

SURFACE RIGHTS BOARD

ANNUAL REPORT

April 1, 2016 to March 31, 2017

Table of Contents

	Page
Board Profile and Mandate	1
Dispute Resolution Activities	3
Decisions of Note	6
Other Board Activities	8
Finances	10
Challenges for 2016/17	11
Appendix 1 – Overview of Board Process	12
Appendix 2 – Board Members’ Biographical Information	14

Board Profile and Mandate

The Surface Rights Board (SRB or the Board) is a quasi-judicial administrative tribunal established under the *Petroleum and Natural Gas Act (PNGA)*. The Board has jurisdiction to resolve disputes under the *PNGA*, *Mining Right of Way Act*, *Mineral Tenure Act*, *Geothermal Resources Act*, and *Coal Act*.

In British Columbia, most landowners do not own subsurface rights to petroleum, natural gas, or minerals. The majority of subsurface rights are owned by the Crown. The government can issue rights to resource companies and free miners for the exploration and development of subsurface resources on private property. The resource company or free miner must compensate landowners for loss or damage caused by entering and using their land to access subsurface resources. The Board's role is to assist in resolving disputes when the parties cannot agree on compensation or other terms of entry to land.

When a landowner and a resource company or free miner are unable to reach an agreement on right of entry to the land and the compensation that should be paid to the landowner for that right of entry, either party may apply to the Board for mediation and arbitration of the dispute. The Board may make an order allowing a person or company to enter private land if the Board is satisfied they need the land to explore for, develop, or produce a sub-surface resource. The Board does not have jurisdiction to determine whether a proposed subsurface installation is appropriate or complies with the legislation and regulations.

If damage to land is caused by an entry for the purpose of exploring for, developing or producing a subsurface resource, the landowner may apply to the Board for mediation and arbitration of damages payable by the subsurface holder.

If the parties to a surface lease cannot agree to terms for rent renegotiation after a certain period of time, either party may apply to the Board for mediation and arbitration of their dispute.

The Board also has jurisdiction to resolve disputes about whether the terms of a surface lease have been complied with.

An overview of the Board's processes may be found in Appendix 1.

The Board is accountable to the Minister of Justice but is independent of the Minister and Ministry in its decision making capacity and in the management of applications before it.

The Board has a part-time chair, and may have up to eight additional part-time members. It currently has three additional part-time members.

The following Board members served during fiscal year 2015/16:

Name	Position	Start date	Expiry
Cheryl Vickers	Chair	July 22, 2007	December 31, 2018
Simmi Sandhu	Vice Chair as of Jul 22/12	July 22, 2007	July 31, 2018
Winton Derby	Member	June 2, 2014	Resigned July 5, 2016
Robert Fraser	Member	February 13, 2014	December 31, 2018
Howard Kushner	Member	June 2, 2014	July 31, 2019

Biographical information on the Board Members is at Appendix 2.

Dispute Resolution Activities

The Board received 45 applications from April 1, 2016 to March 31, 2017, under the *PNGA*. The Board received no new applications under the *Mineral Tenure Act (MTA)* the *Mining Right of Way Act (MRWA)*, *Coal Act* or *Geothermal Resources Act*. The following chart shows the number of applications by type received from April 1, 2016 to March 31, 2017 compared to the previous year.

Nature of Application	# received in period	2015/16
<i>PNGA</i> (right of entry/compensation for wellsite)	13	5
<i>PNGA</i> (right of entry/compensation for flowline)	16	11
<i>PNGA</i> (right of entry/compliance/related activity)	0	0
<i>PNGA</i> (damages)	4	3
<i>PNGA</i> (rent review)	2	8
<i>PNGA</i> (compliance)	10	17
<i>PNGA</i> (termination of surface lease)	0	1
<i>MRWA</i>	0	2
<i>MTA</i>	0	1
Total new applications	45	48
Cases outstanding from previous year	75	73
Total caseload in period	120	121

When the Board receives an application for right of entry for an oil and gas activity, a mediator will determine whether access to land is required for the requested activity, and if so, work with the parties to try and resolve compensation. The Board does not have jurisdiction to determine if a requested activity meets regulatory requirements or to deal with landowner's concerns respecting placement of an installation, environmental impact, or safety – these are matters within the jurisdiction of the Oil and Gas Commission (OGC). The Board will generally require parties to resolve issues within the jurisdiction of the OGC prior to issuing an entry order. The mediator will continue to work with the parties in an effort at resolving compensation issues even after an entry order has been made until the mediator determines a resolution is unlikely. Once the mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication. An application may require several mediations before it is either resolved or referred to arbitration.

The Board similarly mediates applications for damages and rent review in an effort at having the parties resolve the dispute. Once a mediator refuses further mediation, the dispute is referred to an arbitrator for adjudication.

The parties may also negotiate issues without the assistance of a Board mediator in an effort at resolution.

During the reporting period, the Board completed 73 cases as indicated by the Table below:

Case Completions:	Current year	Previous year
Abandoned	9	13
Settled by mutual agreement	21	17
Completed by Arbitration	30	6
Dismissed	4	2
Summary payment orders (s. 176)	9	9
Total completed	73	47

Of the applications open at March 31, 2017, 32 were at the mediation stage of the process or pending further mediation, and 8 at the arbitration stage. Five were contingent on other cases and 2 required a determination respecting the Board's jurisdiction.

The following Table shows the level of dispute resolution and other activities in the reporting period compared to the previous year.

Dispute Resolution & other activities:	Current year	Previous year
Mediations	28	35
Right of entry orders	15	18
Decisions following Arbitration	8	7
Cost orders	2	1
Other Board decisions *	31	15

* Includes decisions on jurisdiction and whether to re-open cases upon reconsideration.

The Board's decisions may be judicially reviewed under the *Judicial Review Procedure Act* within the time established by the *Administrative Tribunals Act*. No judicial review applications were filed from decisions of the Board in the reporting period. The Supreme Court of BC dismissed an application for judicial review of the Board's decision in *Miller v. ARC Resources Ltd.* (Order 1825-1) which had been previously filed (*Miller v. ARC Resources Ltd.*, 2017 BCSC 25).

Decisions of Note

What follows is a brief synopsis of some of the Board's decisions of note in the reporting period.

Petroleum and Natural Gas Act

Jurisdiction – In *Weibe v. Canadian Natural Resources Limited*, Order 1849-1, the Board found it did not have jurisdiction to hear rent review applications that had not been brought in accordance with the time frames set out for the giving of notice of a rent review under section 165 of the *Petroleum and Natural Gas Act*.

The Board issued one decision on the issue of whether a pipeline or segment of a pipeline was a “flow line” within the meaning of the *Petroleum and Natural Gas Act* and the *Oil and Gas Activities Act*. If a pipeline is not a “flow line”, the Board does not have jurisdiction to make a right of entry order or determine compensation payable to a landowner. In *Encana Corporation v. Strasky*, Order 1911/1913-1, the Board found a pipeline segment conveying unprocessed natural gas liquids, separated from the raw natural gas at natural gas processing facilities, to a storage facility and then to a fractionation facility for distillation into pure components to be marketed for commercial and industrial uses, was not a “flow line”.

In *Fell v. Bonavista Energy Corporation*, Order 1920-1, the Board found it had jurisdiction to hear an application from a landowner brought under Divisions 5 and 6 of the *Petroleum and Natural Gas Act*, but that the landowners could not advance a claim under the Act on behalf of former landowners.

Compensation – The Board determined the compensation payable for additional wells on an existing well site in *ARC Resources Ltd. v. Hommy*, Order 1868-2.

Costs – The Board made costs award in favour of landowners in two decisions: *Venturion Oil Limited v. Juell*, Order 1848/1855-4 and *ARC Resources Limited v. Hommy*, Order 1868-3.

Rent Review – The Board made two decisions following arbitrations of rent review applications. In *Thiessen v. Canadian Natural Resources Limited*, Order 1850-1, the Board found the date for determining the effective date of a rent review is the anniversary date prior to the date of the Notice of Rent Review in the prescribed form. The Board reviewed the rent payable under 22 leases and concluded with respect to 11 of the leases that increases were appropriate, and with respect to 11 leases that the current rents adequately compensated the landowner for ongoing loss.

In *Dietz v. Canadian Natural Resources Limited*, Board Order 1870-1, the Board found the current rent continued to adequately compensate the landowners for ongoing losses.

Orders for non-payment of rent – The Board made nine orders pursuant to section 176 of the *Petroleum and Natural Gas Act* requiring four different companies to pay rent owing to landowners under surface leases.

Other Board Activities

Administration:

The Property Assessment Appeal Board (PAAB) provides administrative services to the Surface Rights Board. The SRB has a Service Agreement with Service BC in Fort St. John and Dawson Creek to provide the public with a local contact point and personal assistance in reviewing applications. The volume of inquiries through Service BC is very low. Most clients communicate directly with the Board through its office in Richmond via email or toll free phone or fax.

Security Deposits:

The Board collected \$30,000 in security deposits in the reporting period.

The Ministry of Finance is holding \$285,850 in security deposits that the Board ordered paid prior to entering land. The Board processed two applications for the return of security deposits and ordered refunds totaling \$5,000.

Terra Energy Fund:

Pursuant to Orders of the Supreme Court of British Columbia dated November 1 and 2, 2016 in proceedings brought by Canadian Western Bank against Terra Energy Corp., a fund of \$500,000 was established to satisfy claims of landowners who had not been paid rent owing by Terra Energy under surface leases (the Fund). The Board established a process for landowners who had not been paid rent by Terra Energy owning under a surface lease to apply to the Fund for payment. As of March 31, 2017, the Board had processed 81 orders for payment from the Fund totaling \$353,362.53, leaving \$146,637.47 in the Fund. The Board will continue to process eligible claims from the Fund until it is exhausted.

Filing of Surface Leases:

Section 178 of the *PNGA* requires the holders of surface rights to provide the Board with copies of surface leases and right of way agreements. Compliance with this provision was initially slow, but the Board now frequently receives copies of surface leases and amendment agreements as required. The Board does not know whether all surface leases and amendment agreements are being filed.

The Board is required to make copies of surface leases and right of way agreements available for public inspection at its office. Occasionally, members of the public have attended at the Board's office to view leases. The Board provides electronic access to electronic copies of leases to the Farmers Advocates Office for inspection on their agreement not to copy or distribute the leases.

The Surface Lease Information Regulation, B.C. Reg. 139/2016 became effective on June 10, 2016. Pursuant to this Regulation, the Board is able to publish prescribed information contained in surface leases and right of way agreements. The Board has established an electronic searchable data base where the public can access copies of surface leases and right of way agreements filed with the Board pursuant to section 178 of the *Petroleum and Natural Gas Act* that have been redacted to exclude any information that is not prescribed by the Regulation.

MOU with OGC:

The Chair of the Board and the Commissioner of the Oil and Gas Commission (OGC) signed a revised and updated Memorandum of Understanding in February of 2017. The MOU facilitates coordination and cooperation between the Board and the OGC to enable each organization to effectively meet their respective legislative mandates where both organizations are dealing with the same parties and land.

Case Management System:

The Board has developed a case management system to enable it to more easily track and manage applications and communicate with parties with assistance from the Property Assessment Appeal Board. The system is currently being tested to ensure it will meet the Board's needs.

Finances

The Board's budget for 2016/17 was \$108,000. As detailed in the table below, the Board was over budget by \$9,711.

Expenditure Type	Budget	Actuals	Variance¹	Notes
Salaries	20,000	24,196	(4,196)	Expenditure levels reflect higher mediation and arbitration activity
Benefits	4,800	5,880	(1,080)	
Board Member fees and expenses	38,000	67,696	(29,696)	
Travel	3,500	0	3,500	Allocated to other expenditures
Information systems	31,700	13,516	18,184	Most of development completed for a new case management system
Office and business ²	10,000	6,422	3,578	
Total Expenditures	108,000	117,711	(9,711)	

Notes:

1. In the variance column (brackets) denote that actual expenditures were over budget.
2. Overhead charges were billed at 15% of salary and benefits costs as per an MOU between the Property Assessment Appeal Board and the Ministry of Natural Gas Development.

Challenges for 2017/18:

The Board would like to work with the appropriate ministry in the development of an administrative penalty regulation enabling the Board to impose administrative penalties under section 179 of the *PNGA* for failure to provide the Board with copies of surface leases under section 178 of the *PNGA*. In the meantime, the Board continues to work with industry and other stakeholders to encourage compliance with section 178 of the *PNGA*.

The Board will hopefully be able to implement the new case management system to improve efficiency and effectiveness in managing caseload.

The Chair will continue to ensure the Memorandum of Understanding with the OGC is effectively providing for coordinated dispute resolution in cases involving the same parties and land.

Appendix 1

Overview of the Board's Process

Application

An application must be made on the form prescribed by the Board in its Rules. The Board reviews applications to ensure that they are within its jurisdiction and that they are complete and comply with the Board's Rules and relevant legislation. If an application is deficient, the Board will write to the applicant to provide an opportunity to correct any deficiencies. The Board may dismiss the application if the deficiencies are not corrected, or if an application is not within the Board's jurisdiction.

Mediation

A mediation is a dispute resolution process that attempts to facilitate resolution of the issues by agreement. A mediations may be conducted in-person or by telephone conference. A mediation is confidential and without prejudice to the positions the parties may take later in any arbitration proceedings.

If the parties have not resolved the issues at the end of the mediation session, the Board Member may schedule another mediation or refuse further mediation. If the mediator determines that access to private land is needed to explore for, develop or produce a subsurface resource, the mediator may issue a right of entry order and order the payment of a security deposit and partial payment for compensation. If the mediator makes an order refusing further mediation, the Board must arbitrate the dispute.

Arbitrations

The Board must arbitrate when the parties cannot reach an agreement. An arbitration is a dispute resolution process where each party presents evidence and arguments and the Board makes a decision based on those submissions.

Before an arbitration hearing, the Board will require the parties to attend a pre-hearing conference, usually conducted by telephone. The Board member will, in consultation with the parties, determine how the application will proceed including determining the issues to be decided, and setting dates for hearing and for the pre-production of evidence and witness lists.

The Board may conduct an arbitration hearing by telephone conference, by written submission, or in-person depending on the nature and complexity of the issues.

In-person hearings are open to the public and may be presided over by a panel of one or more members of the Board. Persons giving evidence at a hearing must swear an oath or affirm that their evidence will be the truth. The panel has control over the conduct of the hearing, including how the evidence is presented, what evidence is admitted, and the issuance of summons for witnesses.

Following the conclusion of the arbitration hearing, the panel will issue a written decision with reasons.

Evidence

The Board may accept any evidence that it considers relevant, necessary and appropriate with the exception of evidence that is inadmissible in court because of a privilege under the law of evidence. The Board will normally set timelines in advance of the hearing for the parties to submit documents or expert reports they intend to rely on at an arbitration.

Withdrawals or Consent Orders

A party may withdraw all or part of an application at any time, by completing a Withdrawal Form and delivering it to the Board and the other parties. If the parties settle the application, they must advise the Board and either withdraw the application or request that the Board incorporate the terms of the settlement into a Consent Order.

Costs

The Board may order a party to pay all or part of the costs of another party and, in exceptional circumstances, may order a party to pay the costs of the Board. Ordinarily, unless otherwise ordered by the Board, landowners may expect to recover their costs of the mediation process relating to applications for right of entry and associated compensation. The Board may order costs on its own initiative or on the application of a party.

Appealing the Board's Decision

Decisions of the Board may be judicially reviewed by the Supreme Court of British Columbia.

Board Members' Biographical Information

Cheryl Vickers, Chair

Cheryl Vickers is a lawyer and formerly practiced in a variety of fields, including administrative law. Cheryl was appointed as Chair of the Surface Rights Board in July 2007. She served as Chair of the Property Assessment Appeal Board from 2003 to 2015 and as Acting Chair of the Civil Resolution Tribunal from 2013-2014. She currently also sits as member of the Hospital Appeal Board. Cheryl was active in the development of the British Columbia Council of Administrative Tribunals (BCCAT), and served as a member of that organization's Board of Directors including as Secretary from 1996 to 1998 and as President from 2004 to 2006. Cheryl has assisted in curriculum development for BCCAT courses offering training to appointees of quasi-judicial boards and tribunals. She has delivered these courses and workshops on case management and alternate dispute resolution for tribunals.

Simmi K. Sandhu, Vice Chair

Simmi Sandhu is a lawyer, called to the BC Bar in 1990. Simmi was appointed as a member of the Surface Rights Board in 2007 and is Chair of the Property Assessment Appeal Board, a position she has held since 2015, before which she was Vice Chair since 2001. As a lawyer, Simmi's areas of practice included administrative law, civil litigation, corporate/commercial law and real estate transactions. She has extensive experience in quasi-judicial proceedings, having acted as a Chair of the Board of Referees and has training and experience in conflict resolution and mediation. Simmi is an instructor for and on the Board of Directors of the British Columbia Council of Administrative Tribunals, as well as serving as Past President.

Robert Fraser

Active in the real estate industry for many years, Rob Fraser has been a sales person, agent/manager, owner, local board president, provincial association president, and chair of a real estate related insurance company. In addition to his extensive experience and training in real property valuation, Rob also has expertise and training in conflict resolution, mediation, arbitration, and negotiation. He has a BA, an MA and did doctoral studies specializing in micro-demographic models. Rob was appointed as a Vice Chair to the Property Assessment Appeal Board in 1998, and currently serves as a member of that board. He was appointed to the Surface Rights Board as a member in 2007 and served as Vice Chair from December 2008 until July 2012.

Winton Derby, Q.C.

Winton Derby practiced as a litigator in corporate, commercial, securities, family and administrative law and spent over 40 years at a national law firm, heading

the Litigation group in the Vancouver office. He was called to the British Columbia Bar in 1965 and appointed Queen's Counsel in 1986. Winton was general counsel at a large restaurant chain and at a Vancouver based investment firm. His experience includes acting on professional negligence, contract, personal injury, property, slander and family matters. Winton has represented clients in numerous mediations and arbitrations and currently is a mediator and arbitrator at a Vancouver law firm. He is a member of the Property Assessment Appeal Board and was appointed to the Surface Rights Board in June 2014.

Howard Kushner

Howard Kushner is a practicing lawyer in Vancouver. He is a member of both the Law Society of British Columbia and the Law Society of Alberta. Howard has extensive experience in administrative law, having taught at the Faculty of Law, University of British Columbia and the Faculty of Law, University of Alberta and practiced in the area for over 15 years. Howard was the first Chief Legal Officer of the Law Society of British Columbia and the Deputy Executive Director – Regulation with the Law Society of Alberta. Prior to that, Howard was the Ombudsman for the Province of British Columbia. He is a member of the Property Assessment Appeal Board and was appointed to the Surface Rights Board in June 2014.