

**SURFACE RIGHTS BOARD  
of British Columbia**

**ANNUAL REPORT**

**April 1, 2019 to March 31, 2020**



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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 Attorney General 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. For the period of review, the Board had three part-time members.

The following Board members served during fiscal year 2019/20:

<b>Name</b>	<b>Position</b>	<b>Start date</b>	<b>Expiry</b>
Cheryl Vickers	Chair	July 22, 2007	December 31, 2021
Simmi Sandhu	Vice Chair	July 22, 2007	July 31, 2022
Robert Fraser	Member	February 13, 2014	December 31, 2021
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 91 applications from April 1, 2019 to March 31, 2020, 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, 2019 to March 31, 2020 compared to the previous year.

<b>Nature of Application</b>	<b># received in period</b>	<b>2018/19</b>
<i>PNGA</i> (right of entry/compensation for wellsite)	2	14
<i>PNGA</i> (right of entry/compensation for flowline)	6	8
<i>PNGA</i> (right of entry/compliance/related activity)	3	1
<i>PNGA</i> (damages)	2	3
<i>PNGA</i> (rent review)	11	8
<i>PNGA</i> (compliance)	65	57
<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>89</b>	<b>91</b>
Cases outstanding from previous year	30	53
<b>Total caseload in period</b>	<b>119</b>	<b>144</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 87 cases as indicated by the Table below:

<b>Case Completions:</b>	<b>Current year</b>	<b>Previous year</b>
Abandoned	0	19
Settled by mutual agreement	23	21
Completed by Arbitration	3	2
Dismissed	1	1
Summary payment orders (s. 176)	72	53
<b>Total completed</b>	<b>87</b>	<b>96</b>

Of the 32 applications open at March 31, 2020; 22 were at the mediation stage of the process or pending further mediation, 8 at the arbitration stage, 1 was contingent on other cases and 1 was in acknowledgement.

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	20	45
Right of entry orders	8	9
Arbitrations	9	2
Cost orders	2	0
Other Board decisions *	82	56

\* 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 1920-3, January 26, 2018. The Board found it had jurisdiction to determine a threshold issue of whether the applicants were "landowners" within the meaning of the *Petroleum and Natural Gas Act*, which involved determining whether land in issue used for an oil and gas activity had been expressly excepted and reserved from the original Crown grant. The Board found the land in issue had not been expressly excepted and reserved from the original Crown grant, that the applicants were "landowners" within the meaning of the *Petroleum and Natural Gas Act*, and that the Board had jurisdiction to hear the merits of the applicants' claim. On judicial review, the Supreme Court of British Columbia disagreed and found the Board had no jurisdiction to hear the claim (*Bonavista Energy Corporation v. Fell*, 2019 BCSC 255). The Supreme Court's decision has been appealed to the Court of Appeal. As of March 31, 2020, the appeal remained outstanding.

A judicial review was filed from the Board's decisions in *Encana Corporation v. Jorgensen*, Orders 2066-2 and 2066-3 determining that a proposed pipeline was a "flowline" within the meaning of the *Petroleum and Natural Gas Act*. As of March 31, 2020, the Supreme Court had not yet heard the judicial review.

## **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 *Encana Corporation v. Jorgensen*, Order 2066-1 (and on Reconsideration: Order 2066-3), the Board determined a pipeline segment carrying water for hydraulic fracturing operations and a fuel gas line to power well site equipment were "flow lines" within the meaning of the *Petroleum and Natural Gas Act*, and that the Board had jurisdiction to issue a right of entry order for the proposed pipeline segments.

In *Tourmaline Oil Corp. v. Graham*, Order 1993-1, the Board determined a pipeline in three segments carrying natural gas and produced water was a "flow line" within the meaning of the *Petroleum and Natural Gas Act*, and that the Board had jurisdiction to issue a right of entry order for the proposed pipeline segments.

#### **Other**

In *Furze v. Whitecap Resources Inc.*, Order 2005-2, the Board found that an Assignment of Rent entered between previous owners of the Lands with respect to the payment of rent under a surface lease did not create an interest in land and did not run with the land and bind the current landowners. The Board found the current landowners were entitled to payment of the rent owing under the surface lease.

### ***Mineral Tenure Act***

#### **Compensation**

In *Robinson v. Ironstone Mining Corporation*, Order 2063-1 The Board found a mining corporation caused damage to the Lands and ordered compensation to the landowners equivalent to the cost of remediating the damage.



## **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 SRB through the PAAB office in Vancouver via email or toll free phone or fax.

### **Security Deposits:**

The Board collected \$10,000 in security deposits in the reporting period (April 1/19 – March 31/20).

The Ministry of Finance is holding \$218,850 (as at Mar. 31, 2020) in security deposits that the Board ordered paid prior to entering land. The Board processed nine applications for the return of security deposits and ordered refunds totaling \$25,000 (April 1/19 – March 31/20).

### **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.

Pursuant to the Surface Lease Information Regulation, B.C. Reg. 139/2016, 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 2019/20 was \$108,000. As detailed in the table below, the Board was under budget by \$25,261.

<b>Expenditure Type</b>	<b>Budget</b>	<b>Actuals</b>	<b>Variance</b>
Salaries	\$20,000	\$17,240	\$2,760
Benefits	\$5,000	\$4,312	\$688
Board Member fees and expenses	\$68,000	\$37,999	\$30,001
Information systems	\$10,000	\$9,862	\$138
Office and business	\$5,000	\$2,640	\$2,360
Legal Support Services	\$0	\$10,686	\$(10,686)
<b>Total Expenditures</b>	<b>\$108,000</b>	<b>\$82,739</b>	<b>\$25,261</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. 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.

Appendix 2

**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.