6M, and pipelines from ARC's wellsites to treatment facilities, namely a compressor station and a proposed plant.

[2] The Millers have applied to the Board for a preliminary determination on whether the Board has jurisdiction over these applications. Specifically, the Millers submit that the Board has no jurisdiction over the application for the wellsites as there is an existing lease over the lands and the terms of that lease govern. As for the pipelines, the Millers say that the Board has no jurisdiction as they are not "flow lines" within the definition of the *Pipeline Act*.

THE WELLSITES

[3] On February 20, 2007, the parties entered into a surface lease for wells ARC Dawson 9-17-79-14, and ARC HZ Dawson A9-17-79-14. An amendment to the lease was entered into between the parties in May, 2007 to include a further wellsite, ARC HZ Dawson B9-17-79-14, in which the parties also agreed that before a change in use could be implemented, "the owner must be consulted and a written agreement negotiated."

[4] ARC is now seeking access to construct and operate two additional wells (C9-17-79-14 and D9-17-79-14) adjacent to the existing wells.

[5] The Millers say that, notwithstanding the approval of the Oil and Gas Commission, the Board has no jurisdiction over the application regarding these two additional wells because of the requirement for a written agreement to be negotiated, which has not been done. They say the Board has no authority under the *Petroleum and Natural Gas Act* (the "*PNGA*") to interfere with the contractual obligations between the parties.

[6] In support of this argument, the Millers rely upon section 1(a) of the *Surface Lease Regulation*, BC Reg. 479/74 (the "Regulation") which provides that every surface lease shall contain a term that no surface area covered by the lease shall

be used for purposes other than those set out in the lease unless the grantor of the lease consents in writing to such other use.

[7] ARC submits that ARC has approached the Millers to negotiate but was unsuccessful, and therefore, has applied to the Board. ARC's application is within the scope of the Board's authority and it is not contingent nor does it require the Board to determine the contractual obligations under a prior lease. In fact, ARC says the Board has no jurisdiction to adjudicate the issue of contractual interpretation of the lease and over the remedy the Millers are really seeking, which is specific performance of the lease. In the alternative, ARC says that the clause in the amendment of the lease requiring written agreement for a change in use is void for uncertainty and legally unenforceable.

Board's decision:

[8] There are two methods (section 9 of the *PNGA)* by which an oil and gas company can gain access to a landowner's property: either to enter into a surface lease allowing the entry upon terms negotiated between the parties, or if an owner of the land refuses to grant a satisfactory surface lease, to apply to the Board for a right of entry order.

[9] The Board's jurisdiction over this application is contained in section 16 of the *PNGA*. Section 16 provides that "a person" may apply to the Board if the person "requires land to explore for, develop, or produce petroleum or natural gas or explore for, develop or use a storage reservoir or for a connected or incidental purpose, and an owner of the land refuses to grant a surface lease satisfactory to that person authorizing entry, occupation, or use for that purpose..."

[10] The Millers have not submitted anything to say that the legislative requirements for an application to the Board as set out in the *PNGA* have not been met.

[11] Although, there is nothing in the *PNGA* that precludes the Board's jurisdiction due to existing surface leases, they rely upon the terms of the amendment to the lease. But, the fact that there is an existing lease does not preclude the Board's jurisdiction or a company's ability to apply to the Board under the *PNGA*. The Board is not granting a surface lease or amendment to a surface lease, but rather is determining whether a right of entry should be granted and mediating and adjudicating on the appropriate compensation. Even after a right of entry order is granted, the parties can still negotiate and enter into a surface lease, or written amendments to an existing lease, and are encouraged to do so. If a surface lease or written amendments to an existing lease are entered into, the *Regulation* would apply. The *Regulation* itself does not preclude the Board's authority under the *PNGA*. Rather the *Regulation* governs the requirements when a surface lease is entered into.

[12] Here, ARC has made an application under the *PNGA* for a right of entry and appropriate compensation as the owner of the land has refused to grant a satisfactory surface lease for this new wellsite. The application is within the scope of the Board's authority. The fact it is on existing leased lands does not change the fact that ARC cannot enter the area for purposes of constructing and operating the new wellsites without either a surface lease or right of entry order from the Board. The existence of the prior lease, registered or unregistered in the land titles office, and the terms of that lease are irrelevant to the Board's exercise of its jurisdiction under the *PNGA*. If the Millers wish to enforce the terms of the lease or any other contract, they can do so by way of application to the courts. The Board has no authority to interpret or enforce the terms of the lease, which is what the Millers are essentially requesting.

[13] The Board is not interfering with the contractual obligations between the parties in dealing with this application. It is still up to the parties to negotiate the terms of access and compensation for access for the new wellsites. However, to date, they have been unable to do so. The failure to come to terms cannot now be used to preclude ARC from obtaining access or entry under the *PNGA*.

[14] Therefore, the Millers' application that the Board has no jurisdiction over application 1633-2 is dismissed.

THE PIPELINES

[15] The Millers say that they do not dispute the routing of the pipelines over their lands, however, they want section 3 of the *Expropriation Act* to apply because these pipelines are not "flow lines" as defined in the *Pipeline Act*.

[16] Section 16 of the *Pipeline Act* provides that Part 7 of the *Railway Act* applies to "pipelines" and Part 3 of the *PNGA* applies to flow lines. If the line is a "pipeline" as defined, then the provisions of the *Railway Act* provide that if compensation cannot be agreed upon, the matter is remitted to the courts for arbitration and the *Expropriation Act* applies to determine the "amount" of the compensation, not that section 3 applies.

[17] If the line is a "flow line", then the provisions of the *PNGA* giving the Board jurisdiction applies.

[18] The *Pipeline Act* defines flow lines as follows: "a pipeline serving to interconnect wellheads with separators, treaters, dehydrators, and field storage tanks or field storage batteries." Therefore, a flow line is a specific type of pipeline.

[19] The Millers submit that the lines that ARC proposes do not "interconnect" wellheads with any of these facilities but transport sour gas under pressure from wellhead to a gas processing plant as part of a pipeline network. They say that the plain, dictionary meaning, is that there has to be reciprocal connections between wellheads. In support, they provide a report from Herb Lexa, former appraiser with BC Assessment, who says that the lines do not meet the definition of "flow line" and that the definition requires that the facilities be in the "field". Mr. Lexa offers the opinion that the Board has no jurisdiction to hear these matters because these pipelines are not flow lines.

[20] The Board does not accept Mr. Lexa's opinion evidence. Firstly, Mr. Lexa purports to provide opinion evidence on the ultimate issue before the Board, namely whether or not the lines in question meet the statutory definition of "flow line". In addition, he provides an opinion based on his statutory interpretation of the *Pipeline Act*, again a matter that the Board must decide. As such, his opinion evidence is improper. Finally, Mr. Lexa is not qualified to provide a legal opinion and has no expertise to do so based on his qualifications and lack of legal training. Therefore, I give Mr. Lexa's report little weight.

[21] Finally, the Millers say that only the Oil and Gas Commission has the authority to classify a pipeline and that there is no provision in the *PNGA* for the Board to make orders granting a statutory right of way, only orders granting surface leases.

[22] ARC submits that these lines are "flow lines" as defined by the *Pipeline Act* because the proposed lines serve to directly interconnect wells with existing treatment facilities at the ARC compressor station at 1-34-79-14-WGM and the proposed ARC Dawson plant at 4-35-79-14-WGM. The compressor station contains two separators and the proposed plant will contain one separator. In support, ARC provides an Affidavit from its engineer, Leah Hrab. In addition, ARC relies upon the Board's decision in *Spectra Energy Midstream Co v. Vause*, MAB Order 420A (Dec. 11, 2007).

Board's Decision:

[23] The Board has jurisdiction over these applications if the proposed pipelines are "flow lines" within the definition of the *Pipeline Act*. The Board, not the Oil and Gas Commission, has the authority to determine whether or not it has jurisdiction under the provisions of the *PNGA*, and where relevant, the *Pipeline Act*. Section 16 of the *Pipeline Act* specifically states that Part 3 of the *PNGA* applies to flow lines, and this part gives the Board jurisdiction over right of entry and compensation, the very application before it now. The application is not for a statutory right of way and the Board is not attempting to issue as statutory right of way under the application. Rather, the application is for a right of entry order and

determination of the appropriate compensation, which the Board has authority over under Part 3 of the *PNGA*.

[24] The Millers say that the line is a "pipeline", namely a conduit through which the gas is transported under pressure to a treatment facility. It is true that this meets the definition of a "pipeline" under the *Pipeline Act*, however, this does not preclude the line from also being a flow line because a flow line is a type of pipeline. The definition of "pipeline" confirms this because it includes "(b) all gathering and flow lines used in oil and gas fields to transmit oil and gas..." If the line meets the narrower definition of "flow line", the Board has jurisdiction.

[25] The evidence before me is that these lines propose to interconnect the wells with treatment facilities at the compressor stations and the proposed Dawson plant, both of which contain separators (see Affidavit of Mr. Hrab). There is no evidence to the contrary. Therefore, they are "a pipeline serving to interconnect wellheads with separators", and consequently, are "flow lines". There is no requirement that the separators be "in the field", rather the definition speaks to storage tanks and batteries being in the "field".

[26] The Board has previously applied the principles of statutory interpretation to the definition of "flow line" in the *Spectra* decision where it found that pipelines that connected with producer owned pipelines, rather than wellheads directly, were still "flow lines" as the pipeline need only "serve" to connect, not connect directly. This decision is not under appeal as argued by the Millers, rather leave to file a judicial review of this decision was denied. There is currently a judicial review petition of another of the Board's decisions in that application to amend the style of cause, an unrelated matter. In fact, upon dismissing the application for leave to file a judicial review of the *Spectra* decision, Madam Justice Bruce found that the likelihood of a successful judicial review on the jurisdictional question (ie whether the Board had jurisdiction and if the line was a "flow line") was marginal based on the applicable standard of review.

[27] The Miller's arguments that the Board has no jurisdiction because section 3 of the *Expropriation Act* prevails, or that section 16(1) of the *PNGA* only refers to an owner refusing a surface lease, are unfounded. The correct interpretation of the interplay between *Pipeline Act*, the *PNGA*, and the *Railway Act* was set out in the Board's reasons in *Spectra*. If a pipeline meets the definition of "flow line", the Board has jurisdiction and if it does not, then the *Railway Act* prevails. This interpretation was upheld by Bruce, J. Section 3 of the *Expropriation Act* has no role to play in precluding the Board's jurisdiction nor does it apply to flow lines. As Section 16 is in part 3 of the *PNGA*, it applies to flow lines pursuant to section 16(4) of the *Pipeline Act*.

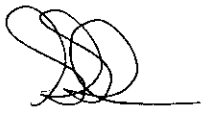
[28] Therefore, the Board dismisses the Millers' application that the Board has no jurisdiction over the applications 1633-1, 1633-6, 1633-3, 1633-7.

CONCLUSION

[29] The Board has jurisdiction and will proceed with these applications and with the mediation on May 26, 2010 in Fort St. John, BC.

Dated May 5, 2010

FOR THE BOARD



Simmi Sandhu, Member