

The relationship between the well licence jurisdiction of the Energy Resources Conservation Board and the jurisdiction of the Surface Rights Board

By Nigel Bankes

Cases Considered:

[EnCana Corporation v. Campbell, \[2008\] ABQB 234](#)

Justice Crighton's decision in *EnCana v. Campbell* suggests that land owners may be able to use the Surface Rights Board (SRB) to require an oil and gas operator to follow more stringent conditions in relation to surface access and related matters such as weed control and water quality protection and testing than may be prescribed in the terms of a well licence or the Energy Resources Conservation Board (ERCB)'s *Oil and Gas Conservation Regulations*. Given the potential surface impacts of coal bed methane (CBM) development in the province and the uncertainties associated with the effect of CBM operations on ground water quality this is an important development. But while it offers additional protection for surface owners it also has the potential for a patchwork of environmental requirements etc. which may vary from property to property. This may well be a case where the re-born ERCB needs to be more proactive and precautionary so as to reflect the concerns of and uncertainties faced by landowners especially with respect to such an important matter as water quality.

The key statutory provision dealing with the interrelationship of the two Boards is s.15(6) of the *Surface Rights Act*, RSA 2000, c. S-24 which provides that:

- (6) Where the Board makes a right of entry order ... it
 - (a) shall describe the portion of the surface of the land that is necessary for the performance of the operator's operations, and
 - (b) may make the order subject to any conditions it considers appropriate,

but where the activity the operator proposes to engage in is the subject of a licence, permit or other approval granted by the Energy Resources Conservation Board ... the Surface Rights Board shall ensure that the right of entry order is not inconsistent with the licence, permit or other approval.

In this particular case EnCana's predecessor in title as the mineral operator, Real Resources, had negotiated a surface lease with the Campbells as the surface owners in which Real Resources had agreed to a number of conditions including water quality testing, berming, etc. that were more stringent than those contained in the relevant ERCB regulations and guides. When EnCana took an ERCB approved transfer of the well licence it also tried to take an assignment of Real's surface lease but balked at the terms of the lease. When Real refused to consent to the assignment unless EnCana agreed to those terms and a specific interpretation of them EnCana applied to the Surface Rights Board for a right of entry order. The SRB granted the order but exercised its discretion to add conditions to the entry order, largely, it seems, replicating the conditions that had been included in the surface lease.

EnCana sought judicial review of the SRB's decision. It succeeded on one matter but failed on the balance. In a very early post-*Dunsmuir* decision (see *Dunsmuir v. New Brunswick*, 2008 SCC 9), Justice Crighton concluded that the standard of review was that of reasonableness: i.e. was it reasonable for the SRB to have included these particular conditions, was it a reasonable exercise of the Board's discretion?

On the one matter on which Encana did succeed, Justice Crighton noted that the original surface lease had actually contained to different standards for weed control but the SRB had selected the more stringent one without providing a rationale. This, Justice Crighton concluded was unreasonable: "Absent some rationale for imposing that higher standard, there is no basis on which to conclude the SRB's decision to impose [this condition] was reasonable" (at para. 28). This is an interesting take on the Board's decision but it seems to have more to do with the duty to provide reasons than the reasonableness or otherwise of the Board's decision and it might have been better to deal with the matter on that basis where there is at least an established line of jurisprudence as to what constitutes adequate reasons.

But EnCana failed in its effort to quash all of the remaining conditions. Those conditions were each more stringent than those of the ERCB but that did not lead to an inconsistency with the terms of the well licence. A condition would only be inconsistent where compliance with one condition involves the breach of another: *Smith v. R*, [1960] SCR 776. In the absence of an inconsistency the conditions could not be said to be unreasonable since they were imposed by the SRB in response to reasonable concerns of the landowner.