

File No. 1654
Board Order # 1654-1

September 13, 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
SW ¼ of District Lot 1227, Peace River District**

(The "Lands")

BETWEEN:

Talisman Energy Inc.

(APPLICANT)

AND:

**David Allan Vrim Gunderson
and Pamela Gail Gunderson**

(RESPONDENTS)

BOARD ORDER

Heard by telephone
conference together with MAB
files 1653 and 1655 to 1661:
Mediator:

September 3 and 10, 2010

Cheryl Vickers

Attended by:

Gary Richardson, Jennifer Findlay, Sacha Plotnikow (Sept 3 only), Lance DeLaRonde (Sept 10 only), for the Applicant; Dave Core, Deborah McVicar (Sept 10 only), Pamela Gunderson (Sept 3 only), Derek Beam, James Vince (Sept 10 only), Terry Webster (Sept 10 only), and Doug Summer (Sept 10 only) for the Respondent and the Respondents in MAB files 1653 and 1655 to 1661

Introduction

[1] The Applicant, Talisman Energy Inc. ("Talisman") has applied to the Board for mediation and arbitration respecting right of entry to the Lands owned by the Respondents, Mr. and Mrs. Gunderson, as well as to the Lands owned by the Respondents in MAB applications 1653 and 1655 through 1661 (collectively the "Respondent Landowners" or "Landowners"), heard at the same time. In each application, Talisman seeks access to the respective Lands for the purpose of surveying, and for conducting the required soil sampling and archaeological assessments in advance of making an application to the Oil and Gas Commission ("OGC") for the construction of a water pipeline. The proposed water pipeline is to transport water to be used in the production of natural gas in a process known as "fracking".

[2] The applications are not about whether the proposed water pipeline should be built, or whether it is either necessary or beneficial. It is only about whether Talisman requires land for a purpose set out in section 16 of the *Petroleum and Natural Gas Act (PNGA)*, and if so, whether I should exercise my discretion to make an entry order pursuant to section 19 of the *PNGA* permitting Talisman to enter and use the Lands for the required purpose. During my discussions with the parties, the Landowners expressed contradictory views about the proposed pipeline. One of the Landowners submitted Talisman does not need the water pipeline, that it can continue to truck water for fracking, and that the purpose of the pipeline is only to save Talisman money. Others of the Landowners expressed support for the proposed pipeline submitting it will lessen traffic on the local roads. The merits of the pipeline itself are not a matter within the jurisdiction of the Board. The OGC must decide whether to grant an application to construct a water pipeline used in conjunction with the oil and gas industry, and address any operational, environmental, safety or other regulatory concerns with the proposed project.

[3] The Landowners submit the applications are premature. They submit that Talisman has not engaged in good faith negotiation, and that they are prepared to negotiate access with Talisman, but not in the context of an application to the Board. The Landowners also take issue with the jurisdiction of the Board to issue an entry order.

Issues

[4] Does the Board have jurisdiction in Talisman's applications?

[5] If so, should I grant the right of entry order requested by Talisman?

Jurisdiction

[6] The Landowners question the jurisdiction of the Board on the basis that the proposed pipeline is a water pipeline, as opposed to a pipeline to transport petroleum or natural gas.

[7] Section 16 of the *Petroleum and Natural Gas Act (PNGA)* provides a person may apply to the Board for mediation and arbitration 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."

[8] Talisman says it requires access to the Lands to conduct a survey, soil sampling and archaeological assessments in advance of making an application to the OGC for a permit to build and operate the pipeline. The purpose of the pipeline is to carry water to the production fields to be used for fraccing. Fraccing is a process whereby water is used to fracture the rock in order to extract the natural gas. Fraccing is, therefore, a connected purpose to the production of natural gas.

[9] The jurisdictional issue for the Board, at this time, is whether entry for surveying, soil sampling and archaeological assessment is a "connected or incidental purpose" within the meaning of the *PNGA*. Talisman cannot construct the proposed water pipeline without a permit from the OGC. The OGC requires that an application be accompanied by a survey, soil tests and an archaeological assessment. Talisman must access the Lands in order to complete the required survey work, soil tests and archaeological assessments. The Landowners have not given Talisman permission to enter their land for this purpose. Because the surveying, soil testing and archaeological assessments is work that is required by the OGC before an application to build the water pipeline for fraccing can be considered, this work is also a connected or incidental purpose to the production

of natural gas. The purpose for which Talisman requires access to the Lands, therefore, is a purpose that triggers its ability to make an application to the Board under section 16(1) of the *PNGA* and the Board has jurisdiction.

Right of Entry

[10] Section 18(3) of the *PNGA* provides:

If an application is made under section 16(1), and if the mediator believes, as a result of a mediation hearing, that the applicant should be permitted to enter, occupy or use the land, the mediator may make an order under section 19.

[11] Section 19 provides that the mediator may make an order permitting, subject to terms the mediator may specify, an applicant under section 16 to enter, occupy or use land for a purpose stated in that section.

[12] I am satisfied that Talisman requires entry to the Lands for a purpose stated in section 16. The question remains, however, whether I should exercise my discretion to grant the right of entry order at this time.

[13] The Landowners submit they have not refused entry. They say they have been and remain willing to negotiate entry with Talisman but that Talisman has not engaged them in negotiation. They submit the applications to the Board ought not to have been made in advance of meaningful negotiations. Talisman, on the other hand, says they held discussions with individual Landowners as far back as May 2010, that permission to enter has not been forthcoming, and that time to conduct the necessary work before freeze-up is running out.

[14] Talisman says it initially contacted individual Landowners in early May 2010 to provide information about the proposed project and seek permission to survey. Talisman says that, initially, some of the Landowners agreed to access for the surveying and other work, but later withdrew agreement. Talisman's record of events indicates that following initial contact with individual Landowners in the first half of May, one of the Landowners indicated Mr. Core of CAEPLA would be in touch on the Landowners' behalf. Talisman received a letter from CAEPLA on June 7, 2010 requesting Talisman agree to a budget for costs and expenses of Landowners but without any documentation from the Landowners confirming CAEPLA's representation. Talisman responded on June 22, 2010 requesting authorization from the Landowners confirming CAEPLA's representation, proposing a conference call to discuss, and requesting permission for survey work. CAEPLA emailed Talisman on June 28 requesting advance payment of fees prior to proceeding with negotiations. Talisman responded reiterating the need for Landowner authorization of CAEPLA's representation and again requesting a conference call and requesting permission for survey work. Talisman says they did not receive written authorizations from the Landowners of

CAEPLA's representation until July 21, 2010 and that most of the authorizations received by Talisman had been signed in May 2010.

[15] Talisman served CAEPLA on behalf of the Landowners with its applications to the Board on July 23, 2010.

[16] On July 29, 2010, following receipt of Talisman's applications to the Board, Mr. Core of CAEPLA wrote to the Board submitting it was premature to apply for right of entry without having previously consulted or negotiated with the Landowners' authorized spokespeople. Mr. Core said, "Before landowners will agree to entry of their lands, for surveying purposes, they want to address access and damage issues." The Board responded that it had not yet received Talisman's applications and that, once the applications had been received, there would be opportunity to discuss the Landowner's concerns through the Board's processes.

[17] On July 30, 2010, CAEPLA copied the Board with a letter of the same date to Talisman expressing that Talisman had not met with the Beryl Prairie Land Committee (BPLC) or CAEPLA to discuss terms of access for surveyors or terms of damage mitigation as a result of surveying, and setting out landowner concerns. While some of the concerns articulated in the letter of July 30, 2010 are relevant to access for surveying, most of the concerns raised in the letter of July 30, 2010 relate to the construction of the water pipeline itself, for which access to the Lands is not yet requested or required.

[18] The Board received and acknowledged Talisman's applications on August 3, 2010.

[19] Communication between Talisman and CAEPLA continued in the first two weeks of August and the parties met by teleconference on August 11, 2010. Minutes of that teleconference prepared by Talisman indicated that all parties expressed a desire to work together to build a positive relationship. The minutes note Talisman's initial contact with the Landowners in May, and the concern about winter approaching and the increasing necessity to complete the survey and other work before then. The minutes note the Landowners' concern over their stewardship responsibilities, the imposition on them and impact to the land of the proposed project, their desire to negotiate a comprehensive agreement encompassing all aspects of the pipeline project before granting survey permission, and their feeling that the project was being pushed on them through the involvement of the Board. The Landowners questioned the need for a survey as the proposed route for the water pipeline followed an existing right of way. Talisman indicated the proposed route represented an ideal route but that it would be adjusted as necessary based on information obtained from a survey and that the archaeological work also needed to be done. Some negotiation ensued around funding for expenses and commitment by Talisman to pay damages and reasonable compensation. The parties agreed to another teleconference the following week.

[20] Further correspondence between the parties ensued, however negotiations broke down essentially over the involvement of the Board. Talisman expected the negotiations would continue in parallel with the Board's process. The Landowners indicated they were not willing to negotiate with Talisman as long as Talisman proceeded with the Board's process.

[21] The Board convened a teleconference with the parties on September 3, 2010. The Landowners maintained their position that the Board's application was premature, that Talisman had not negotiated with the Landowner's legitimate representative in an effort to reach agreement. They maintained they were not opposed to the proposed project but wanted to be treated with respect and wanted the opportunity to engage in negotiations without the coercion of the Board as they would in any other business arrangement. They asked Talisman to withdraw their applications and expressed a likelihood that an agreement could be reached. Talisman's representatives indicated they would consider withdrawing the applications but needed to discuss with the project's executive and seek instructions. A telephone conference between the parties without the Board was scheduled for early the following week. The Board adjourned its process pending further advice from the parties.

[22] On September 7, 2010 Talisman indicated it was not willing to withdraw the applications. The Landowners indicated they were not willing to negotiate under the circumstances. The Board reconvened its process by teleconference on September 10, 2010.

[23] The Landowners maintained their position that no meaningful negotiation had occurred between Talisman and CAEPLA, the Landowners' authorized representative, that any consultations with the Landowners individually were not valid once notification of CAEPLA's representation was given. The Landowners feel that the Board's involvement compromises their ability to negotiate on a level playing field with the company. They reiterated that they were willing to negotiate, but not before the Board. They questioned Talisman's need to do survey work. Talisman maintained they also wanted to negotiate with the Landowners but that time was running out before freeze-up. Talisman reiterated the necessity for a survey, soil testing and archaeological assessment as a requirement of the OGC process. The Board invited the Landowners to express their concerns about the proposed access for surveying, soil testing and archaeological assessments and to propose terms of access that would address their concerns. The Landowners were not willing to discuss their concerns with the Board. The Board offered to adjourn proceedings to allow the parties the opportunity to reach an agreement. The Landowners reiterated that unless the applications were withdrawn, they were not willing to negotiate. Talisman, in turn, expressed concern that if the applications were withdrawn, and agreement was not reached, there would be insufficient time to reapply to the Board before freeze-up.

[24] I was advised that freeze-up could happen anytime from about the middle of October. I was further advised that while the work could continue after the ground froze, it would require more time on the Lands, be more intrusive, and cause greater inconvenience.

[25] In British Columbia, most landowners do not own subsurface resources. Their ownership of land is not absolute but limited to rights to the subsurface retained by the Crown. The Crown, in turn, may grant a person or company rights to explore for or develop subsurface resources. If a person or company requires surface access to private lands to explore for, or develop a subsurface resource, the person or company requiring surface access may not enter without the agreement of the landowner or authorization of the Board. The Board may authorize entry if access is needed and terms of access are not agreed. In other words, if access is required, a landowner may either agree to compensation and terms of access, or the Board may make an order authorizing access and setting out terms. The courts have acknowledged the compulsory aspect of this situation and that landowners lose the right to decide whether there will be oil and gas activity on their land (*Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510 (Q.L.)(S.C.)). An application to the Board does not compromise a landowner's negotiating position; the law has already compromised it. In the circumstances, landowners should focus on negotiating the best terms of access possible to compensate them for loss and that will address their legitimate concerns about stewardship of the land.

[26] While companies should always endeavour to negotiate terms of access and compensation with landowners or their representatives in advance of making an application to the Board, if terms of access are not agreed, they may seek the assistance of the Board. The Board's job is then to try and facilitate an agreement that addresses the needs and concerns of all parties within the context of the law. An application to the Board does not preclude the parties from reaching their own agreement without the Board's assistance or intervention.

[27] The information before me indicates that Talisman has been attempting to negotiate entry for the purpose of surveying, soil testing and archeological assessment with the Landowners since early May. Upon receipt of CAEPLA's letter in early June, it sought to convene a conference call to discuss while seeking confirmation of CAEPLA's authority to negotiate. Despite being asked by CAEPLA to commit to paying fees and costs, Talisman did not receive confirmation from the Landowners of CAEPLA's representation until late July, almost three months after initial contact with the Landowners and more than two months after being told CAEPLA would be involved.

[28] Talisman served CAEPLA, as the Landowners' representative, with the applications to the Board in late July, filing the applications with the Board itself in early August. Following initiation of the applications to the Board, Talisman and CAEPLA continued to correspond, although somewhat at cross-purposes prior to

the Board convening its first conference call with the parties. CAEPLA wanted to negotiate a comprehensive agreement for the pipeline right of way; Talisman only sought an agreement for the limited purpose of surveying, soil testing and archaeological assessments given that the project could change as a result of the initial work or as a result of the OGC's process.

[29] I am satisfied Talisman tried to negotiate the Landowners' agreement for the survey work both individually and with CAEPLA before filing the applications to the Board. Some of the Landowners initially agreed to the survey work but then withdrew. Time passed without discussions occurring with CAEPLA despite requests for a conference call. CAEPLA sought payment of fees, but without formal confirmation that it had the authority to negotiate on the Landowners behalf. Given the amount of time that had passed following Talisman's initial contact with the Landowners and initial communications with CAEPLA, I do not think it was unreasonable for Talisman to commence the applications to the Board to seek assistance in negotiating an agreement. When Talisman filed its applications, the Landowners had not agreed to terms of access to the Lands, and it was not unreasonable, in the circumstances, to seek the Board's assistance in negotiating that agreement.

[30] An application to the Board does not preclude the parties from coming to agreement. The Board received the applications on August 3. It convened its first teleconference with the parties on September 3. The parties had a month before the Board commenced telephone discussions to continue negotiations. In fact, they did continue negotiations but negotiations broke down. Despite a telephone conference between the parties on August 11 and ensuing correspondence, no agreement was reached. By the time the Board convened its process, the Landowners were no longer willing to negotiate unless the applications were withdrawn. Talisman considered the Landowners' request to withdraw the applications but declined to do so.

[31] It is possible that if Talisman had acceded to the Landowners' request to withdraw the applications, agreement for access to the Lands to complete the surveying, soil sampling and archaeological assessments would have quickly followed. It is equally possible that, given negotiations to date had not focused on the immediate need for limited access and the differing views amongst the Landowners themselves over the merits of the proposed pipeline, negotiations would have continued to be unsuccessful. We will never know.

[32] I am satisfied that the parties had the opportunity to agree to terms of access both before and after the applications to the Board were made. In the context of these proceedings I invited the Landowners to express their concerns about the proposed access and suggest terms that would address their concerns. They were not willing to do so. I offered to adjourn the Board's proceedings to allow the parties to agree on terms of access, but the Landowners maintained that they would not negotiate with Talisman unless the applications were withdrawn.

[33] I am satisfied that Talisman requires access to the Lands for a purpose set out in section 16 of the *PNGA*. I am further satisfied that Talisman tried to negotiate terms of access with the Landowners individually and with CAEPLA on the Landowners' behalf without success before making their applications to the Board. I am satisfied that Talisman continued to try to negotiate terms of access with CAEPLA on the Landowners' behalf following the applications to the Board again without success. I am satisfied there are time pressures to Talisman's need for access and that it is beneficial for the required work to be done before freeze-up. I am satisfied that time is running out in that regard. If I decline to make the entry order, I am not convinced that the parties will be able to negotiate terms of access in a timely way so that the work can be completed before freeze-up.

[34] In all of the circumstances, I am inclined to exercise my discretion to grant the right of entry. It is not without a great sense of sadness that I do so. I had hoped that the parties would come to terms. I regret that they have not. I accept that the Landowners have stewardship responsibilities with respect to the Lands and that, in any access for subsurface development, an effort should be made to address their legitimate concerns. I am frustrated that the Landowners were not willing to participate in mediation before me, were not willing to let me facilitate discussion in an effort at having the parties craft an agreement for the limited purpose of surveying, soil testing, and archaeological assessment that would be satisfactory to all parties. I hope that if Talisman proceeds with an application to the OGC for a permit to construct the water pipeline, that the parties will engage with each other and the OGC to address any operational, environmental, safety or other regulatory concerns. In the event a permit to construct the pipeline is granted, I encourage the parties to engage with each other in a timely manner to negotiate terms of access for the construction of the pipeline itself. Hopefully, further applications to the Board will not be necessary.

[35] As the Landowners declined to engage in negotiations before me, declined to express their specific concerns about the access for surveying, soil sampling and archaeological assessments, and declined to suggest terms of access that would address their concerns, I have made my best efforts to set out terms of access that will minimize impact to the land and livestock and permit consultation between the parties to ensure the safety of persons and livestock. There is no point to further mediation and further mediation is refused.

[36] I make the following Order pursuant to section 18(2) and section 19 of the *Petroleum and Natural Gas Act*.

Order

The Mediation and Arbitration Board orders:

1. Upon payment of the amounts set out in paragraphs 3 and 4, the Applicant and its contractors shall have the right of entry to and access across the Lands for a period of sixty (60) days from the date of this Order for the purpose of surveying, soil testing, and archaeological assessment, as required by the OGC in advance of making an application for a permit to construct the proposed water pipeline.
2. Entry to the Lands for the purpose of surveying, soil testing, and archaeological assessment shall be subject to the terms set out in Appendix "A".
3. The Applicant shall deposit with the Mediation and Arbitration Board security of \$2,500.00 payable to the Minister of Finance. All or part of the security deposit may be returned to the Applicant or paid to the Respondent upon the agreement of the parties or as ordered by the Board.
4. The Applicant shall pay to the Respondent \$2,000.00 as partial payment for compensation payable for entry to and use of the Lands for the specified purpose, and to acknowledge the compulsory aspect of the entry.
5. The Applicant shall serve the Respondent with a copy of this Order prior to entry onto the Lands. Service may be accomplished by personal service of a copy of the Order or by e-mail to CAEPLA.
6. The Applicant shall pay the Respondent's costs of this application. If the parties cannot agree on the amount of costs payable, the Board retains jurisdiction to determine the amount.
7. Nothing in this order operates as consent, permission, approval or authorization of matters within the jurisdiction of the Oil and Gas Commission.

Dated: September 13, 2010

FOR THE BOARD



Cheryl Vickers
Chair

APPENDIX A

Right of entry to the Lands for surveying, soil testing, and archaeological assessment required for the purpose of making an application to the Oil and Gas Commission is subject to the following general terms:

- Talisman and/or its contractors shall at all times conduct their work in a safe and responsible manner, which without limitation, shall include: driving with due care and attention when approaching the Lands, including being mindful of speed, the presence of children playing, and the minimization of dust, and taking care in the presence of livestock to avoid disturbance or harm to the livestock
- Talisman shall advise the Respondent landowner immediately of any situation that may require the landowner's attention
- The Respondent landowner shall advise Talisman of any concerns with respect to the activity of Talisman and/or its contractors and of any damage incurred as a result of the entry
- Talisman shall be responsible for any damage caused by the entry
- Contractors of Talisman entering the Lands pursuant to this Order will be accompanied by a representative of Talisman

Surveying of the Lands is subject to the following additional terms:

- Focus will conduct the survey. Focus will give the Respondent landowner at least 24 hours notice prior to entry. The Respondent landowner may contact the surveyors, or the attending representative of Talisman, with any questions or concerns during the survey
- Surveyors will consult the Respondent landowner with respect to their method of access over the Lands, and may only use motorized vehicles with the permission of the Respondent landowner
- Surveyors will minimize the number of survey stakes used. Any stakes required can be removed after the soils assessment and archaeological assessment have been completed
- Surveyors will only cut trees or branches in areas where growth is too dense for sight lines.
- Any trees or branches cut down will be disposed of in a manner acceptable to the Respondent landowner

Soil sampling is subject to the following additional terms:

- Roy Northern will conduct the soil testing. Roy Northern will give the Respondent landowner at least 24 hour notice prior to entry. The Respondent landowner may contact Roy Northern, or the attending representative of Talisman, with any questions or concerns during the soil sampling

- Personnel will consult the Respondent landowner with respect to method of access across the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- Soil samples will be taken in accordance with the requirements of the Oil and Gas Commission
- The Respondent landowner will be provided with a copy of the soil assessment report

Archaeological assessment is subject to the following additional terms:

- Landsong will conduct the archaeological assessment. Landsong will give the Respondent Landowner at least 24 hours notice prior to entry. The Respondent landowner may contact Landsong, or the attending representative of Talisman, with any questions or concerns during the assessment.
- The assessment will take place at or near the same time as the soil assessment.
- Personnel will consult the Respondent landowner with respect to method of access over the Lands and may only use motorized vehicles with the permission of the Respondent landowner
- The bulk of the assessment will be completed with an archaeologist walking along the proposed access. Ground disturbance (shovel testing) will only occur if the archaeologist sees areas of "high potential".