

**SURFACE RIGHTS BOARD**

**ANNUAL REPORT**

**April 1, 2017 to March 31, 2018**

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## **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:

<b>Name</b>	<b>Position</b>	<b>Start date</b>	<b>Expiry</b>
Cheryl Vickers	Chair	July 22, 2007	December 31, 2018
Simmi Sandhu	Vice Chair as of Jul 22/12	July 22, 2007	July 31, 2018
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 36 applications from April 1, 2017 to March 31, 2018, 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, 2017 to March 31, 2018 compared to the previous year.

<b>Nature of Application</b>	<b># received in period</b>	<b>2016/17</b>
<i>PNGA</i> (right of entry/compensation for wellsite)	6	13
<i>PNGA</i> (right of entry/compensation for flowline)	20	16
<i>PNGA</i> (right of entry/compliance/related activity)	0	0
<i>PNGA</i> (damages)	2	4
<i>PNGA</i> (rent review)	1	2
<i>PNGA</i> (compliance)	7	10
<i>PNGA</i> (termination of surface lease)	0	0
<i>MRWA</i>	0	0
<i>MTA</i>	0	0
<b>Total new applications</b>	<b>36</b>	<b>45</b>
Cases outstanding from previous year	47	75
<b>Total caseload in period</b>	<b>83</b>	<b>120</b>

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 31 cases as indicated by the Table below:

<b>Case Completions:</b>	<b>Current year</b>	<b>Previous year</b>
Abandoned	5	9
Settled by mutual agreement	21	21
Completed by Arbitration	3	30
Dismissed	2	4
Summary payment orders (s. 176)	0	9
<b>Total completed</b>	<b>31</b>	<b>73</b>

Of the applications open at March 31, 2018, 45 were at the mediation stage of the process or pending further mediation, and 1 at the arbitration stage. Six were contingent on other cases.

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

<b>Dispute Resolution &amp; other activities:</b>	<b>Current year</b>	<b>Previous year</b>
Mediations	19	28
Right of entry orders	18	15
In person Arbitrations	0	8
Arbitrations by written submissions	1	0
Other applications heard by written submissions	10	n/a
Cost orders	2	2
Other Board decisions *	15	31

\* 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*. A judicial review was filed from the Board's decision in *Fell v. Bonavista Energy Corporation*, Order 1920-2, June 16, 2017, declining to dismiss an application under section 31(1)(f) of the *Administrative Tribunals Act* as having no reasonable prospect of success. The application for judicial review was dismissed (*Bonavista Energy Corporation v. Fell*, 2017 BCSC 2406).

## **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 – The Board issued two decisions 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. Jorgensen*, Order 1939-1, and *Encana Corporation v. Strasky*, Order 1955-1, the Board followed its previous decisions to find a pipeline in four segments including segments to carry water to and from a well for fracking are “flow lines” within the jurisdiction of the Board.

In *Encana Corporation v. Jorgensen*, Order 1939-3, the Board determined a proposed sump was required for, and part and parcel of, the construction of a pipeline and was, therefore, an “oil and gas activity” within the jurisdiction of the Board.

In *Arc Resources Ltd. v. Miller*, Order 1951-1, the Board determined it did not have jurisdiction to impose a term or condition in a right of entry order requiring a flow line to be constructed by boring instead of trenching.

In *Black Willow Bison Incorporated v. Canadian Natural Resources Limited*, Order 1919-1, the Board found that it had jurisdiction to determine if an existing surface lease provided an effective right of entry, and that the landowner had standing to bring an application under section 158 of the *Petroleum and Natural Gas Act* to dispute that an existing surface lease provided an effective right of entry.

In *Fell v. Bonavista Energy Corporation*, the registered owner of Lands applied to the Board alleging Bonavista did not have a valid right of entry for a wellsite operated by it on the Lands. Bonavista alleged that its rights to the area occupied by the wellsite were granted by an Order in Council (OIC) and that the area in issue had been expressly excepted and reserved from the original Crown Grant of the Lands. Bonavista challenged the Board's jurisdiction to hear the application on the basis that the area in issue was Crown land beyond the jurisdiction of the Board. The Board found, Order 1920-3, that it had jurisdiction to resolve the threshold issue of whether the applicants were “landowners” within the meaning of the *Petroleum and Natural Gas Act* which involved determining whether the area occupied by Bonavista for its oil and gas activity was expressly excepted and reserved from the Crown Grant. The Board further found that the area in issue was not expressly excepted and reserved from the Crown Grant, the applicants were “landowners”, and that the Board had jurisdiction to hear the merits of their application. The issue going forward will be whether the OIC gives Bonavista the right to enter the Lands for the purpose of a wellsite.



Right of Entry – In *Harrington v. Procyon Energy Corp.*, Order 1935-1, the Board determined that the landowners had effectively terminated a surface lease for non-payment of rent. As the company continued to require access to the land to meet its continuing obligations with respect to the well site, the Board issued a right of entry order.

Compensation – As the landowners had effectively terminated the surface lease granting the company the right to enter and use land for the purpose of a well site, the Board determined the compensation payable to the landowners to re-acquire those rights in *Harrington v. Procyon Energy Corp.*, Order 1935-36-37-2. The Board found no compensation was owing to the landowners, however, to acquire a right of entry order for a pipeline necessitated because the right of way agreement for the pipeline had not been registered in the Land Title Office.

Damages – Also in *Harrington v. Procyon Energy Corp.*, Order 1935-36-37-2, the Board was satisfied that the landowners had suffered loss as a result of the rights of entry and assessed damages against the company.

Costs – The Board made orders for costs in favour of landowners in *Harrington v. Procyon Energy Corp.*, Order 1935-36-37-1, and *Mertens, et al v Leucrotta Exploration Inc.*, Order 1858-1859-2. In both of these decisions, however, the Board awarded only partial costs, finding the claims to be unreasonable in all of the circumstances.

Other – In *Fell v. Bonavista Energy Corporation*, Order 1920-2, the Board dismissed Bonavista's application seeking to have the claim dismissed as having no reasonable prospect of success.

## **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 \$81,000 in security deposits in the reporting period.

The Ministry of Finance is holding \$315,850 in security deposits that the Board ordered paid prior to entering land. The Board processed six applications for the return of security deposits and ordered refunds totaling \$15,000.

### **Terra Energy Fund:**

The Board continued to process eligible claims for rent owned by Terra Energy Corporation until the Fund of \$500,000 was exhausted in August 2017. The Board worked with the OGC to establish an ongoing process for claiming unpaid rent from the Orphan Well Fund following dispersal of the Terra Energy Fund and declaration of sites formerly operated by Terra Energy Corporation as orphan sites under the *Oil and Gas Activities Act*. Landowners with orphan sites formerly operated by Terra Energy Corporation may now apply either to the Board or to the OGC directly for payment from the Orphan Well Fund. The Board processed 46 applications for payment from the Orphan Well Fund in the reporting period.

### **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. While the Board does receive copies of surface leases in accordance with this requirement, it is not confident that that all companies are complying with the legislation.

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.

## **Finances**

The Board's budget for 2017/18 was \$108,000. As detailed in the table below, the Board was under budget by \$31,670 primarily due to a lower caseload during this fiscal year.

<b>Expenditure Type</b>	<b>Budget</b>	<b>Actuals</b>	<b>Variance</b>	<b>Notes</b>
Salaries	20,000	11,330	8,670	Expenditure levels reflect lower mediation and arbitration activity from previous years
Benefits	5,000	2,753	2,247	
Board Member fees and expenses	74,000	58,325	15,675	
Information systems	5,000	1,012	3,988	
Office and business	4,000	2,910	1,090	
<b>Total Expenditures</b>	<b>108,000</b>	<b>76,330</b>	<b>31,670</b>	

## 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.

### **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.