THE SURFACE RIGHTS BOARD OF MANITOBA
BOARD ORDER
Under *The Surface Rights Act*, C.C.S.M. c. S235

File No: 02-2013 **Order No: 38-2013**

Hearing: Virden Legion Hall Virden, Manitoba

Date issued: September 25, 2013

BEFORE:

Margaret Hodgson, Presiding Member
Clare Moster, Deputy Presiding Member
Claude Tolton, Board Member

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant (Operator)	**Penn West Petroleum Ltd.**
	- AND –
Respondent (Landowner/Owner)	**Wayne Douglas Serruys**
Occupant	**Garry Andrew Serruys**

CONCERNING:

NW¼ 4-4-26 WPM in the Province of Manitoba (the "Lands").

PURPOSE OF HEARING:

To hear and receive evidence regarding an application under s. 21 of *The Surface Rights Act* of Manitoba received from the Applicant for right of entry and compensation for surface rights to construct one underground crude oil pipeline across the Respondent's Lands.

RIGHT OF ENTRY ORDER FOR AN OIL PIPELINE

BACKGROUND:

The Applicant applied on April 12, 2013 for an order granting the right to enter the Respondent's Lands for the purpose of running both a new crude oil pipeline and a natural gas liquids pipeline across the Lands and setting the compensation payable for this right of entry and resulting right-of-way. The new oil pipeline was to replace the existing smaller pipeline constructed in the mid 1980s. The new lines were in most locations to run adjacent and parallel to the existing pipeline.

The subject Lands were one (1) land parcel out of a total of 37 parcels for which the Applicant made applications. The applications affected 27 separate landowners, 26 of whom were represented by counsel and hereinafter are referred to as the **"landowner group"**, to which the Respondent is a party.

The Applicant has indicated that the reasons given by various parties in the landowner group for not being willing to agree to right of entry, included:

- Did not want pipeline on their land
- Want the proposed route of the pipeline on their land changed
- Compensation being proposed by Applicant not acceptable
- Concern regarding liability for the existing pipeline
- Want the decommissioned line removed at same time as construction of new line
- Wanting Applicant to make a $1 million contribution to Melita Rec Centre
- Concerns regarding drainage and repair of surface after construction
- Concerns regarding inconvenience during construction
- Wanting annual compensation payments

At the beginning of the hearing the Applicant announced that the proposed natural gas liquids pipeline had been cancelled due to economic reasons and the application now pertained only to the crude oil replacement pipeline.

During the hearing process, the landowner group stated they had been denied adequate time to prepare their evidence and therefore were effectively denied the opportunity to present evidence they otherwise would have presented. ' This position was based on their submission that their counsel had been denied sufficient time to review the matter and prepare their evidence.

ISSUES:

1. **Does the Applicant require the right to enter upon the lands of the Respondent?**
2. **Were the Respondents denied the opportunity to adduce evidence?**
3. **What will be the terms and conditions of any Board orders, if issued?**
4. **Was determination of compensation necessary?**
5. **Costs**?

APPEARANCES:

COUNSEL:

Keith D. Boyd and Murray Douglas, Kanuka Thuringer LLP
– Counsel for the Applicant

Tristan N. Culham, MacPherson Leslie Tyerman LLP
– Counsel for the landowner group, including the Respondent

WITNESSES FOR THE APPLICANT: *(Introduced as a panel at the July 23rd hearing)*

Jason Hardy, P.Eng., Penn West (sworn)

Victor Wong, P.Eng., Penn West (sworn)

Wade McLeod, Penn West (sworn)

Bill Voth, Penn West, (sworn)

Jacqueline Redburn, Rangeland Conservation (sworn)

WITNESSES FOR THE LANDOWNER:

Glen Campbell (sworn), spokesperson for the landowner group who gave evidence in support of a request for an adjournment.

EXHIBITS: For June 26, 2013

Exhibit #1 - Affidavit of Service - DVD with electronic copies of Operator's documents to all landowners, submitted by PennWest
Exhibit #2 - 16 letters/emails (some are duplicate) appointing G.Campbell/D. Greig as spokesperson, submitted by G. Campbell
Exhibit #3 - June 25, 2013 letter from Larry Maguire, MLA, submitted by G. Campbell
Exhibit #4 - Pipeline application, construction permit, miscellaneous documents submitted by PennWest - binder containing 17 tabs
Exhibit #5 - Land Titles documents, contact reports, photos/air photos submitted by PennWest - binder containing 36 tabs
Exhibit #6 - McNally Reports submitted by PennWest - binder containing 5 tabs
Exhibit #7 - Comparables Summary submitted by PennWest - binder containing 74 tabs
Exhibit #8 - Proposed Pipeline Route map for townships 1 & 2-25 WPM, 2, 3 & 4-26 WPM, and 4 & 5-27 WPM
Exhibit #9 - Proposed Pipeline Route in townships 6 & 7-27 WPM and 7, 8 & 9-28 WPM

EXHIBITS: For July 23, 2013

Exhibit #10 – Draft terms/conditions of Environment Act Proposal, submitted by Penn West
Exhibit #11 – Landowners' Proposed Provisions for any Interim Access Order, submitted by the landowner group.

DECISION:

Upon hearing the presentations of each of the parties and the oral evidence on June 26 and July 23, 2013 and reviewing the submissions into evidence and final written arguments; decision being reserved until today's date:

It is the Order of this Board That:

1. **Pursuant to *The Surface Rights Act* this Right of Entry application is granted for the pipeline right-of-way, and temporary workspaces and/or temporary access roads, if applicable, as shown on the Individual Ownership Plan; subject to the terms and conditions as set out on Schedule "A" , all of which are attached to and form part of this Board Order.**

2. **The Applicant shall pay interim compensation of $1,000.00 for each quarter section on the Lands affected by this Board Order. Payment shall be made within 60 days of the issuance of this Order, or prior to the Applicant using the right of entry granted by this Board Order, whichever first occurs.**
   The compensation portion of this application is adjourned without date. Should the parties be unable to agree upon the final compensation payable, a party may request the Board to set a date for a hearing with respect to compensation.

3. **No costs are awarded**

Background:

Under section 151(2) of *The Oil and Gas* Act, where a person receives a pipeline construction permit from the Minister under section 149 of *The Oil and Gas Act* the person (a "permittee") may not commence construction of the pipeline without first obtaining the surface rights necessary to construct and operate the pipeline. A permittee may obtain the surface rights by agreement with the landowner or by obtaining an order under *The Surface Rights Act* from this Board. In the present case the Applicant received a permit to construct a pipeline from the Minister; Pipeline Construction Permit No. 2013-02 was issued to the Applicant on March 21, 2013 by the Minister of Innovation, Energy and Mines. The Permit has a map attached to it which identifies the final approved route of the proposed pipeline with respect to the lands in question. The parties were evidently not able to arrive at an agreement as to the surface rights and compensation and the Applicant filed an application with the Board on April 12, 2013.

REASONS FOR DECISION

1. Does the Applicant require the right to enter upon the Lands of the Respondent?

The Board is of the opinion that the definition of "operator" in *The Surface Rights Act* describes an entity that has the "right" to conduct any operation in connection with the production of a mineral.

Undisputed evidence presented by the Applicant indicated that Penn West Petroleum Ltd., was an operator under *The Surface Rights Act*, by virtue of the Pipeline Construction Permit No. 2013-02, therefore the Board determined that as such, the Applicant requires the right to enter upon the Lands for the purpose of running an underground crude oil pipeline across the Lands.

2. Was the landowner group denied the opportunity to adduce evidence?

The landowners group claimed that they had been denied adequate time to prepare their evidence and therefore were effectively denied the opportunity to present evidence they otherwise would have presented. This position was based on their claim that their counsel had been denied sufficient time to review the matter and prepare their evidence.

The scheduled hearing dates for this matter were June 26, and June 27; July 3 and July 4; and July 9 and July 10, 2013. By email dated June 17, 2013, Mr. Glen Campbell advised the Board that Mr. Sheldon Lanchbery, their legal counsel had been appointed to the Manitoba Court of Queen's Bench on June 7, 2013, that the landowner group now had no legal counsel, and requested an adjournment of the scheduled hearing. He was advised by the Board that his adjournment request would be heard at the commencement of the hearing on June 26, 2013.

At the commencement of the hearing on June 26, 2013 the Board heard the landowner group's request for an adjournment. Mr. Campbell, spokesperson for the landowner group, asked the Board to adjourn the matter for a few months due to lack of legal counsel and extenuating circumstances related to weather and other matters out of their control.

The Board deferred its decision on the request for an adjournment, and proceeded to hear some evidence presented by the Applicant primarily related to the background of the application. The Board then granted the landowners a 26 day adjournment, with the hearing to resume on July 23, 2013 instead of June 27, 2013. In addition, the Board with the concurrence of the Applicant, reduced the scope of the hearing to cover only the issue of right of entry, with the compensation issue deferred to a later date. This adjournment was to allow the landowners additional time to acquire new legal counsel and prepare their case as it related to the right of entry only.

On July 17, 2013 Mr. Deron Kuski, the landowner group's new counsel, requested a further adjournment of the hearing. The Board advised Mr. Kuski his adjournment request would be heard at the scheduled resumption of the hearing on July 23, 2013.

At the commencement of the July 23, 2013 hearing, the landowner group again presented a request for adjournment stating there had not been adequate time to prepare. The Board considered their request and heard evidence from the Applicant as to the potential prejudice an adjournment would cause. The hearing then proceeded, with the Applicant presenting its evidence and cross examination by counsel for the landowner group. No witnesses were called by counsel representing the landowner group, though he did introduce a document containing proposed terms and conditions for right of entry. This document was marked as Exhibit #11 by the Board. Mr. Rick Tilbury presented his evidence. The Board then afforded the landowners an opportunity to present a written final argument before August 2, 2013, and the Applicant given until August 12, 2013 to respond to Exhibit #11 and the landowners' written argument. Both parties exercised their opportunity.

The Board concludes that the Respondent was given an adequate opportunity to retain counsel for the purposes of addressing the issue of whether a right of entry should be granted to the Applicant. The Board did postpone the date for the second day of the hearing for an additional 26 days and the Respondent was able to retain and instruct counsel within that time period.

The Board also deferred the "compensation" part of the application to a future date, if required, thus providing the Applicant and the landowners additional time to possibly come to agreement on compensation without requiring a further Board proceedings on compensation, or failing that, further time to prepare for a hearing on compensation.

3. The Terms and Conditions of the Right of Entry

The Board is of the opinion that any right of entry order should specify the rights in detail in order to avoid disputes between owners and operators, and Part III of the *Act* does not specifically address these items in detail.

The Applicant referenced the Terms and Conditions included in Board Order No. 05-2012 (Enerplus v. Gabrielle) and suggested they would be appropriate in these circumstances, subject to removal of items pertaining to indemnification, compensation, liability, construction and protection of the environment.

At the conclusion of the hearing the landowner group presented a proposed list of conditions for the right of entry order. The document containing the proposed conditions was entered into evidence as Exhibit #11. This was not a document that had been previously disclosed to the Applicant, who indicated they were not in favor of many of the items presented in it.

Many of the concerns raised by the Respondents in this hearing were issues not within the powers of the Board to address, but were concerns that were considered and addressed in the approval process for the pipeline construction permit and the environmental licence.

The powers of this Board do not include determining how the pipeline is to be designed and constructed, or the route of the pipeline. That authority falls under the Oil and Gas Act, and the Minister of Innovation, Energy & Mines exercises those powers when issuing the pipeline construction permit. Permits normally determine what standards will apply to the pipeline, including depth of burial and abandonment, and also set the final approved route for the pipeline.

Similarly, issues related to protection of the environment fall under the Environment Act, and the environment act licence issued by Manitoba Conservation and Water Stewardship covers such issues as the methodology to be used to separate and replace topsoil, mitigation measures to prevent the introduction and spread of foreign aquatic and terrestrial biota, alteration of local drainage patterns, compaction and re-establishment of pre-existing land contour profiles, and submission of as built record drawings.

The proposed terms and conditions submitted by the landowner group to be in a right of entry order included items related to removal of abandoned pipelines, depth of burial, handling of topsoil, prevention of the spread of pests and crop diseases, subsidence and grading.

Terms and conditions that are related to construction standards and environmental concerns are already being addressed in pipeline construction permits and in environment act licences. The Board considers it ill conceived to include provisions in a board order that may differ or duplicate provisions not under the Board's jurisdiction.

Attached to and forming part of this Board Order is Schedule "A", which provides the general terms and conditions for a right-of-way for a pipeline, a temporary work space and a temporary access road.

4. What Compensation is payable?

The question of compensation was set aside to be determined at a later date if the parties are not able to arrive at an agreement, so no final compensation is awarded in this Order.

However, Subsection 20(2) of *The Surface Rights Act* states that every operator shall pay compensation for rights acquired by him. The Board in granting right of entry considers it appropriate to order interim compensation. Based on recent Board compensation orders for pipelines, the Board considers an interim payment of $1,000.00 for each quarter section of the Lands affected as appropriate in these circumstances.

The Board is also of the opinion that interim compensation payments should be paid in a timely manner, either prior to the Applicant using the right of entry, or within 60 days of the granting of the right, whichever first occurs.

Should the parties be unable to agree upon the final compensation payable, a party may apply to the Board to determine the amount.

5. Costs

The Board makes no award for costs.

Decision delivered this 25th day of September 2013.

M. D. Hodgson, Presiding Member

Schedule "A"
Attached to and forming part of Board Order No 38-2013
Terms and Conditions for Right-of-Way for Oil Pipeline
Located in NW¼ 4-4-26 WPM in the Province of Manitoba

1. Quiet Enjoyment
The Operator performing and observing the covenants and conditions on its part to be performed and observed shall and may peaceably hold and enjoy the rights, liberties, and easements hereby Ordered without hindrance, molestation or interruption on the part of the Owner (or any person claiming that by, through, under, or in trust for the Owner) for so long thereafter as the Operator, his successors, and assigns continues to use the right-of-way for the purposes herein set forth.

2. Demised Premises
The Owner for the purposes and at the consideration set forth in this Order, if applicable, does hereby grant, transfer and convey to the Operator all and singular those parts shown upon the **Individual Ownership Plan** attached hereto as **pipeline right-of-way** (hereinafter called the "demised premises") to be held by the Operator, for itself, its servants, agents and contractors, the right, licence, liberty, privilege and easement, to survey and select so much of the demised premises as may be necessary for a right-of-way throughout for the laying down, construction, operation, maintenance, inspection, removal, replacement, reconstruction and repair of a pipeline, and underground appurtenances as may be necessary or convenient in connection therewith, for the carriage, conveyance, transportation and handling of crude oil through or by means of the same, and the right of ingress and egress for all purposes incidental to this grant as and from the date hereof and for so long hereafter as the Operator may desire to exercise the rights and privileges hereby given. The right to construct a pipeline in the right-of-way hereby Ordered shall be limited to one construction operation.

3. Protection of the Right-of-Way
(A) Subject to the following, the Owner shall have the right to use and enjoy the right-of-way.

i. The Owner shall not use the right-of-way for any purpose which might either interfere with the rights granted herein to the Operator, or incur a liability for damages to the Operator without the prior written consent of the Operator, including in particular, no permanent structures may be erected on the right-of-way by the Owner without the written consent of the Operator.

ii. The Owner hereby indemnifies and saves harmless the Operator from all actions, causes of action, proceedings, claims, demands, losses, costs, damages and expenses which the Operator may pay or incur as a result of or in connection with any use by the Owner of the right-of-way.

(B) The Operator shall be responsible for and compensate the Owner for reasonable additional costs incurred by the Owner which may be caused by the existence of the said pipeline and right-of-way, in connection with the excavation, drilling, installation, erection, repair, or construction for any permitted operation for agricultural or related purposes across, over or under, on or through the right-of-way.

4. Removal of Property
Notwithstanding any rule of law or equity, the pipeline shall at all times remain the property of the Operator, notwithstanding that the same may be annexed or affixed to the demised premises and shall at any time and from time to time be removable in whole or in part by the Operator.

5. Damages
The Operator shall pay compensation for any and all damage where such damage occurs as a result of the operations of the Operator, its servants, agents, or contractors.

6. Liability
The Operator covenants and agrees to indemnify and save harmless the Owner from any and all liabilities, damages, costs, claims, suits, or actions caused by or resulting from the construction, operation, maintenance, and/or repairs of the said pipeline and/or any related fixtures and appurtenances affixed to the right-of-way other than through wilful damage or gross negligence by the Owner.

7. Topsoil
Insofar as it may be practicable to do so, the Operator shall, unless otherwise requested by the Owner, strip from the ditch line prior to construction such width as may be required under good oil field practices and in compliance with existing regulations, permits and licences, and replace the topsoil as near as possible to its original condition following construction.

8. Taxes
The Operator shall pay all rates and taxes that may be assessed and levied from time to time against its interest in the demised premises and installation or in connection with its operations thereon.

9. Above Ground Installations
The Operator shall, so far as may be practicable, locate any above ground installation in such a fashion as to provide a minimum of inconvenience to the Owner. The Operator shall obtain a written agreement from the Owner prior to constructing such installation and compensate the Owner for such installation by separate agreement, and failing such agreement, apply to the Surface Rights Board for an appropriate order.

10. Discontinuance and Abandonment
Upon the discontinuance of the use of the said right-of-way and of the exercise of the right(s) hereby Ordered, the Operator shall restore the demised premises to the same condition, so far as may be practicable to do so, as the lands were prior to the entry thereon and the use thereof by the Operator.

11. Discharge of Encumbrances
The Operator shall have the right at its option, to pay or discharge any balance owing under any agreement of sale or mortgage or any tax charge, lien or encumbrances of any kind or nature whatsoever, which may exist prior to the registration of this Board Order, upon or against or in any way affecting the demised premises, in which event the Operator shall be subrogated to the rights of the holder or holders thereof and may, in addition to exercising and enforcing such rights, at its option, apply and credit the amount so paid by it, to any considerations as set forth above in this Board Order.

12. Assignment
All the covenants and conditions herein contained, shall extend to, be binding upon, and inure to the benefit of the executors, administrators, successors and assigns of the Owner and the Operator respectively.

13. Temporary Workspaces/Temporary Access Roads
The Owner for the purposes of access, construction, clean-up and restoration of the pipeline, if applicable, does hereby grant to the Operator the right to enter upon, use and occupy, all and singular those parts shown as temporary workspaces and/or temporary access roads upon the Individual Ownership Plan attached hereto, subject to the following terms and conditions:

- The Operator shall compensate the Owner at the consideration set forth in this Order, if applicable, for right of entry and for damages that occur in the area covered by the Temporary Work Spaces and/or Temporary Access Roads.
- The Operator shall restore the area of all temporary workspaces and/or temporary access roads to the same condition so far as may be practicable to do, as it was prior to the entry thereon and the use thereof by the Operator, its contractors and/or representatives.
- The area designated as Temporary Work Space and/or Temporary Access Road will automatically expire on the one (1) year anniversary of the commencement of construction on the demised premises.

13. Additional Terms

The Terms and Conditions above are excerptions from applicable Right of Entry Orders. Any additional terms, expressed or implied, shall be of no force or effect unless made in writing and agreed to by the Owner and the Operator.

PENN WEST

INDIVIDUAL OWNERSHIP PLAN

Showing

RIGHT-OF-WAY

in

N.W. 1/4 Sec.4 - Twp. 4 - Rge.26WPM

Scale - 1 : 5000

Portions referred to outlined thus :

Bearings are NAD 83 (Original) UTM Grid Bearings referred to the Central Meridian 99° W and were derived by G.P.S.

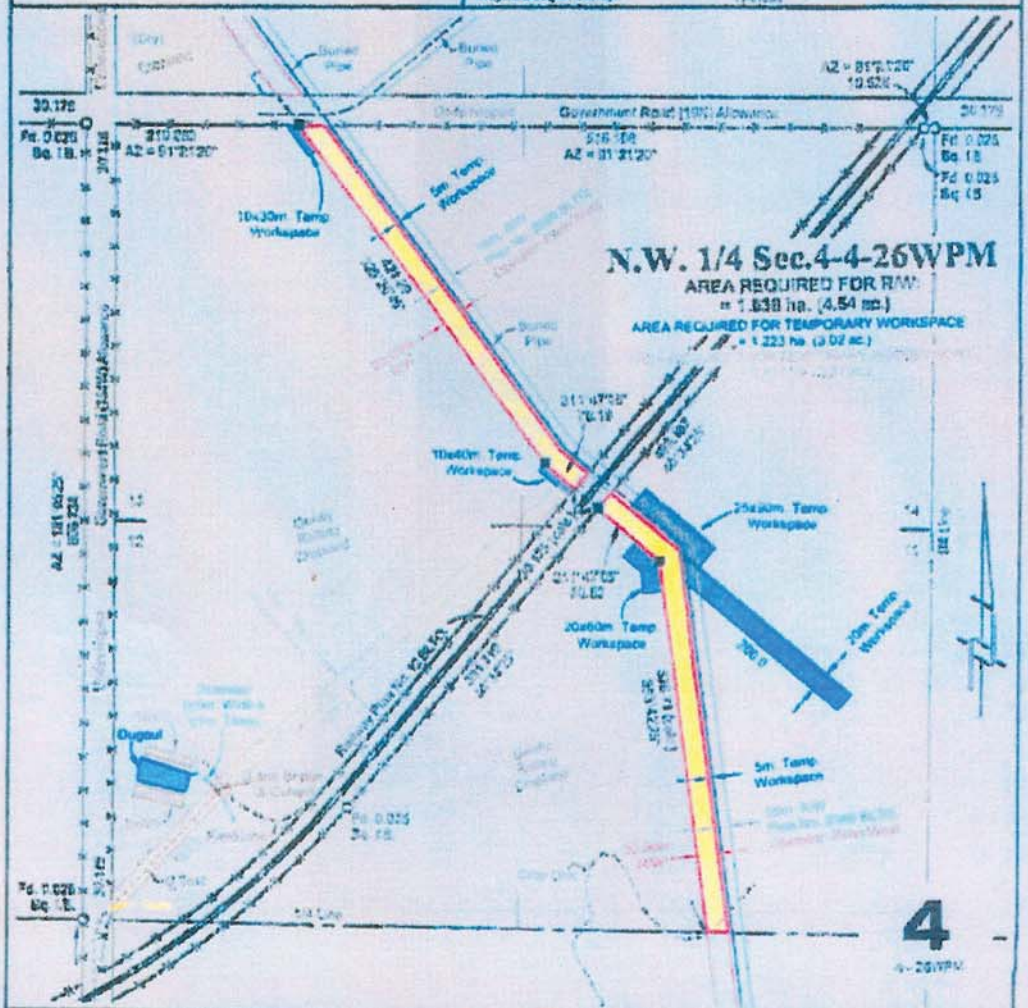
TITLE No. : [illegible]

OWNER : Wayne Douglas Serrays

I/We, the landowner(s), consent to the location of the Right-of-Way as shown and have no objections to The Manitoba Petroleum Branch of Manitoba Mines and Minerals issuing an Underground Facility and/or construction permit.

Dated this ____ day of _____ 2011

Wayne Douglas Serrays Witness



Altus Geomatics Manitoba

I.O.P. No.: 4	SEGMENT: C1
Client File No: 11-0368	AFE No: P.11780880
REV	Revision
Date: Nov. 14, 2011	Job No.: 145450-V
File: 145450P	Initials: WWGA - AV - PFS