

CANADA / JUDGMENT

## Jorgensen v. Surface Rights Board

2021 BCSC 396

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2021 BCSC 396 Jorgensen v. Surface Rights Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jorgensen v. Surface Rights Board,

2021 BCSC 396

Date: 20210308

Docket: S201366

Registry: Victoria

Between:

Olaf Jorgensen

Petitioner

And

Surface Rights Board and Encana Corporation

Respondents

**Before: The Honourable the Honourable Mr. Justice Punnett**

On judicial review from: Orders of the Surface Rights Board, dated May 31, 2019 Order No. 2066-1 and 2066-2) and November 22, 2019 (Order No. 2066-3)

Reasons for Judgment

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Place and Date of Hearing:

Victoria, B.C.

June 25 and 26, 2020 and

September 20, 2020

Place and Date of Judgment:

Victoria, B.C.

March 8, 2021

## Introduction

[1] The petitioner seeks a review of a decision of the Surface Rights Board permitting entry by Encana Corporation onto the petitioner's lands for construction, placement and operation of "flow lines" relating to the production of unconventional natural gas. He seeks to set aside the resulting orders that authorized the operation of pipeline segments within a right of way on his lands.

[2] "Flow lines" are a type of pipeline defined under s. 1 of the Oil and Gas Activities Act, S.B.C. 2008, c. 36 ("OGAA"):

"flow line" means a pipeline that connects a well head with a scrubbing, processing or storage facility and that precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line;

[3] Construction of four pipeline segments within a single right of way were authorized by the Surface Rights Board ("SRB" or "Board"). Segments 1 and 2 are conceded to be flow lines as they are pipelines that carry raw gas taken from the ground from the wellhead to facilities where they are stored or processed.

[4] The petitioner however alleges the two other segments (Segments 3 and 4) are pipelines that do not constitute "flow lines". If they are not flow lines then expropriation was required as the Board's jurisdiction is limited to flow lines and does not extend to other pipelines.

## Background

- [5] The petitioner, Olaf Jorgensen, is the owner of lands identified as SE ¼ 31-79-17 W6M (the "Lands"). The respondent, Encana, recently underwent a corporate reorganization and name change from Encana to Oventiv Canada ULC effective January 24, 2020. However, it will be referred to as Encana in these reasons.
- [6] Encana is an oil and gas exploration and production company. It drills numerous wells in the Montney formation.
- [7] Unconventional gas drilling and production activities require significant volumes of water, including water for hydraulic fracturing purposes. Water existing within the Montney formation is also produced with the natural gas ("produced water"). A significant volume of water needs to be transported to and from each pad site. In order to reduce the need for fresh water, Encana has developed water resources facilities, including a Water Resources Hub which serves Encana's operations west of Dawson Creek. At the Water Resources Hub, produced water is treated, recycled, blended and stored so it can be used and re-used in hydraulic fracturing operations. Recycled water is distributed to and from pad sites by a network of pipeline segments co-located with production and fuel lines.
- [8] Unconventional gas drilling and production activities also require a supply of processed gas to operate the pieces of equipment at the pad site and facilitate production of natural gas from each well.
- [9] All of Encana's natural gas exploration and production activities require regulatory approval. On May 13, 2019, the British Columbia Oil and Gas Commission ("OGC") issued Permit 100107235 (the "Permit") authorizing the coincident construction and operation of four flow line segments within a single 2871 metre-long right-of-way ("ROW") (collectively, the "Project").
- [10] The Project crosses the lands of several private landowners. Approximately 72 linear metres of the Project (with an associated 0.408 acres of ROW and 0.862 acres of temporary workspace area) is on the petitioner's Lands. The Project was constructed between June 3 and July 23, 2019.
- [11] The Project is called a "tie-in." It connects wells at a new multi-well pad site located at 16-36-79-18 W6M (the "New Pad") to an existing pad site located at 5-32-79-17 W6M (the "Existing Pad") where connections to existing infrastructure are already in place. This infrastructure connects the pad sites to nearby gas processing facilities and Encana's Water Resources Hub.
- [12] The Permit authorizes the construction and operation of the four pipeline segments described as:

- i. Segments 1 and 2: Uni-directional flow lines that move produced natural gas from the New Pad to the Existing Pad. From the Existing Pad, the natural gas moves on to processing facilities in the area.
- ii. Segment 3: Uni-directional pipeline segment that moves processed natural gas (fuel gas) from Veresen Midstream's Saturn Gas Plant to the New Pad. The fuel gas is used to power the instruments and pieces of equipment required to operate the New Pad and as part of the natural gas production process.
- iii. Segment 4: Bi-directional pipeline segment that moves produced water from the Water Resources Hub to the New Pad for hydraulic fracturing activities, and facilitates the return of used hydraulic fracturing water and new produced water from the New Pad to the Water Resources Hub.

- [13] On January 7, 2019, under the OGC regulations, Encana provided an Invitation to Consult letter to the petitioner regarding its plans to construct the Project. The letter advised the petitioner of his right to provide submissions to Encana or the OGC regarding the Project. The petitioner responded by letter dated January 28, 2019. Among other things, the petitioner suggested that the Project should utilize an alternative route. Encana met with the petitioner on January 29, 2019 to discuss his concerns and the rationale for the selected route. The parties also discussed the proposed form of a ROW agreement and Encana's offer of compensation for its proposed access to the Lands.
- [14] Given the petitioner declined to grant a ROW agreement, on April 10, 2019 Encana applied to the Surface Rights Board for a right of entry ("ROE") order. Their application sought the Board's mediation and arbitration services or, if mediation and arbitration were unsuccessful, the issuance of a ROE order granting access to the lands. A copy of that application was provided to the petitioner.
- [15] A mediation occurred. The petitioner raised the issue of jurisdiction, which was referred to the Board for arbitration. The jurisdiction issue was whether the Board had the authority to designate segments 3 and 4 as flow lines.
- [16] Both parties filed submissions and the Board issued its decision on the jurisdictional issue under Order 2066-1 on May 31, 2019 (the "Original Decision"). The Board determined that the segments are flow lines and hence, the Board had jurisdiction to issue a ROE order to authorize Encana access to the Lands. The decision was made by the Board Chair, Cheryl Vickers. The SRB mediator Robert Fraser issued Order 2066-2 (the "ROE Order") authorizing Encana's access to the lands later on the same day.
- [17] On July 26, 2019 the petitioner sought reconsideration of the Original Decision under s. 155 of the Petroleum and Natural Gas Act, R.S.B.C. 1996. c. 361 (the "PNGA") and s. 17 of the Board's Rules of Practice and Procedure (the "SRB Rules"). On November 29, 2019 the Board (Vice-Chair Simmi K. Sandhu) dismissed the application for reconsideration, upholding the Original Decision and the ROE Order (the "Reconsideration Decision").

## Issue Before Board on Original Decision and Reconsideration Decision

[18] At issue is the definition of a flow line and whether a pipeline that is part of a gathering system constitutes a flow line. For convenience, I repeat the definition of a flow line as defined in s. 1 of the OGAA:

"flow line" means a pipeline that connects a well head with a scrubbing, processing or storage facility and precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line.

[19] A "gathering system" is not defined in the OGAA, nor in the PNGA. The term existed in the legislation before the SRB had clear jurisdiction over flow lines. It is however used in the SRB's analysis that is under review. The official glossary of the BC Oil & Gas Commission does define the term:

Gathering system: The pipelines and other infrastructure moving raw gas from the wellhead to processing and transmission facilities.

[20] This is also referred to as "upstream" activities involved in the production of unconventional natural gas that bring the natural gas to processing facilities, after which it is eventually delivered "downstream" to consumers.

[21] A pipeline is defined under the OGAA:

"pipeline" means, except in section 9, piping through which any of the following is conveyed:

- (a) petroleum or natural gas;
- (b) water produced in relation to the production of petroleum or natural gas or conveyed to or from a facility for disposal into a pool or storage reservoir;
- (c) solids;
- (d) substances prescribed under section 133(2)(v) of the Petroleum and Natural Gas Act;
- (e) other prescribed substances,

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

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

**The Board's Original Decision of May 31, 2019 - Order 2066-1**

[22] The Board noted that Segments 1 and 2 were uni-directional lines to transport raw produced natural gas and liquids between two pads. No issue is taken that they are flow lines. Segments 3 and 4 are described by the Board in its reasons as:

[3] Segment 3 [actually 4] is a bi-directional line to transport produced water from the 5-32 Pad to the 16-36 Pad for hydraulic fracturing. It will also carry produced water from the 16-36 Pad back to the 5-32 Pad. At the 5-32 Pad the water line will connect with existing water infrastructure to flow water to and from Encana's Water Resource Hub (the Water Hub) (hereinafter called the "Water Pipe")

[4] Segment 4 [actually 3] is a uni-directional fuel line to move processed purchased fuel gas across the Saturn field including to the 16-36 Pad. The fuel is used to power various instruments and equipment required to operate the 16-36 well site and associated pipelines, including emergency shut down valves and control valves. (hereinafter called the "Fuel Gas Pipe")

[Because the SRB in its reasons has reversed numbers 3 and 4, the definitions "Fuel Gas Pipe" and "Water Pipe" are used to avoid confusion.]

[23] The Board then reviewed previous jurisprudence:

[8] The Board has issued a number of decisions considering the meaning of "flow line". It has found that pipelines that are located within the upstream or gathering part of the system, and that function as part of the gathering system are flow lines. It has found the gathering system comprises the pipelines and other infrastructure that move raw gas from the well head to processing facilities. A flow line 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. A summary of the Board's jurisprudence on the meaning of "flow line" may be found in *Encana Corporation v. Strasky*, Order 1911/13-1, October 20, 2016 (Strasky 1).

[9] The Board has found that water lines similar to [the Water Pipe] are flow lines (*Encana Corporation v. Hnisky*, Order 1823-1, April 11, 2014 (Hnisky); *Encana Corporation v. Jorgensen*, Order 1939-1, May 31, 2016 (Jorgensen 2); *Encana Corporation v. Strasky*, Order 1955-1, October 23, 2017 (Strasky 2); *Encana Corporation v. Derfler*, Order 1973-74-1, May 22, 2018 (Derfler)).

[10] The Board has found that fuel lines similar to [the Fuel Gas Pipe] are flow lines (*Murphy Oil Company Ltd. v. Shore*, Order 1745-1, September 13, 2012 (Shore); Hnisky; Jorgensen 2).

[13] As indicated, the Board has considered the definition of "flow line" on numerous occasions. None of these decisions has been judicially reviewed. Nor has the legislature amended the definition so as to provide greater clarity or negate the Board's interpretation.

- [14] I do not accept the Respondent's submission that the Board's definition of gathering system was not tested or weighed against the language of the statute or against a comprehensive analysis of the legislative scheme and legislative intent. In interpreting the definition of a "flow line", the Board has applied the modern rule of statutory interpretation to interpret the words of the definition in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the legislation and the intention of the legislature. It has engaged in an analysis of the legislative scheme established by the PNGA and OGAA and an analysis of legislative intent. It has considered other statutory definitions within the PNGA and OGAA. It has considered interpretive aids including excerpts from legislative debates and the Glossary published by the OGC. It has considered legislative history. It has considered the OGC's treatment of pipeline segments as a single pipeline project for permitting purposes. These analyses and considerations are set out in Shore and Ilnisky, and have been adopted and applied in subsequent decisions of the Board.
- [15] I accept that it is difficult to apply the statutory language of the definition of "flow line" to either of Segment 3 or Segment 4 if the words of the definition and each of those segments is considered in isolation. I disagree, however, that when the words are considered in the context of the whole of the legislative scheme, that the Board's rationale for including pipelines that function as part of the gathering system for the production of natural gas is untenable or goes beyond what can be considered necessarily incidental.
- [18] The purpose of the proposed pipeline, comprised of four segments, is to gather natural gas. Segments 1 and 2 do that specifically. Segment 3 is used for hydraulic fracturing for the purpose of gathering natural gas. Segment 4 powers the facilities required for the gathering of natural gas, including those necessary for safety of the well site and pipeline. Together, the segments are permitted as a single pipeline project and collectively function to gather natural gas and connect well heads with processing facilities. Segments 3 and 4 are not, as submitted by the Respondent entirely unconnected pipelines; they are part of a single pipeline project for the purpose of gathering natural gas.
- [19] For all of the reasons expressed in Shore and Ilnisky, I am satisfied that the legislative intent was to give the Board jurisdiction over pipelines and pipeline segments of the nature in issue here and that the definition of "flow line" captures the proposed pipeline inclusive of Segments 3 and 4. To interpret the definition of flow line otherwise, so as to give the Board jurisdiction over only two of four pipeline segments collectively functioning as part of the gathering system and connecting well heads with processing facilities, would result in an absurdity. As said in ATCO Gas at para 51: "...the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature."

- [20] I am satisfied that including segments 3 and 4 in the definition of "flow line" is not an interpretation falling outside of the doctrine of jurisdiction by necessary implication. The analysis of the legislative scheme and intent articulated in the Board's earlier jurisprudence supports that conclusion.
- [21] I am satisfied the Board has jurisdiction over the proposed pipeline inclusive of Segments 3 and 4.
- [24] After referral back to the mediator, the ROE Order was made.

### **The Reconsideration Decision of November 29, 2019 - Order 2066-3**

- [25] The petitioner then sought reconsideration of the Original Decision under s. 155 of the PNGA and s. 17 of the SRB Rules. The petitioner made three substantive submissions to the Board before its Reconsideration Decision.
- [26] The reconsideration request was dismissed on November 29, 2019. The Board provided reasons for its decision to dismiss the reconsideration requested.
- [27] The reconsideration process is set out in s. 155. Pursuant to the power under s. 155(2)(b), the Board has made rules (SRB Rules).
- [28] The Board's reasons for dismissal of the reconsideration application were:
- [3] The Landowner disputed the Board's jurisdiction over the subject pipeline. On May 31, 2019 by way of Order 2066-1, the Board determined that it had jurisdiction and that the disputed segments were "flow lines" (the "Decision"). The Landowner now applies for reconsideration of this Decision and says two of the four segments are not within the Board's jurisdiction as "flow lines".
- [9] The power to reconsider a decision is discretionary. The reconsideration process is not intended to provide parties with a forum to re-argue their appeals. Rule 17 of Board's Rules of Practice and Procedure describes certain situations where the Board may exercise its discretion to reconsider a decision.
- [11] The Landowner applies for reconsideration of the Decision on the basis the Board erred in law in misconstruing its jurisdiction and made findings of fact without evidentiary basis leading to a misapplication of the appropriate jurisdictional test. Encana argues the application should be dismissed as the Decision contains no error of law or of mixed fact and law.

### **STANDARD OF REVIEW OF RECONSIDERATION**

- [12] The Landowner says the standard of review on a reconsideration review should be correctness while Encana says it should be reasonableness.

- [13] Rule 17 provides that the standard of review on a review for errors of law or fact is whether the errors are "patently unreasonable". In *Venturion Oil Limited* (Board Order 1848-1855), the Board adopted an interpretation of "patently unreasonable" to mean whether the impugned decision made findings of fact without evidence or the decision is "openly, clearly and evidently unreasonable."
- [14] The Landowner not only alleges the Board made findings of fact without evidence but misconstrued its jurisdiction by misinterpreting definitions in the Act. In a review for jurisdictional error, Rule 17 does not expressly indicate the standard of review.
- [15] Section 148 of the PNGA provides that section 59 of the Administrative Tribunals Act applies to decisions of the Board. Section 59 provides that, in a "judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness." Section 59 clearly applies to judicial review proceedings, not reconsiderations by the Board and therefore, is not determinative of the standard of review required in this instance.
- [16] Rather, reconsiderations are dealt with by section 155 of the PNGA that provides the Board with discretion to "reconsider an order of the board, and may confirm, vary or rescind the order". Subsection (2) provides that "(t)he board may make rules (a) specifying the circumstances in which subsection (1) applies; (b) respecting practice and procedure relating to the exercise of the authority of the board under subsection (1)".
- [17] The Decision in question makes a determination based on the Board's interpretation of "flow line" in the Act, the Board's enabling legislation. The Courts have held that the standard of review for a tribunal's interpretation of its own statute, or statutes closely connected to its function and which it is familiar with, will be presumed to be a question of statutory interpretation subject to deference by the application of a reasonableness standard of review (see the seminal Supreme Court of Canada decision of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R.) I note that the Court in *Dunsmuir* indicated that the correctness standard on judicial review would apply in "true questions of jurisdiction" which includes breaches of the duty of procedural fairness as indicated by Rule 17 and which has not been alleged here.
- [18] This is consistent with the Board's discretionary authority in a reconsideration application under Rule 17 and section 155 of the PNGA. Rule 17 provides that the Board "may" reconsider in certain circumstances. Also, in a reconsideration application, the Board does not re-weigh the evidence, second guess the conclusions or findings drawn from the evidence or the application of the legislation by the panel and substitute different findings of fact or inferences from findings, or rely on evidence being insufficient. Therefore, in a reconsideration review for jurisdictional error, it makes sense to apply a reasonable standard of review rather than a correctness standard that may apply in a judicial review.

- [20] Therefore, I will review the Decision for patently unreasonable errors of fact or law or mixed fact/law or for unreasonable jurisdictional defects.
- [29] After reviewing the arguments of the petitioner and the respondent Encana, the Board concluded:
- [39] As indicated above, the Board has discretion to reconsider a decision in certain circumstances. In particular, the Board may reconsider if there is no evidence to support the findings or the decision is "openly, clearly, evidently unreasonable" in which instances the decision is "patently unreasonable" (see *Venturion*, supra.). The other circumstances a decision can be reconsidered is if the Board was unreasonable in determining the Board's jurisdiction in the matter.
- [40] I find that the Board did not make findings of fact or mixed fact/law that were "patently unreasonable" or committed an unreasonable jurisdictional defect in the Decision. In making these findings, I need not consider any additional evidence produced as part of the reconsideration submissions. The Board had some evidence and submissions before it in making its findings. The Board had provided the parties with the opportunity to produce submissions and evidence which they did. The Board relied on the written material to make its findings. It is generally not bound by the rules of evidence in making these findings.
- [41] In terms of statutory interpretation in the Decision, the Board reviewed the definitions of "flow line" and "pipeline" in the OGAA and "wellhead" in the Drilling and Production Regulation BC Reg 282/2010 as it stood at the time of the Decision. The Board also reviewed the Oil and Gas Activities Act Regulation (BC Reg. 274/2010) that prescribes certain substances for the purposes of the definition of "pipeline", including "(a) water or steam used for geothermal activities or oil and gas activities...and (2) Piping used in a gas distribution main..."
- [42] The fact that the definition of "wellhead" was amended after the Decision does not warrant a reconsideration as there is nothing to indicate that the amendment to the definition should be applied retroactively. Nor does the amendment change the analysis or test to be applied in applying the definition of "flow line".
- [43] In the Decision, the Board reviewed previous cases that interpreted and applied the definition of "flow line". It applied the modern rule of statutory interpretation to interpret the words of the definition in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the legislation and the intention of the legislature. After reviewing the statutory interpretation process, it recognized that the analyses and considerations set out in *Shore* and *Ilinsky* have been adopted and applied in subsequent decisions of the Board.

- [44] The Board also recognized the difficulty in applying the statutory language of the definition of "flow line" to either of Segment 3 or Segment 4 if the words of the definition and each of those segments is considered in isolation. The Board held that the words are to be considered in the context of the whole of the legislative scheme which it reviewed along with the relevant caselaw.
- [45] Therefore, the Board held that previous decisions that concluded that pipelines that are located within the upstream or gathering part of the system, and that function as part of the gathering system are flow lines (*Ilinsky, ARC Resources Ltd. v. Hommy*, Order 1837-1, September 26, 2014) and that gathering system comprises the pipelines and other infrastructure that move raw gas from the well head to processing facilities (*Shore*), were all consistent with the words of the definition and the statutory scheme as a whole, and interpretive aids. The Board then applied these analyses and findings to the disputed segments at hand.
- [46] There is nothing in the Board's reasons to indicate that the Board used extrinsic evidence improperly to "overwhelm" the clear language of the statute in favour of achieving an "industry centric result" at the expense of the fee simple owner as submitted by the Landowner. This presumes "clear language" in the statute which I do not accept. If there was such clear language, there would be no need for the Board to interpret the definition in as many cases as has been required. Nor would there be need for the Board to outline a three part test in determining what is a "flow line" based on principles of statutory interpretation. The use of extrinsic evidence is admissible and part of the analysis of legislative context and intent required by the modern approach to statutory interpretation. In the Decision, the Board explained that its interpretation avoided absurd results as well as was consistent with the legislative scheme. In doing so, the Board reviewed the purpose of the proposed pipeline and the four different segments.
- [47] As such, the Board's interpretation of the definition of "flow line" in the Decision was reasonable based on the modern approach to statutory interpretation and was consistent with the Board's previous jurisprudence that have considered the meaning of "flow line" (see *Encana Corporation v. Strasky*, Order 1911/13-1, October 20, 2016 (*Strasky 1*)). The finding that [the Water Pipe] is a flow line is consistent with prior decisions that found water lines similar to [the Water Pipe] are flow lines (see *Encana Corporation v. Ilinsky*, Order 1823-1, April 11, 2014 (*Ilinsky*)), *Encana Corporation v. Jorgensen*, Order 1939-1, May 31, 2016 (*Jorgensen 2*); *Encana Corporation v. Strasky*, Order 1955-1, October 23, 2017 (*Strasky 2*); *Encana Corporation v. Derfler*, Order 1973-74-1, May 22, 2018 (*Derfler*). The finding that [the Fuel Gas Pipe] is a flow lines is consistent with prior decisions that found that similar fuel lines are flow lines (*Murphy Oil Company Ltd. v. Shore*, Order 1745- 1, September 13, 2012 (*Shore*), *Ilinsky*, *Jorgensen 2*). These findings on [the Fuel Gas Pipe] and [the Water Pipe] is within a reasonable range of outcomes available to the Board. I do not see that there is an inconsistency in the interpretation of the legislation in these decisions as outcomes in the application of the interpretation would necessarily be different as the facts of each case

are different.

[48] Finally, I find that the Decision is not "openly, clearly evidently unreasonable". The Board considered and weighed all the evidence and submissions before it made its findings and conclusions. It had some evidence to support its findings in its Decision (evidence and submissions provided by the parties and the Oil and Gas Permit and in the application). As indicated above, the Board will not reconsider a decision on the basis of the insufficiency of the evidence nor will the Board re-weigh the evidence or second guess findings of fact (see *Venturion*).

#### ORDER

[49] I dismiss the application to reconsider.

[Emphasis in original]

[30] Before considering the merits of this judicial review, I will consider objections to two affidavits before the Court. The respondents object to the affidavit of the petitioner sworn on July 26, 2019, while the petitioner objects to the affidavit of Jason Blanch sworn on March 5, 2020.

#### **Preliminary Issue Respecting Jorgenson and Blanch Affidavits**

[31] The affidavit of the petitioner is challenged by both respondents. The petitioner challenges the affidavit of Jason Blanch, a manager at Encana, filed March 10, 2020.

[32] The affidavit of the petitioner was part of the record before the Vice Chair, however the petitioner did not refer to any evidence in it at the hearing. In any event, the Vice Chair stated "[i]n making these findings, I need not consider any additional evidence produced as part of the reconsideration submissions". That finding has not been challenged. Of note as well, the affidavit was not before the Chair at the original hearing.

[33] Encana submits the petitioner's affidavit contains arguments in the guise of evidence that are not statements of fact and are speculation, examples of which are:

Para. 6: "I have been defeated in the past by technical arguments. I do not believe that the merits of my position have been considered or resolved in court."

Para. 14: "The Board assumed it was to be used in on site machinery. Gas for this purpose can be trucked by road. It is not necessary in these circumstances. Apparently, convenience is the only reason for this pipeline. This was not considered by the Board.

Para. 15: The Board assumed it was necessary. Water for this purpose can be trucked by road. It is not necessary in these circumstances. it was assumed by the Board that it would connect to a water hub, where it is recirculated. It is not connecting a well head to a scrubbing, processing or storage facility that precedes of [sic] the conveyed substance to or from a transmission, distribution or transportation line."

Para. 19: "There was no evidence before Mr. Fraser or Ms. Vickers from Encana Corporation about the pipelines in question."

Para. 22: "Damages caused to the Lands through the perfunctory approval of a Right of Entry by the Surface Rights Board are cumulative, substantive and not adequately compensated under this regime."

Para. 27: "Expansion of the jurisdiction of the Board through a body of decisions that does not respect the statute is prejudicial to owners at multiple levels."

- [34] I agree that such passages are arguments in the guise of evidence, are not statements of fact, and are to be disregarded. (Supreme Court Civil Rules, Rule 22-2(12)). In any event, the SRB did not rely on the petitioner's affidavit.
- [35] The petitioner challenges the affidavit of Jason Blanch and the exhibits attached to it. He submits it was not part of the record of the proceeding, was made after the decisions in issue were made, is revisionist in an attempt to shore up weaknesses in the respondent Encana's case, includes irrelevant argument not before the tribunal and is inconsistent with the supervisory role of the court on judicial review.
- [36] Encana submits the Blanch affidavit is admissible under the principled approach to the admissibility of evidence on a judicial review because it:
- (a) provides general background information that assists the court in understanding the history and nature of the case;
  - (b) educates the court on matters that are of common understanding to those who operate in this highly particular field and form the foundation from which the specialized Board approaches its decision-making;
  - (c) permissibly summarizes, explains and consolidates some of the more technical information contained in the documents that make up the record; and
  - (d) relates to the policies and procedures employed by the Board and which would have been known to its members.
- [37] Encana submits the definition of "record of the proceeding" in the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 (the "JRPA") has a very limited purpose. Its function is not to limit the scope of admissible evidence but to simply provide a method of ensuring that the official documents in the possession of the tribunal are transmitted to the court. Indeed, the JRPA provides no instruction or limitation on what material a court can consider in its judicial review: see the JRPA, s. 1; *Wan v. The National Dental Examining Board of Canada*, 2019 BCSC 32 at para. 10.

- [38] Formalistic notions of the "record" to assess the admissibility of evidence on judicial review are unhelpful and the jurisprudence has cautioned against use of the narrow traditional concept of a "record" as the standard. Rather, a court must be allowed to look at the material that was considered by the tribunal, whether or not that material would, historically, have formed part of the tribunal's "record": see *Air Canada v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 BCCA 387 at para. 35; Wan at para. 15.
- [39] In considering whether to admit evidence on a judicial review, courts must apply a principled approach rather than a purely categorical one. The key question is whether the admission of the evidence is consistent with the limited supervisory jurisdiction of the court (*Air Canada* at paras. 38-39; Wan at para. 18).
- [40] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada provided guidance on the type of material that is properly before the court:
- 125 It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings .
- 126 That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56 .
- [41] To help make the tribunal process more accessible to the court and the parties, affidavits containing general background information will be admissible to the extent that it is confined to what the tribunal knew or acted upon. This "general background" exception applies to non-argumentative orientating statements that assist the court in understanding the history and nature of the case before the administrative decision maker: *Air Canada* at paras 40-42, Wan at para. 20, and *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 45.
- [42] The Board agrees with *Encana* that the traditional structures that once limited judicial review to the materials before the tribunal has given way to a more principled approach. In *Air Canada* the court stated:
- [32] In their arguments, some of the parties to this appeal suggest that a judge on judicial review has "discretion" to admit evidence that was not before the tribunal. In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163, this Court discussed the nature of a discretionary decision:
- [20] Discretionary decisions are ones where "the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 52; see also *459381 B.C. Ltd. v. Strata Plan BCS 1589*, 2012 BCCA 44 at para. 14. Where the law does dictate a specific outcome, a chambers judge has no discretion.

[Emphasis in original.]

- [33] In some situations, a chambers judge will have to evaluate the factual matrix of the case in order to determine whether evidence is admissible. In the result, questions of admissibility are not necessarily pure questions of law; they can also be questions of mixed fact and law. They are not, however, matters of discretion.
- [34] The function of a court on judicial review is supervisory. The court must ensure that a tribunal has operated within legal norms. Courts are, in a very strict sense, reviewing what went on before the tribunal. They are not undertaking a fresh examination of the substantive issues. For that reason, judicial review normally concerns itself only with evidence that was before the tribunal: see *Albu v. The University of British Columbia*, 2015 BCCA 41 (particularly at paras. 35-36); and *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 (particularly at paras. 51-53).
- [43] While the Board does not take issue with the various objections raised by the petitioner against the Blanch affidavit, the Board does submit that the Court should adopt a principled approach to questions of admissibility given the key question is whether the admission of the extra-record evidence is consistent with the supervisory function of the court.
- [44] The objected-to portions of the Blanch affidavit, for the most part, touch on matters of little or no relevance on this application. For example, the lengthy history of the petitioner with the Board is neither relevant nor does it assist in resolving the matters before the Court on this judicial review. Nor does the background information respecting Encana and its business practices assist. The only paragraphs objected to that are admissible are paragraphs 9 and 10, and then only to the factual information respecting water use and such. The portions of those paragraphs that relate to trucking of water, costs reduction and environmental impact of truck traffic are not relevant. Portions of the affidavit that are within the knowledge of the Board are admissible. The balance of the Blanch affidavit is admissible but for the remaining portions objected to by the petitioner. Exhibits objected to, if already part of the material before the SRB, are also admissible.

### Decision to be Reviewed

- [45] The parties disagree on whether the Original Decision or the Reconsideration Decision is before the Court for judicial review. Depending on the answer to this question, the standard of review may differ.
- [46] Generally, a tribunal's reconsideration decision is that which is subject to judicial review. This principle was explained by the British Columbia Court of Appeal in *British Columbia Old Age Pensioners' Organization v. British Columbia Utilities Commission*, 2017 BCCA 400:

28 This Court in *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329 (B.C. C.A.), set out the framework governing the determination of whether leave to appeal should be from a tribunal's original or reconsideration decision. Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, the reconsideration decision represents the final decision of the tribunal and it is the decision which should be reviewed: *Yellow Cab Company Ltd.* at para. 40.

29 The original decision of course gives rise to the reconsideration decision. It forms part of the appeal record and will inform the court's review of the reconsideration which is, in this case, an affirmation of the original order. This is the situation that arose in *Zellstoff Celgar Ltd. Partnership v. British Columbia Hydro and Power Authority* (Oct 21, 2014), Vancouver CA041888, CA042066 (B.C. C.A. [In Chambers]). In that case, as in this, the parties sought leave to appeal both the original and reconsideration decisions of the Commission. Madam Justice MacKenzie held that leave should only be granted in regard to the reconsideration decision. She noted that since the original decision forms part of the record and will inform the court's review on appeal, there was no prejudice in granting leave to appeal only the reconsideration decision. The same considerations apply in this case. If leave to appeal is to be granted, leave should only be granted with respect to the Reconsideration Decision.

[47] However, there are limited circumstances where the original decision, rather than the reconsideration decision is subject to judicial review. This was also addressed in *Yellow Cab Co. v. British Columbia (Passenger Transportation Board)*, 2014 BCCA 329:

38 I do not read *Auyeung* as standing for the broad proposition that whenever a statute provides a tribunal with power to reconsider its decisions, the courts will refuse to entertain judicial review of the tribunal's initial decisions. *Auyeung* is more nuanced. In applying it, a court must consider the scope of the reconsideration power and whether an attempt has been made to invoke it. Where a party has attempted to invoke the reconsideration power, the court must also consider whether the tribunal -- either in undertaking reconsideration or in deciding that it will not do so -- has made a determination that the allegation of error lacks foundation. I will discuss the various possible scenarios and the considerations that apply to them.

39 There is a general principle that a party must exhaust statutory administrative review procedures before bringing a judicial review application: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.); *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.). For that reason, where an alleged error comes within a tribunal's statutory power of reconsideration, a court may refuse to entertain judicial review if the party has not made an attempt to take advantage of the reconsideration provision. Of course, where the power of reconsideration is not wide enough to encompass the alleged error, reconsideration cannot be considered an adequate alternative remedy to judicial review, and the existence of the limited power of reconsideration will not be an impediment to judicial review.

40 Where a party has taken advantage of a tribunal's reconsideration power, and the tribunal has undertaken the reconsideration, it is the reconsideration decision that represents the final decision of the tribunal. In such a situation, it is only the reconsideration decision that may be judicially reviewed, since it is the final decision of the tribunal. (emphasis added)

### Position of the Petitioner on Decision to be Reviewed

- [48] The petitioner seeks judicial review of the Original Decision and the ROE Order. He argues that to consider the Reconsideration Decision is not a sufficient remedy as the reconsideration was not an adequate alternative remedy to judicial review. Specifically, he submits the SRB's power of reconsideration is not wide enough to encompass or address the alleged error. He argues review of the Reconsideration Decision alone would impede judicial review by effectively ousting the supervisory jurisdiction of the Court. The petitioner submits the reconsideration hearing was not wide enough to encompass or address the alleged error because the standard of review on reconsideration was for patently unreasonable errors of fact or law, or mixed fact/law, or for unreasonable jurisdictional defects.
- [49] The petitioner notes he engaged the court's jurisdiction to review the Original Decision, but had no choice but to also apply for reconsideration given such is mandatory.

### Position of the Respondents on Decision to be Reviewed

- [50] The SRB submits it has a "plenary and unrestricted" jurisdiction over reconsideration. It undertook the reconsideration as requested and provided detailed reasons for its decision. As such, the Reconsideration Decision constitutes the final decision of the SRB and is the only SRB decision appropriately subject to judicial review.
- [51] The respondent Encana submits the petitioner is only entitled to seek judicial review of the Reconsideration Decision as that is the final decision of the Board and is the only Board decision appropriately subject to judicial review.

### Discussion

- [52] At issue then is whether the SRB reconsideration powers are wide enough to encompass the alleged error. The reconsideration powers are provided to the SRB by the PNGA. Section 155 sets out the powers of the SRB to reconsider decisions:

#### Reconsideration by board

155(1) The board, on its own motion or on application, may reconsider an order of the board, and may confirm, vary or rescind the order.

(2) The board may make rules as follows:

(a) specifying the circumstances in which subsection (1) applies;

- (b) respecting practice and procedure relating to the exercise of the authority of the board under subsection (1).

[53] In accordance with s. 155(2), the SRB has made rules addressing reconsideration. SRB Rule 17 states:

### Reconsiderations

17(1) The Board may reconsider an order of the Board and may vary or rescind the order under section 155(1) of the Act if the Board is satisfied that any of the following circumstances exist:

- (a) there has been a change in circumstance since the making of the Board's order;
  - (b) evidence has become available that did not exist or could not have been discovered through the exercise of reasonable diligence at the time of the making of the Board's order;
  - (c) the Board made a jurisdictional error including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction.
- (2) An application for reconsideration must be in writing and a copy of the application must be delivered to each other party.
  - (3) An application for reconsideration must state the grounds for reconsideration and must include as appropriate, a statement of the change of circumstance since the making of the board order, a summary of any new evidence relied on in support of the reconsideration, and the details of any alleged jurisdictional error.
  - (4) The Board may determine the procedures to be followed on a case by case basis in order to determine whether to conduct a reconsideration and how a reconsideration will be conducted

[54] As is apparent, the PNGA provides the SRB with wide powers of reconsideration. The powers to reconsider, confirm, vary or rescind orders are analogous to the powers of a court at a judicial review proceeding in which courts can confirm or overturn a tribunal's decision or send it back to the tribunal for reconsideration. The SRB's reconsideration power is arguably even broader than those of a court on a judicial review as it can reconsider decisions "on its own motion" and is not restricted to applications for reconsideration. Further, the SRB has the power to make rules specifying the circumstances in which it can reconsider a decision and the practice and procedure for the SRB to follow when exercising its reconsideration authority.

[55] I turn then to whether the SRB reconsideration powers are wide enough to encompass the alleged error.

[56] The petitioner does not specify how the SRB's powers of reconsideration are too narrow, nor how the Reconsideration Decision is an inadequate alternative remedy to judicial review. He relies on *Yellow Cab*, stating that the Original Decision ought to be the subject of this judicial review because, to hold otherwise, "would be to allow a tribunal, through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts". However, this statement in *Yellow Cab* was in the context of a tribunal denying leave for reconsideration:

44 Where a denial of leave does not constitute a determination that the request for reconsideration lacks merit, it is my view that the initial administrative decision, and not the denial of leave, will be the appropriate target for judicial review. To hold otherwise would be to allow a tribunal, through procedural machinations, to oust the inherent, constitutionally-protected supervisory jurisdiction of the superior courts. In *Jozipovic v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2012 BCCA 174 (B.C.C.A.) this Court emphasized that a tribunal cannot, by blocking access to administrative review of a decision, bar the courts from passing on the merits of judicial review.

[57] In *Yellow Cab*, the board had limited jurisdiction to reconsider its decisions. Therefore, the board denied leave for reconsideration without addressing the merits of the original decision, nor considering the issues later raised on judicial review. Unlike the tribunal in *Yellow Cab*, the SRB is provided with a broad jurisdiction to reconsider its decisions. In this case, the Reconsideration Decision considered both parties' submissions, whether some evidence was available to the SRB for the Original Decision, the principles of statutory interpretation considered in the Original Decision, and the SRB cases relied on. Finally, the SRB assessed whether the Original Decision followed SRB jurisprudence. Therefore, the SRB fully addressed the merits of the Original Decision and considered the same issues raised now on this judicial review.

[58] I note as well that a right of judicial review from the Reconsideration Decision under s. 155 of the PNGA provides the court with the advantage of hearing the SRB's views regarding the Original Decision: *Miller v. ARC Resources Ltd.*, 2017 BCSC 25 at para. 24. In *Miller*, when the petitioner prematurely applied for judicial review before exhausting the reconsideration powers of the SRB, the court stated at para. 20 that it "would have been useful, and in fact necessary, for this court to have the benefit of the views of the Board on the legal issues the petitioner did not raise before the Board before embarking on the analysis sought by the petitioner". If the Original Decision was the decision subject to judicial review, this Court would be deprived of the advantage of the SRB's additional views within the Reconsideration Decision.

[59] The views of the SRB regarding the Original Decision are important because it is a specialized tribunal. The SRB was established under the PNGA to, amongst other matters, decide what compensation should be paid to landowners for the use of land: *Miller* at para. 20. The British Columbia Court of Appeal has emphasized the importance of giving deference to specialized tribunals as the "tribunal's own expertise and experience will

inform its decisions": *Air Canada* at para. 36. Although Vavilov has removed the expertise of a tribunal as an independent consideration in determining the standard of review, the role of expertise in administrative decision making is still "folded into the new starting point" and remains a relevant consideration in conducting reasonableness review: at para. 31. As such, the expertise of the SRB is valuable and necessary for the court conducting a judicial review.

- [60] In my view, the legislature has shown an intention to delegate broad decision-making and reconsideration powers to the SRB. When Vavilov replaced the "contextual inquiry" with a presumption of reasonableness review, it did so based on "respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute": at para. 26. Ultimately, Vavilov confirms that the presumption of reasonableness "is grounded in respect for legislative choice": at para. 32.
- [61] The specialized expertise of administrative decision makers is one of the many reasons for the legislature's choice to delegate decision-making powers. Other rationales include "the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice": Vavilov at para. 29. Vavilov confirms that reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: at para. 82. As such, courts must give effect and be deferential to the choices of the legislature. In this case, the legislature intended that the SRB, a specialized tribunal, have the power to review its decisions under its rules and have its own mechanisms to review the proceedings.
- [62] However, the petitioner argues that if the Reconsideration Decision is the decision subject to judicial review, the SRB is effectively insulated from judicial review by the court. I disagree. The reconsideration power given to the SRB gives effect to the legislature's intent to delegate the decision-making and review process to the SRB. Despite the petitioner's views of "fairness", this legislative choice is to be respected. Yet, the Reconsideration Decision it is still subject to judicial review by the court. The court's review of the Reconsideration Decision ensures that the SRB's decisions, and reviews thereof, are subject to the rule of law. At this point, the court now has the benefit of reading both decisions to understand the perspective of the administrative body.
- [63] I conclude there is no foundation to the petitioner's claim that the reconsideration powers of the SRB are not wide enough to address the alleged errors. The SRB has the breadth of powers to fully address the errors alleged. As a result, the Reconsideration Decision is the only decision subject to judicial review.

What is the Standard of Review?

[64] Section 148 of the PNGA states that s. 59 of the Administrative Tribunal Act, S.B.C. 2004, c.45 (the "ATA") applies to SRB decisions. Section 59 of the ATA states:

59(1) In a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

- (2) A court must not set aside a finding of fact by the tribunal unless there is no evidence to support it or if, in light of all the evidence, the finding is otherwise unreasonable.
- (3) A court must not set aside a discretionary decision of the tribunal unless it is patently unreasonable.
- (4) For the purposes of subsection (3), a discretionary decision is patently unreasonable if the discretion
  - (a) is exercised arbitrarily or in bad faith,
  - (b) is exercised for an improper purpose,
  - (c) is based entirely or predominantly on irrelevant factors, or
  - (d) fails to take statutory requirements into account.
- (5) Questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly.

[65] Vavilov confirms that, where the legislature has established the applicable standard of review, that standard must be applied:

35 It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the Administrative Tribunals Act, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); Human Rights Code, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

- [66] The petitioner submits the Reconsideration Decision must be reviewed on a standard of correctness as the question was still one of jurisdiction arguing that otherwise the internal mechanisms of the SRB have ousted the legislated standard of review. Therefore, whether or not the SRB in the Reconsideration Decision applied a standard of reasonableness, its conclusions must still be assessed as to their correctness on the question of jurisdiction, as a matter of law.
- [67] The respondent Encana submits that the legislature's use of the word "may" in s. 155 of the PNGA shows that the Reconsideration Decision was a discretionary decision. Therefore, under s. 59(3) of the ATA, the reviewable standard is patent unreasonableness. The respondent submits that the question is whether the Board exercised its power of reconsideration appropriately.
- [68] The wording of s. 155 gives the SRB the discretion to reconsider a decision. Once it exercises this discretion, and reconsiders a decision, it has the discretion as to whether it will "confirm, vary or rescind the order". That is, the actions of the SRB that precede and follow the reconsideration of the issue are discretionary. However, this does not necessarily mean that the nature of the issue they are reconsidering is discretionary. In the Reconsideration Decision, the SRB reviewed the Original Decision, prior Board decisions, and the applicable legislative definitions and rules of statutory interpretation. In arriving at its conclusion, the SRB was constrained by jurisprudence, principles of administrative law and statutory interpretation. Therefore, the SRB's consideration of whether the Original Decision's interpretation of a flow line was reasonable does not constitute a true discretionary decision.
- [69] In *Progress Energy Canada Ltd. v. Salustro*, 2014 BCSC 960 at para. 55, Mr. Justice Steeves stated that the first step in a judicial review is to "determine the nature of the question in order to determine the appropriate standard of review". This approach was followed by *Bonavista Energy Corporation v. Fell*, 2019 BCSC 255 in a judicial review of a SRB reconsideration decision. In that case, the respondents challenged the SRB's jurisdiction over a claim on the basis that the petitioners were not "landowners" in accordance with s. 158 of the PNGA. When the SRB found it had jurisdiction over the claim, the respondent brought another application challenging the SRB's decision on jurisdiction. That application caused the SRB to exercise its reconsideration powers. In doing so, the SRB confirmed the first decision and concluded they did have jurisdiction over the claim. The respondent then sought judicial review of that reconsideration decision.
- [70] Similar to this case, it was submitted in *Bonavista Energy* that the standard of review was patent unreasonableness because the wording of s. 155 of the PNGA shows reconsideration is a discretionary decision. However, the court relied on *Salustro* and looked at the nature of the specific question. The question of whether the petitioners were "landowners" within the meaning of the PNGA was found to be one of law or, at best, a question of mixed fact and law: at para. 43. As such, the court found that the appropriate standard of review for the reconsideration decision was correctness.

- [71] In applying that standard, the SRB decision was found to be incorrect and set aside. The Court of Appeal, in *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144, overturned the trial decision and found that the SRB decision was correct. It is important to note that, although the Court of Appeal disagreed on the correct interpretation of "landowners", it did not disagree on the standard of review. However, since the parties agreed on the standard of review once before the Court of Appeal, the court did not address the submission that the reconsideration decision was a discretionary decision. Therefore, the Court of Appeal applied the standard of correctness but did not explicitly confirm or deny the approach the trial judge took in applying the standard of correctness to a reconsideration decision based on the "nature of the question". The parties have provided no other authority that points to a specific standard of review that applies to reconsideration decisions. I find the approach taken in *Bonavista Energy* to be persuasive and instructive.
- [72] That approach requires assessing the nature of the question considered in the Reconsideration Decision. The issue before the SRB was the interpretation of "flow line" within the meaning of the PNGA and whether the segments at issue met the definition. At first glance, this appears to be a question of law. It also may be a question of mixed fact and law as the statutory interpretation of flow line must be applied to the facts of the case and whether the segments at issue meet the definition. However, the petitioner does not submit the test was applied incorrectly but submits that the SRB has formulated the wrong test entirely. As such, this is a question of law.
- [73] This question of statutory interpretation decides the parameters of how the SRB can exercise their jurisdiction. In *Canada (Attorney General) v. P.S.A.C.*, [1991] 1 S.C.R. 614, the issue was one of jurisdiction when the definition of "employee" within the meaning of the Public Service Staff Relations Act, R.S.C. 1970, c. P-35 determined the tribunal's jurisdiction. However, the Supreme Court of Canada in *Vavilov* ceased to recognize jurisdictional questions as a distinct category attracting correctness review. This is because it is "often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": at paras. 65-66. In any event, whether the question is one of law or jurisdiction, the standard of review is the same. According to s. 59 of the ATA, the standard to be applied to questions of law or jurisdiction is correctness.
- [74] The question that then arises is how to apply the standard of correctness to a decision that applied the reasonableness standard. That is, was the SRB correct in applying the reasonableness standard and concluding the Original Decision was reasonable, or is the question whether the SRB applied the correct interpretation of a flow line? For completeness, I will answer both questions.
- [75] I turn to whether the SRB's Reconsideration Decision was correct in applying a standard of reasonableness.

Did the Reconsideration Decision Apply the Correct Standard?

- [76] The Reconsideration Decision applied a reasonableness standard in its review of the Original Decision. The petitioner submits the SRB had no authority to apply a reasonableness standard. He further submits that the Reconsideration Decision effectively summarized and adopted the Original Decision's conclusion without additional analysis, declined to consider new evidence, and repeated the same errors as the Original Decision.
- [77] As noted earlier, the respondents argue the appropriate standard of review is patent unreasonableness, but submit that the Reconsideration Decision was also correct and that the SRB applied the appropriate standard of review in reconsidering the Original Decision.
- [78] Also as discussed earlier, the language of s. 155 of the PNGA and s. 17 of the SRB Rules evidences the legislature's intent to provide the SRB with broad powers of reconsideration and the autonomy to manage and review their own orders. Section 155 does not specify a standard of review. Section 17(4) of the SRB Rules states that the SRB may determine how a reconsideration will be conducted on a case-by-case basis. Section 17(1)(c) states that the SRB may vary or rescind the order if the SRB is satisfied that "the Board made a jurisdictional error including a breach of the duty of procedural fairness, or a patently unreasonable error of fact, law or exercise of discretion in respect of matters within the Board's jurisdiction." In *Bonavista Energy Corporation v. Fell*, 2017 BCSC 2406 at para. 17, Adair J. confirmed that the use of the word "including" means the provision is inclusive and provides a non-exhaustive list of the types of jurisdictional errors for which reconsideration may be available. Hence, the SRB may vary or rescind orders for patent unreasonable errors of fact, law or exercise of discretion. However, the SRB Rules do not expressly indicate the standard of review to be patent unreasonableness in a review for jurisdictional error.
- [79] Section 59 of the ATA has no application to the SRB's exercise of its reconsideration power because it is not a "judicial review proceeding". Since the ATA does not apply and the PNGA and SRB Rules do not provide for a specific standard of review, the SRB was correct to look at the common law to determine the appropriate standard of review. It relied on *Dunsmuir v. New Brunswick*, 2008 SCC 9, for the proposition that the standard of review for a tribunal's interpretation of its own statute, or statutes closely connected to its function and which it is familiar with, will be presumed to be a question of statutory interpretation subject to deference by the application of a reasonableness standard of review.
- [80] Although the SRB did not have the benefit of *Vavilov* at the time of the reconsideration, its conclusion aligns with the presumption of reasonableness. In *Vavilov* at para. 25, the Supreme Court of Canada held that "a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes". Where "the legislature has afforded a decision maker broad powers in general terms - and has provided no right of appeal to a court - the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect": *Vavilov* at para. 68.

[81] I conclude the SRB was correct in applying the standard of reasonableness. The application of that standard to the issue of the interpretation of a flow line then arises. For the following reasons, I find that the SRB applied the correct interpretation of a flow line. Therefore, I need not discuss whether the Reconsideration Decision was correct in finding that the Original Decision was reasonable. If the Original Decision is correct, then concluding that such an interpretation is reasonable is also correct.

#### What is the Correct Interpretation of a Flow Line?

[82] In the Original Decision, the SRB held that pipelines located within the upstream or gathering part of the system, and that function as part of the gathering system, are flow lines. This definition was first established by the 2012 SRB decision called *Murphy Oil Company Ltd. v. Shore*, Order 1745-1 (2012). The petitioner submits that the SRB has exceeded its jurisdiction and developed a line of cases based on *Murphy* that are wrong in law, resulting in the formulation of an incorrect legal test for what constitutes a flow line.

[83] As noted in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, the purposive approach to statutory interpretation set out by Driedger in *Construction of Statutes* (2nd ed. 1983) at p. 87 is well-established:

26 Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[84] In *P.S.A.C.*, the Supreme Court of Canada adopted a "pragmatic and functional approach" to the construction of the provisions before concluding that Parliament did not intend to confer jurisdiction on the board with respect to the labour relations of employees who are not members of the public services: at para. 21. Similarly, in this case, a pragmatic and functional approach must be adopted in considering whether the legislature intended to confer jurisdiction on the board regarding the Fuel Gas Pipe and Water Pipe. This emerges from the following statement of Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088-1089:

At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

[85] The definition of flow line in s. 1(2) of the OGAA creates a three-part analytical framework. The segments at issue must:

- a. be a "pipeline" as defined by the OGAA;
- b. connect a wellhead to a scrubbing processing or storage facility; and

- c. precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line.

[86] It is not disputed that the Fuel Gas Pipe and Water Pipe are pipelines as defined by the OGAA. However, the petitioner submits that a plain reading of the provision cannot support the SRB's interpretation because the Fuel Gas Pipe and Water Pipe do not connect directly to a "wellhead", and as such, do not connect a wellhead to a processing, scrubbing or storage facility. Section 1 of the Drilling and Production Regulation, B.C. Reg. 282/2010, defines "wellhead":

"wellhead"

- (a) includes the flow control valves and all equipment installed on a well above the uppermost portion of the surface casing, and
- (b) does not include associated flow lines;

[87] A "facility" is defined in the OGAA as:

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

[88] The above definition specifies that a wellhead does not include a flow line. It includes "all equipment" on a well as long as it is "above the uppermost portion of the surface casing". That is, any equipment installed on a well that is above the ground. The respondent submits that the Water Pipe connects wellheads (equipment installed above ground on a well) at the well site to a processing and storage facility, namely the Water Resource Hub. The respondent also submits the Fuel Gas Pipe connects the wellheads at the well site to a facility at which gas processing takes place. In *Murphy*, the SRB concluded at para. 29 that a flow line must connect to the equipment at a wellhead rather than to a well itself. Although this was before the recent addition of the definition of wellhead in the Drilling and Production Regulation, this conclusion remains consistent with the plain and grammatical reading of the definitions of "flow line" and "wellhead" together.

[89] What remains in contention is the last portion of the definition. What is captured by the requirement that the pipeline "precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line"? The petitioner submits the Fuel Gas Pipe and Water Pipe do not precede transmission or distribution pipelines because they have already been transmitted and distributed. Further, the petitioner advocates for a narrow reading, in which the "conveyed substance" can only be produced raw natural gas. The respondent submits a broader reading should be taken to include infrastructure that moves the produced natural gas to the transmission lines. As noted, this infrastructure is referred to as a "gathering system".

- [90] In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, the Supreme Court of Canada stated at para. 48 that "the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading". As such, the entire context of the provision must be looked at to clarify its meaning.
- [91] Applying the principles of statutory interpretation, the correct approach in interpreting the meaning of a flow line is to look to the intention of the legislature. The petitioner submits that a plain reading of the words of the statute are clear. Hence, the SRB did not need to look at other interpretive aids outside the statute. He asserts the SRB justified its interpretation with a "flawed analysis of intent or pragmatism". Further, once the SRB looked to *Hansard*, he argues it incorrectly concluded that the legislature's intention was for the term "flow line" to be synonymous with "gathering line" or "gathering system".
- [92] In support, the petitioner relies on *Bell ExpressVu*. There, *Iacobucci J.* states at para. 28 that other principles of interpretation, such as strict construction of penal statutes and the presumption of Charter values, only receive application where there is ambiguity as to the meaning of the provision. He explains how such ambiguity will arise:

29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte*, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang* (1965), [1966] A.C. 182 (U.K. H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, *Major J.*'s statement in *Canadian Oxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 (S.C.C.), at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

30 For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by *Driedger*, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (*Willis*, supra, at pp. 4-5).

[Emphasis added]

- [93] As stated above, included in the purposive approach is reading the words of an Act harmoniously with the intention of the legislature. Hence, not only is it correct to do so, it is mandatory for the court to consider the intention of the legislature before determining if a provision is ambiguous.
- [94] Regarding the petitioner's challenge to the SRB's use of Hansard, the petitioner relies on *Rizzo & Rizzo Shoes Ltd., Re*, [1988] 1 S.C.R. 27, to argue that the Supreme Court of Canada has cautioned the use of Hansard in interpreting legislation. The petitioner has left out important qualifying language of the Court. While Rizzo admits to the frailties of Hansard evidence, the Court recognized that it can play a limited role in interpreting legislation. The Court, citing *R v. Morgantaler*, [1993] 3 S.C.R. 463, states, "[p]rovided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of the legislation": at para. 35. Therefore, Rizzo acknowledges that Hansard may have limited weight but does not caution against using it. Rather, it confirms the usefulness and relevance of it as evidence of the purpose of the Act and legislative intent.
- [95] In Hansard debates, where the current definition of flow line was adopted by the legislature, Minister Lekstrom spoke to the distinction between a flow line and other pipelines. He referred to a flow line as a "gathering line - ones that bring wellheads together into a main pipeline" and stated that a flow line and gathering line are "one and the same". Minister Lekstrom also elaborated on the distinction between a flow line and pipeline in which a pipeline is "more permanent in nature", traditionally larger, and "wouldn't be a gathering system". As previously noted, the Oil and Gas Commission Glossary and Definitions define a gathering system as the "pipelines and other infrastructure moving raw gas from the wellhead to processing and transmission facilities".
- [96] The petitioner submits the Fuel Gas Pipe does not fit under the definition of "flow line" because it transports fuel gas, a post-production product, to the oil and gas permit holder on the well site to power equipment. Similarly, he submits the Water Pipe does not precede transmission and distribution because it is being distributed to its end user. He argues a pipeline that conveys a processed product to an end user is not a flow line. The petitioner's submissions are based on the assumption that the well site is an "end user" or "market" that is consuming the water and fuel gas. However, this ignores the fact that the well site is the producer of the raw natural gas. The well site forms part of the gathering system used to bring "upstream" natural gas to processing facilities, after which it is eventually delivered to "downstream" consumers or "end users". It does not logically follow that the well site can be both the "upstream" producer and the "downstream" end user. This type of reasoning is cyclical and creates an absurd result.
- [97] Looking at the context of the provision, including the intention of the legislature, the ambiguity regarding what it means for a pipeline to "precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line" is largely resolved. To precede the transfer of the conveyed substance to or from a transmission, distribution or

transportation line means to be part of the gathering system. The Fuel Gas Pipe distributes fuel gas to pad sites and facilitates the production and transmission of natural gas from each well. The Water Pipe moves produced water to the well site for fracturing activities and facilitates the return of produced water to the Water Resource Hub for processing and storage. The use of the Fuel Gas Pipe and the Water Pipe form a necessary part of Encana's gathering system. In other words, they are pipelines that "precede the transfer of the conveyed substance to or from a transmission, distribution or transportation line".

- [98] A well-established principle of statutory interpretation is that statutes must be interpreted in a way that avoids absurdity. If the Fuel Gas Pipe and Water Pipe were properly characterized as pipelines, the same right of way would have to be acquired twice by separate and duplicative processes.
- [99] The petitioner submits this analysis by the SRB incorrectly relied on *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031. He submits this case is distinguishable because the issue was access to justice in which an absurdity was found when a person wished to appeal from a decision and had to file two different documents in two different courts to appeal the same decision. He submits this analogy of access to justice to different classes of pipelines is "entirely misplaced." In my view, whether or not *Canadian Pacific Ltd.* is distinguishable, it does not take away from the fact that there is still an absurdity in this case. It is absurd for the legislature to have intended such a result in which the same area of land is acquired twice by separate and duplicative processes.
- [100] The petitioner submits absurdity results from the SRB's interpretation of a flow line because the result is the removal of a substantive right from a private landowner absent compensation. Again, such a claim is misguided because there are no substantive rights being removed from the petitioner without compensation. As discussed below, the PNGA provides for compensation and the petitioner has been compensated.
- [101] In my view, after reading the provision within the context of the entire scheme of the PNGA and the intention of the legislature, the words are no longer ambiguous. Given the intention of the legislature, it is clear that pipelines within the upstream or gathering part of the system are flow lines. Thus, external statutory interpretive principles need not be considered. However, the petitioner submits that we must consider the principle that jurisdiction of administrative tribunals must be "construed narrowly" to "avoid confiscatory effects of private property". The petitioner relies on *ATCO Gas* for this principle. The actual wording of the case states:

79 It is well established that potentially confiscatory legislative provision ought to be construed cautiously so as not to strip interested parties of their rights without the clear intention of the legislation

86 This Court's role in this case has been one of interpreting the enabling statutes using the appropriate interpretive tools, i.e. context, legislative intention and objective. Going further than required by reading in unnecessary powers of an administrative agency under the guise of statutory interpretation is not consistent with the rules of statutory interpretation. It is particularly dangerous to adopt such an approach when property rights are at stake.

[102] I do not read this to say that jurisdiction must always be construed narrowly to avoid confiscation of private property, especially if the legislative intention is clear. Rather, absent this clear intention, courts must be cautious in construing legislation in a way that strips interested parties of their rights. Here, the SRB has explicit powers over flow lines and compensation to landowners for a permit holder's right of entry. Therefore, the legislature has made it clear that the SRB has the authority to strip an interested party of their right to prevent a permit holder from entering their land if it is for the purpose of constructing a flow line.

[103] The petitioner also argues that the SRB's jurisdiction over the Fuel Gas Pipe and Water Pipe authorizes the granting private property rights to third parties without compensation. He claims the "stigma" that results to his land is not compensated by the SRB. Such a claim is unfounded. Landowners are compensated for access to their land, either via the Board-administered process for flow lines or the expropriation process for other pipelines. While the SRB's jurisdiction over the Fuel Gas Pipe and Water Pipe grants a right of entry to Encana, it also provides compensation to the landowner. Further, the respondent submits that the petitioner has already been compensated for the right of entry to his lands in accordance with s. 159(4) of the PNGA. Section 159(4) of the PNGA states:

(4) A right of entry order made by a mediator must, as a condition of the order, require the person who is seeking the right of entry to pay to the landowner, on account of rent, if any, or compensation that may be ordered under section 162(1)(a), an amount of money ordered by the mediator.

[104] The petitioner submits that expropriation provides fairer compensation for landowners. It is his position that utilizing the SRB process is administratively faster and less expensive for the oil and gas user while providing less remuneration to the landowner. However, he does not specify how expropriation provides more remuneration. In any event, it is irrelevant to the analysis. Since the Fuel Gas Pipe and Water Pipe are properly characterized as flow lines, there is no argument that the "stigma" is not compensated as compensation is provided for by s. 159(4).

[105] Although the petitioner submits that the provision ought to be construed narrowly to avoid confiscatory effects of private property, he advocates for the process of expropriation. The SRB process does not remove the petitioner's fee simple ownership of the right of way. Expropriation, on the other hand, does. In my view, expropriation has a much more confiscatory effect on private property. As such, the SRB's interpretation of flow lines is construed in a way that avoids the confiscation of the petitioner's private property through

expropriation.

## Conclusion

[106] I conclude that flow lines are pipelines that form part of the gathering system as such is consistent with the grammatical meaning of the statute and the larger context of legislative intent. In this case, such an interpretation is consistent with the principle of avoiding absurdity as it avoids the need to acquire the same right of way through separate and duplicative processes. Accordingly, this interpretation of a flow line means the Fuel Gas Pipe and Water Pipe are properly described as flow lines within the meaning of the PNGA. The purpose of the Fuel Gas Pipe and Water Pipe is to convey the produced natural gas from the well site to processing facilities. Their function, use and purpose precede the transfer of the produced natural gas to a transmission, distribution or transportation line. As a result, the SRB did not exceed its jurisdiction in issuing the Original Decision, the ROE Order, nor the Reconsideration Decision. The petition is dismissed.

## Costs

[107] As requested, if the issue of costs is not resolved by agreement, the parties are at liberty to make submissions at a time arranged through Scheduling.

"The Honourable Mr. Justice Punnett"

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