

IN THE MATTER of a CONTRAVENTION
of the *ENERGY RESOURCE ACTIVITIES ACT*

[SBC 2008] Chapter 36

before

The BRITISH COLUMBIA ENERGY REGULATOR

Case File 2022-0033

BETWEEN

The British Columbia Energy Regulator

AND

Lane's End Holdings Ltd. and Guy Mercier

ADMINISTRATIVE FINDING

Before

Patrick Smook, Vice President, Compliance &
Operations

Representing the British Columbia Energy
Regulator

Ken McLean, Compliance & Enforcement
Officer

Representing Lane's End Holdings Ltd. and
Guy Mercier

John Drayton, Legal Counsel

Decision Date

June 25, 2024

Introduction

1. On August 31, 2021, Fortis BC Energy Inc. (Fortis) issued a Pipeline and/or Right of Way Permit #4200019483 (Agreement) to Lane's End Holdings Ltd. (Lane's End). The Agreement constituted a written agreement from Fortis to provide Lane's End with temporary access and to complete new building construction and associated landscaping at 1802 Versatile Drive, Kamloops, BC within a Fortis pipeline right of way.
2. A Contravention Report (the Report) was sent to me on March 20, 2024, alleging that Lane's End and Mr. Guy Mercier (Mr. Mercier) carried out work that was not authorized by the agreement and thereby contravened section 76(1) of the *Oil and Gas Activities Act*, now the *Energy Resource Activities Act* (ERAA).
3. The British Columbia Energy Regulator (Regulator) sent Lane's End a letter and the Report on March 25, 2024, informing Lane's End that I was considering making a finding that it contravened section 76(1) of the ERAA. The letter informed Lane's End of its opportunity to be heard in written form and advised that a finding of contravention could result in the Regulator imposing an administrative penalty in accordance with section 63 of the ERAA.
4. On March 25, 2024, the Regulator also sent Mr. Mercier a letter and the Report informing him that the Regulator was considering making a finding that Mr. Mercier as director of Lane's End contravened section 76(1) of the ERAA. The letter informed Mr. Mercier of the opportunity to be heard in written form and advised that a finding of contravention could result in the Regulator imposing an administrative penalty on Mr. Mercier in accordance with section 63 of the OGAA.
5. Lane's End and Mr. Mercier provided a joint response in a letter dated May 15, 2024 (the Response).
6. The Commissioner of the BC Energy Regulator has delegated me authority under sections 62 and 63 of the ERAA. I will be making a determination with regards to: whether Lane's End contravened section 76(1) of the ERAA; whether Mr. Mercier contravened section 76(1) of the ERAA; whether to impose an administrative penalty under section 63 of the ERAA to Lane's End and/or Mr. Mercier; and the amount of the penalties, if any. I have reviewed the Report and the Response submitted on behalf of Lane's End and Mr. Mercier. In making a determination, I rely on these documents, and the applicable legislation.

Applicable Legislation

7. Section 76(1) of the ERAA states that a person must not carry out a prescribed activity along, over or under a pipeline or within a prescribed distance of a pipeline unless the pipeline permit holder agrees in writing to the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities, the regulator by order approves the construction or the carrying out of the prescribed activity, either specifically or by reference to a class of construction projects or activities, or the construction or prescribed activity is carried out in accordance with the regulations.

8. Section 2(2) of the Pipeline Crossings Regulation (Regulation) prescribes the distance for the purposes of section 76(1) of the ERAA as 30m.
9. Per section 2(1) of the Regulation, a "ground activity" is a prescribed activity for the purposes of section 76(1)(b) of the ERAA.
10. The Regulation defines a "ground activity" as "any work, operation or activity that results in a disturbance of the earth, including a mining activity as defined in section 1 of the *Mines Act*, but not including (a) cultivation to a depth of less than 45 cm below the surface of the ground, or (b) a disturbance, other than cultivation referred to in paragraph (a), of the earth to a depth of less than 30 cm".
11. Maximum penalties for specific violations are set by regulation. Section 2(5) of the *Administrative Penalties Regulation* provides that a person who contravenes section 76(1) of the ERAA is liable to an administrative penalty not exceeding \$20,000.
12. Section 62(2) of ERAA states if a corporation contravenes a provision referred to in subsection (1), a director, agent or officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.
13. Section 62(1) of the ERAA states that, after providing an opportunity to be heard to a person who is alleged to have contravened a provision of the Act, the regulations, a permit, an authorization or an order, the Regulator may find that the person has contravened the provision.
14. Section 62(5) of the ERAA states, in part, that the Regulator may not find that a person has contravened a provision of the ERAA or the regulations if the person demonstrates to the satisfaction of the Regulator that they exercised due diligence to prevent the contravention or if the actions were the result of officially induced error.
15. Section 63(1) states that, if the Regulator finds that a person contravened a provision of the ERAA or its regulations, the Regulator may impose an administrative penalty. Section 63(2) of the ERAA sets out the factors that must be considered when determining whether to impose an administrative penalty under section 63(1) and the amount of the penalty. These include:
 - (a) previous contraventions by, administrative penalties imposed on, or orders issued to the person;
 - (b) the gravity and magnitude of the contravention;
 - (c) the extent of harm to others resulting from the contravention;
 - (d) whether the contravention was repeated or continuous;
 - (e) whether the contravention was deliberate;
 - (f) any economic benefit derived by the person from the contravention;
 - (g) the person's efforts to prevent and correct the contravention; and
 - (h) other prescribed matters.

Background

16. Mr. Mercier is the listed director of Lane's End.
17. Fortis is the operator of the transmission pressure pipeline and is the holder of a pipeline permit issued under the former Oil and Gas Activities Act. The pipeline is located on the northeast side of 1802 Versatile Drive where construction activities occurred.
18. On April 20, 2021, Fortis received a "ticket" request from BC 1 Call for works to be conducted near one of their natural gas pipelines in Kamloops, BC.
19. On August 31, 2021, Fortis issued a Pipeline and/or Right of Way Permit #4200019483 (Agreement) to Lane's End. The Agreement allowed Lane's End temporary 3.0m access within the right of way, new building construction and associated landscaping at 1802 Versatile Drive, Kamloops, BC.
20. The Agreement provided that construction, excavation and backfilling not take place on the Fortis pipeline right of way or in the vicinity of Fortis facilities unless a Fortis representative was present, The Agreement also included additional conditions that required Lane's End to obtain approval from an onsite Fortis representative prior to any works within the Fortis statutory right of way or within two meters of the pipeline, that concrete barricades and construction chain link fence be established at 3.0m offset from the pipeline, that no vehicles or equipment be permitted to cross the gas pipeline unless approved by the onsite Fortis representative, and that construction debris must not fall within the boundary of the pipeline right of way.

Issues

21. The issues which I will decide are:

Section 76(1) of ERAA:

- Did Lane's End carry out a prescribed activity along, over or under a pipeline within a prescribed distance contrary to section 76(1) of the ERAA?
- Did Lane's End exercise due diligence in its efforts to comply with section 76(1) of the ERAA?
- Was any noncompliance due to an officially induced error?
- Did Lane's End contravene section 76(1) of the ERAA?
- If Lane's End contravened section 76(1) of the ERAA, did Mr. Mercier authorize, permit or acquiesce in the contravention?
- Did Mr. Mercier exercise due diligence in his efforts to comply with section 76(1) of the ERAA?
- Was any noncompliance due to an officially induced error?
- Did Mr. Mercier contravene section 76(1) of the ERAA?

Section 63 of the ERAA:

- If Lane's End and/or Mr. Mercier are found to have contravened section 76(1) of the ERAA what if any, administrative penalty to impose?

Did Lane's End carry out a prescribed activity along, over or under a pipeline within a prescribed distance contrary to section 76(1) of the ERAA?

22. As part of a new building construction in Kamloops BC, Lane's End advised BC One Call of its intention to excavate soil to a depth of 1 to 3 meters. I am satisfied that the excavation of soil, being more than 30 cm, constitutes a ground activity for the purposes of section 76(1) of the ERAA.
23. I am further satisfied, based on the sketch attached to the Agreement, that Lane's End carried out the ground activity within the prescribed distance. The ground activity was also within 10 m of the pipeline. There being no order from the Regulator, I am satisfied that pursuant to section 76(1)(c) of the ERAA Lane's End required the written agreement of Fortis to carry out the ground activity given the proximity of the ground activities to the pipeline.
24. I note that Lane's End does not contest the requirement for a written agreement. Indeed, as a result of the BC One Call, Fortis advised Lane's End that the excavation would be in proximity to a Fortis transmission pressure pipeline and subsequently issued Lane's End with a written permission (the Agreement) to complete new building construction, landscaping and temporary 3 meter access to the pipeline right of way.
25. The Report included a copy of the Agreement between Lane's End and Fortis.
26. The Agreement included, amongst other things, the following requirements:
 - That construction, excavation and backfilling not take place on a Fortis BC right of way or in the vicinity of Fortis facilities unless a Fortis BC representative is present.
 - For approval from an onsite Fortis representative prior to any works within the Fortis statutory right of way or within two meters of the pipeline.
 - That concrete barricades and construction chain link fence be established at 3.0m offset from the pipeline.
 - That no vehicles or equipment were permitted to cross the gas pipeline unless approved by the onsite Fortis representative.
 - That construction debris must not fall within the boundary of the pipeline right of way.
27. In its Response, Lane's End and Mr. Mercier admit to conducting excavation, backfilling and construction and compaction activities without contacting Fortis or having a Fortis representative present. Since a Fortis representative was not present during these operations, I am satisfied that approval from such a representative was not secured prior to these operations commencing.
28. From the information in the report and the response, I am satisfied that the required concrete barriers and fence were established and inspected by Fortis prior to excavation. However, Lane's End and Mr. Mercier admit to removing the barriers and fence prior to conclusion of construction operations and without notifying Fortis.
29. The Response includes a statement from Lane's End and Mr. Mercier that they deny doing any work in the "no go zone," which they describe as an area beyond where the concrete barriers and fence were established. If work did not occur in this area, they further submit that no equipment would have operated overtop of the pipeline.

30. I do not accept this submission. The Report presents photo evidence¹ that fill was placed and a compaction machine was used overtop of the pipeline. The photos show fill and tire marks consistent with compaction equipment which was observed at the construction location. The photos further demonstrate, and it is also acknowledged in the Response, that the tractor was used for compaction purposes. I do not accept as relevant whether or not the equipment was used with or without vibration.
31. The Report states that Lane's End placed rocks and woody debris on the right of way and on top of the pipeline. The response provides an air photo from the City of Kamloops Property Portal as evidence that rocks and woody debris were on the right of way prior to construction. I have reviewed this photo. It shows that rocks and woody debris were on the right of way prior to construction of the building. There is insufficient evidence to determine if additional rocks or woody debris were introduced as a result of Lane's End's activities.
32. Given the above facts, I am satisfied that Lane's End did conduct a ground activity for purposes of section 76(1) of ERAA within a prescribed distance from a Fortis pipeline without permission from or presence of a Fortis representative. Further, I am satisfied that Lane's End did place fill material on top of the pipeline and did run a compaction machine over the pipeline, but I do not see sufficient evidence that Lane's End placed boulders and woody debris on the right of way.
33. I am satisfied that Lane's End did not comply with the conditions in the Agreement. By failing to comply with the conditions of the agreement, Lane's End conducted ground activities without approval of Fortis, contrary to section 76(1) of the ERAA.

Did Lane's End exercise due diligence in its efforts to comply with section 76(1) of the ERAA?

34. Pursuant to section 62(5) of the ERAA, I may not find that Lane's End contravened section 76(1) of the ERAA if Lane's End demonstrates to my satisfaction that it exercised due diligence to prevent the contravention. The test to be applied is whether Lane's End has demonstrated that it took all reasonable steps to prevent the contravention. Lane's End is not required to show that it took all possible or imaginable steps to avoid the contravention. The standard is not one of perfection, but rather of a reasonable person in similar circumstances.
35. Lane's End did not provide any evidence in relation to any actions it took to prevent the contravention.
36. Lane's End knew the requirements in the Agreement with Fortis. When notified by Fortis that Lane's End had engaged in certain activities contrary to the Agreement, Mr. Mercier advised Fortis that he considered the obligation to have a Fortis representative on site "simply not reasonable." In a statement given to the Compliance & Enforcement Officer, Mr. Mercier stated that he "didn't have time to wait for Fortis" and therefore removed the concrete barricades on his own initiative.

¹ See photos 2 and 3 from the Encroachment / Activity Field Data Collection Form, Appendix 6 of the Report.

37. Lane's End chose to continue works without notifying Fortis or have a representative on site. If Lane's End felt that changes to the Agreement were necessary, it could have reached out to Fortis or have previously scheduled an onsite representative as stated in the Agreement.

38. I do not have evidence before me that shows due diligence.

Was any noncompliance due to an officially induced error?

39. I do not have any evidence before me that suggests the noncompliance was the result of officially induced error.

Did Lane's End contravene section 76(1) of the ERAA?

40. I find that Lane's End has failed to comply with section 76(1) of the ERAA. I am not satisfied that Lane's End exercised due diligence to prevent the contravention. As such, I find that Lane's End contravened section 76(1) of the ERAA.

If Lane's End contravened section 76(1) of the ERAA, did Mr. Mercier authorize, permit or acquiesce in the contravention?

41. Section 62(2) of the ERAA states that if a corporation contravenes a provision referred to in subsection (a), a director, agent or officer of the corporation who authorized, permitted or acquiesced in the contravention also contravenes the provision.

42. Therefore, I must decide if Mr. Mercier is a director, agent or officer of Lane's End and that he authorized, permitted or acquiesced in the contravention.

43. According to the BC Corporate Registration, Guy Mercier is identified as the sole Director of Lane's End.

44. For the purpose of this decision, I consider "authorized" to be an appropriate term. By definition, authorized means to give official permission for or approval.

45. In his statement to the Compliance and Enforcement Officer, Mr. Mercier identified himself as the President and owner of Lane's End, which is consistent with how he self-identifies in his correspondence. Mr. Mercier is noted as the contact person on the BC One Call and is identified as the applicant for a written agreement to conduct the construction activities from Fortis.

46. Included in the Report is evidence that Mr. Mercier had knowledge of the requirements in the Agreement with Fortis. The evidence also demonstrates that that Mr. Mercier was the main point of contact between Lane's End and Fortis and all of the correspondence to Fortis from Lane's End was provided by Mr. Mercier. It was also Mr. Mercier who stated that he felt that the requirement to have a Fortis representative on site daily during construction operations was unreasonable.

47. I also note that in his statement to the Compliance & Enforcement Officer, Mr. Mercier stated "Just give me a fine so I can get on with finishing the building."

48. Based on the above, I am satisfied that Mr. Mercier authorized the contravention. Accordingly, I find that Mr. Mercier also contravened section 76(1) of the ERAA.

Did Mr. Mercier exercise due diligence in his efforts to comply with section 76(1) of the ERAA?

49. As discussed above, Lane's End failed to satisfy me it took all reasonable steps to prevent the contravention. The Response did not provide any evidence in relation to any actions Mr. Mercier took to prevent the contravention.
50. For these same reasons noted above, Mr. Mercier has failed to satisfy me that he took all reasonable steps to prevent the contravention.

Was any noncompliance due to an officially induced error?

51. I do not have any evidence before me that suggests a noncompliance by Mr. Mercier as the result of officially induced error.

Did Mr. Mercier contravene section 76(1) of the ERAA?

52. I find that Mr. Mercier has failed to comply with section 76(1) of the ERAA. I am not satisfied that Mr. Mercier exercised due diligence to prevent the contravention. As such, I find that Mr. Mercier contravened section 76(1) of the ERAA.

If Lane's End and/or Mr. Mercier are found to have contravened section 76(1) of the ERAA what if any, administrative penalty is to be imposed?

53. Section 63 of the ERAA sets out factors that the Regulator must take into consideration when determining whether to impose an administrative penalty. In the following paragraphs, I consider the applicability of those factors to this contravention.
54. There have been no previous contraventions or administrative penalties issued to Lane's End or Mr. Mercier.
55. The gravity of the contravention was high as it created a risk to onsite workers and public safety. If there had been damage to the pipeline as a result of the contravention, the consequences could have been catastrophic. The magnitude of the contravention is low, as there was no actual damage to the pipeline.
56. There was no harm to others as a result of the contravention. Fortis did have to do an exploratory dig to confirm there was no damage to its pipeline.
57. The contravention was not repeated or continuous.
58. The contravention was deliberate as evidenced by Mr. Mercier's authorization as president and his statements to both Fortis and the Compliance and Enforcement Officer.
59. There was no evidence of economic benefit presented.

60. There was no evidence presented to show effort by Lane's End or Mr. Mercier to prevent the contravention. Security fence was re-installed after the contravention was discovered and communicated to Fortis by Lane's End and Mr. Mercier.
61. There are no other matters prescribed by the Lieutenant Governor in Council that are relevant to this matter.

Conclusion

62. I have found Lane's End and Mr. Mercier contravened section 76(1) of ERAA. Based on the above discussion of the various factors set out in section 63(2), I am imposing an administrative penalty of \$10,000 on Lane's End and \$10,000 on Mr. Mercier.



Patrick Smook
Vice President, Compliance & Operations
BC Energy Regulator

Date: June 25, 2024