**File No. 1745**
**Board Order No. 1745-3**

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**May 13, 2014**

## SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF

THE NORTH WEST ¼ OF SECTION 12 TOWNSHIP 78 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT, EXCEPT PARCEL A (F8005)

BLOCK A OF THE SOUTH WEST ¼ OF SECTION 12 TOWNSHIP 78 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT

THE SOUTH EAST ¼ OF SECTION 12 TOWNSHIP 78 RANGE 18 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT

(The "Lands")

BETWEEN:

MURPHY OIL COMPANY LTD.

(Applicant)

AND:

WILLIS MORLEY SHORE
AND MITCHELL TODD SHORE

(Respondents)

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## BOARD ORDER

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Heard: February 26 and 27, 2014 at Dawson Creek, BC.
Appearances: Rick Williams, Barrister and Solicitor, for Murphy Oil Company Ltd.
Elvin Gowman, Farmers' Advocacy Office, for Willis Morley Shore

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## INTRODUCTION

[1] Willis Morley Shore (also known as Bill Shore) owns, individually or jointly with Mitchell Todd Shore, the Lands described as:

NW ¼ Section 12, Township 78, Range 18, W6M Peace River District, except Parcel A (F8005) ("NW 12");
Block A, SW ¼ Section 12, Township 78, Range 18, W6M Peace River District ("Block A SW 12");
SE ¼ Section 12, Township 78, Range 18, W6M Peace River District ("SE 12")

[2] Bill Shore also owns other parcels in the area including the SW ¼ Section 7, Township 78, Range 17 ("SW 7") located immediately to the east of SE 12, as well as the NE ¼ of Section 12, Township 78, Range 18 ("NE 12"), and the NW ¼ of Section 7, Township 78, Range 17 ("NW 7").

[3] In May 2011, Murphy Oil approached Mr. Shore to obtain permission to survey a route for flow lines required to tie in two natural gas wells located north of the Lands with Murphy Oil's Tupper West Plant via a connection point south of the Lands. Murphy Oil's preferred route would have taken the flow line right through NE 12 and SE 12. Mr. Shore advised Murphy Oil that there were significant deposits of gravel on SE 12 and SW 7 immediately to the west, and that he was opposed to any route that passed through those quarter sections. The parties discussed various alternative routes and in August 2011 agreed to an alternative route that would have taken the flow line across the northwest corner of NW 7. This route turned out not to be feasible because of its impact on a planned residence of another landowner to the north.

[4] In December 2011, Murphy Oil filed an application to the Board seeking right of entry to the Lands. The initial planned project area submitted to the Oil and Gas Commission (OGC) was for a total of 11.35 acres, being 7.24 acres of right of way and 4.11 acres of temporary workspace. In February 2012, Murphy Oil agreed to reduce the width of the right of way from 18 metres to 15 metres, and later amended its application to the Board.

[5] On May 18, 2012, the Ministry of Energy, Mines and Petroleum Resources (the Ministry) approved an application by Brian Elliott of Tryon Land Surveying Ltd. (Tryon) for a 10-hectare sand and gravel mine on SE 12. The approved application proposes a 15 year mine life (2012-2027 depending on market conditions) with annual extraction of

approximately 55,100 $m^3$ and a mineable reserve over the life of the mine of approximately 827,000 $m^3$. The permit requires a seven metre leave strip around the mine area. This leave strip, and the western boundary of the mine area, extends 113 metres along the boundary between SE 12 and Block A SW 12.

[6] On July 23, 2012, the OGC granted Murphy Oil a permit to construct, operate and maintain the flow lines in the revised project area of 11.02 acres comprised of 6.05 acres of right of way and 4.23 acres of temporary workspace. On September 16, 2012, the Board granted Murphy Oil the right to enter the Lands to construct, operate and maintain the flow lines. The Board's right of entry order authorizes entry to the Lands within the revised project area as permitted by the OGC.

[7] The flow line right of way extends 113 metres along the boundary of Block A SW 12, immediately adjacent to and parallel with the western boundary of the mine on SE 12, before angling to the west and then angling back to the boundary between NW 12 and NE 12. The right of entry includes a .05 acre area in the southwest corner of SE 12 as temporary workspace.

[8] Mr. Shore filed an appeal of the OGC permit to the Oil and Gas Appeal Tribunal (OGAT), but OGAT denied the appeal.

[9] The flow lines were constructed in the fall of 2012 and are currently operating.

[10] The parties have been unable to resolve the compensation payable by Murphy Oil to the Shores for Murphy Oil's use and occupation of the Lands, and the Board must, therefore, arbitrate the compensation payable.

## ISSUE

[11] The issue is to determine the appropriate compensation payable by Murphy Oil to the Shores arising from Murphy Oil's entry to and use and occupation of the Lands. Compensation is the equivalent in money for the loss sustained (*Western Industrial Clay Products Ltd. v. Mediation and Arbitration Board*, 2001 BCSC 1458; *Dome Petroleum Ltd. v. Juell*, [1982] B.C.J. 1510). The question the Board must ask is: what is the landowners' loss arising from Murphy Oil's entry to and use and occupation of the Lands?

[12] In determining compensation for loss arising from a right of entry, section 154 of the *Petroleum and Natural Gas Act* (*PNGA*) provides that the Board may consider, without limitation, the following:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;

(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

## SUBMISSIONS

[13] Bill Shore submits there are significant quantities of gravel under the right of way that are now lost to him as a result of the flow lines. He seeks compensation of approximately $115,000 for 25,267 $m^3$ of gravel he says is under the 113 metre section of the right of way on Block A SW 12, and under the 113 metre area adjacent to the right of way under the seven metre leave strip and excavation slope in the mine area. He submits this quantity of gravel is lost to him as a result of Murphy Oil's use and occupation of the Lands. A person's loss of a right or profit is a factor the Board may consider in determining compensation payable as a result of a right of entry.

[14] Murphy Oil argues the claim for loss of gravel is speculative. It submits there is no evidence of an economic deposit of gravel beneath the right of way. Murphy Oil submits its offer of just over $19,000 exceeds the Shores' actual loss arising from its use and occupation of the Lands.

[15] In the alternative, the landowners seek compensation of approximately $115,000 on the basis of other surface leases, in particular a lease between BC Hydro and Mr. Shore for a transmission line right of way. The terms of other agreements are a factor that the Board may consider in determining compensation payable as a result of a right of entry.

[16] Murphy Oil submits the circumstances with the BC Hydro lease are different and that lease does not provide an appropriate basis for determining the compensation payable for Murphy Oil's right of way. It submits its other agreements with landowners in the area are a more appropriate comparator.

[17] Murphy Oil submits appropriate compensation may be determined on consideration of the value of the land and estimated crop loss and provides evidence relevant to those factors. These are factors the Board may consider in determining compensation payable as a result of a right of entry.

## EVIDENCE AND ANALYSIS

[18] I heard evidence from Bill Shore, Erwin Spletzer, John Wasmuth and Glen Schafer. Erwin Spletzer is the Aggregates Manager at Terus Construction Ltd., part of an international group that owns DGS Astro Paving Ltd. (DGS). He has over 30 years experience in the gravel business. John Wasmuth is an appraiser accredited by the Appraisal Institute of Canada and a professional agrologist. He has experience appraising sand and gravel deposits and has some limited, although dated, experience working with the soil survey division of the Research Council of Alberta. Glen Schafer is a Surface Land Man with Murphy Oil.

[19] The landowners have the burden of proving their alleged loss on a balance of probabilities. That burden is met if the evidence discloses it is more probable than not that the alleged loss has occurred or will occur in the reasonably near future.

[20] For the landowners to succeed in their claim for loss of gravel, the evidence must not only establish that it is more likely than not that there is gravel under the 113 metre section of right of way and adjacent strip in the quantity alleged, but it must also establish the probable value of that gravel, and that the landowners are prevented now or in the foreseeable future from developing and marketing the gravel as a result of Murphy Oil's use and occupation of the right of way. The evidence must establish that as a result of Murphy Oil's use and occupation of the Lands, an economic opportunity is lost to the landowners, and the value of that lost economic opportunity.

### Claim for lost gravel

Gravel on SE 12

[21] The bulk of the evidence respecting gravel relates to the deposit on SE 12.

[22] Erwin Spletzer's evidence is that he was looking for a gravel source close to Dawson Creek. He says there is a general need for gravel in the area and that a source closer to Dawson Creek than those in Taylor and the Pine River area would have a cost advantage on hauling as trucking costs are reduced the closer a source of gravel is to its market. When he heard that Mr. Shore might have gravel on his land, he contacted Mr. Shore and went to see the property. When he saw the test holes Mr. Shore had dug, he was surprised and decided he was interested in pursuing an agreement to mine. He took samples from four test sites that Mr. Shore had dug and had DGS do a sieve analysis.

[23] The DGS sieve analysis indicates the gravel at all four test sites is suitable for aggregates. The results indicate gravel depth of seven metres, but Mr. Shore provided this information to Mr. Spletzer from Mr. Shore's observations in digging the pits. As Mr. Spletzer did not dig the test holes, he could not say how deep the gravel is at each location. Mr. Shore dug several pits on SE 12, not just the four from which DGS took

samples. Mr. Shore's evidence is that in some of the pits, the depth of gravel exceeds the 23 foot reach of his hoe.

[24] Mr. Shore's evidence includes photographs of eight test holes, all on SE 12, seven within the permitted mine area and one to the north of the permitted area. All of the DGS test sites are located on SE 12. On the basis of the aerial photographs showing the locations of the DGS test sites and the test pits Mr. Shore photographed, I find it is likely that DGS Pit #4 corresponds with Mr. Shore's Test Pit #5 located outside of the permitted mine area to the north. I am not able to match any of the other DGS test pits with the test pits Mr. Shore photographed.

[25] The closest test pit to the right of way is Mr. Shore's Test Pit #3. The evidence does not disclose the precise distance of this test pit from the right of way, but it appears it may be approximately 30 metres to the east. Mr. Shore's evidence is that he dug down at least 16 feet in this pit and did not get to the bottom of the gravel.

[26] The evidence also includes photographs showing gravel taken from a location in the southwest corner of SE 12, just next to the flow line trench, to create a crossing under an existing pipeline for the Murphy Oil flow lines. Mr. Shore's evidence is that this material was wet and different from the gravel dug out of his test holes on SE 12.

[27] DGS prepared a Letter of Intent dated May 10, 2012, indicating its interest in entering into an agreement with Mr. Shore to develop the pit. DGS offered to pay Mr. Shore $\$4.75/m^3$ with an annual minimum royalty of $20,000. Mr. Shore did not accept this offer. DGS prepared a second Letter of Intent dated January 27, 2014. DGS seeks exclusive rights to the gravel and is willing to pay Mr. Shore a minimum annual payment of $35,000 based on taking 10,000 $m^3$ at $\$3.50/m^3$ for a five-year term with a right of renewal. Mr. Shore has not accepted this proposal. It is his intention to mine the site himself. His evidence is that others have also expressed interest in mining the site but he has not sought out other offers in writing. There are no other expressions of interest in the evidence before me.

[28] As of the date of this arbitration, Mr. Shore had not commenced operations at the mine site. He had not cleared the land or constructed the required access. His evidence is he had intended to start by the spring of 2013, but "money and oil and gas slacked off a bit" so he was "in a holding pattern waiting to see what the summer would bring". He is hoping a proposed highway expansion project in the area will be approved creating a demand for gravel. There is no evidence of a business plan, equipment contracts or agreements to purchase gravel once mined.

[29] The mine permit on SE 12 must be renewed every five years, which means Mr. Shore will need to apply to have the permit renewed prior to May 2017.

[30] The application approved by the Ministry includes a cross-sectional alignment drawing prepared by Tryon showing the depth of material to be removed from the

permitted area. The drawing indicates that the deposit is greatest towards the east of the site in a north south direction and that it thins out towards the west of the site and towards the north edge of the site on the west side. Mr. Shore's evidence is that the largest gravel reserves he knows about on his properties are located on SE 12 and SW 7. He believes the gravel extends 600 to 800 metres to the north on SE 12 and SW 7. He believes, as does Mr. Spletzer, that the gravel also extends into the property to the south of SE 12. He initially wanted to apply for a permit to mine the whole of SE 12 but was convinced to limit the application to just over 10 hectares to avoid the necessity of an environmental assessment. He believes there is room for four or five more developments of a similar size on SE 12 and NW 7.

[31] Mr. Spletzer's evidence is that it is best to work a pit from its edge and work towards the gravel doing progressive reclamation as you go. This evidence conforms to the permit providing for the development of the pit in two phases. Phase 1 being the western side of the pit where the topography is lower and the deposit thinner, and Phase 2 being the eastern side, where the topography rises and the deposit thickens enabling excavation of a gravel face. The permit provides for the reclamation of Phase 1 prior to the excavation of Phase 2.

[32] The evidence establishes there is an economic gravel deposit on SE 12 that Mr. Shore intends to mine in the near future. If he decides not to develop the mine himself, DGS remains interested in securing an agreement with Mr. Shore to develop the site. There is no evidence that the flow lines, or Murphy Oil's use and occupation of the Lands will in any way impact Mr. Shore's ability to develop the permitted gravel mine, and indeed Mr. Shore does not make any claim in this regard.

Gravel on Block A SW 12

[33] The evidence respecting any deposit of gravel within the 113 metres of the right of way on Block A SW 12 for which Mr. Shore claims loss is less direct. I was not provided with any geotechnical evidence relating to the depth or quality of any gravel deposit on Block A SW 12. The only direct evidence before me that there is gravel under the right of way is found in six photographs Mr. Shore took at intervals in the 113 metre section of the flow line trench on Block A SW 12 immediately adjacent to the mine boundary. These photographs show rocks in the bottom of the flow line trench. Mr. Shore's evidence is that the overburden is 1.8 metres, based on his observations of the trench. I was also provided with a photograph identified as "pipeline trench material backfill" which Mr. Shore says is gravel thrown up from the backfill when digging the trench.

[34] Mr. Wasmuth's evidence is that in valuing gravel deposits various factors need to be considered including: the distance to truck, the depth of the overburden, the quality of the deposit, the extent and depth of the deposit, the level of the water table, and the percentage of waste as a result of admixing of other materials. Mr. Wasmuth's observations from the trench photographs are that the different colourings suggest admixing of materials, and that there may be clay and silt mixed in with the gravel.

[35] The only other evidence respecting any quantity of gravel on Block A SW 12 is Mr. Shore's testimony that the parcel the Crown owns in the northwest corner of SW 12 (SW ¼ Section 12 except Block A) is a former gravel pit that the Crown operated. I have no evidence as to the quantity or quality of gravel removed from that pit, the length of time the pit operated, or when or why it was closed.

[36] Mr. Shore provides a letter from Andrew Hall of Tryon calculating the total volume of gravel affected by 113 metres of the pipeline corridor at 25,267 $m^3$ or 33,048 $yds^3$. In this calculation, Mr. Hall includes the volume of gravel under the seven metre leave strip surrounding the mine immediately adjacent to the right of way, and the gravel under the back side of the excavation slope to the edge of the seven metre leave strip. The calculation is based on a depth of seven metres of gravel under 1.8 metres of overburden. The evidence is that these numbers were provided to Mr. Hall and that they have not been actually measured or independently verified.

[37] On the basis of Mr. Shore's testimony respecting a former pit in the northwest corner of SW 12, the photographs of the trench, and the evidence relating to the gravel on SE 12, I am being asked to infer that there is seven metres of gravel below 1.8 metres of overburden in the right of way of similar quality to the gravel located on SE 12. I find it more likely than not that there is gravel under the 113 metre section of the right of way on Block A SW 12. But, as there is no geotechnical evidence or even photographs of test pits in or immediately adjacent to the right of way, the evidence is inconclusive as to the probable depth and quality of gravel at this location. It is possible, that the quality determined by the DGS testing from pits on SE 12 extends to the gravel on Block A SW 12. It is also possible, based on the photographic evidence depicting different and wetter material immediately adjacent to the right of way, and variations of colour within the right of way that appears different from that at the test pits, that the quality of the gravel deteriorates as it approaches and extends below the right of way. It is possible that the depth of gravel observed at the test pits closest to the right of way extends under the right of way. It is also possible, based on the alignment drawings showing a thinning of the deposit on the western edge of the mine area, that the depth of gravel thins further as it extends under the right of way. There is no evidence to support the assumption that any gravel deposit existing on the Crown parcel in the northwest corner of SW 12 is a continuation of the same deposit on SE 12 within the mine permit area.

[38] I am not able to infer a depth and quality of gravel on the basis of photographs of rocks in a trench and test pits some distance away, in light of other evidence that casts doubt on whether the inference can be made and in the absence of geotechnical evidence to confirm the depth and quality of the deposit. As the evidence is insufficient to conclude that either of the possibilities above is more probable than the other, the burden of proving that there is the depth and quality of gravel alleged is not met.

[39] As the quantity of gravel under the right of way is not established on a balance of probabilities, neither has the value of any quantity been established.

Are the landowners prevented now, or in the foreseeable future, from developing any gravel under the right of way as a result of Murphy Oil's use of the right of way?

[40] I am not satisfied the evidence establishes there is gravel under the right of way of the depth and quality Mr. Shore alleges; however, if I am wrong in that conclusion, I will nevertheless consider whether the landowners are prevented in the foreseeable future from developing any supply of gravel under the right of way as a result of Murphy Oil's use and occupation of the right of way.

[41] To the extent any gravel under the seven metre leave strip imposed by the permit or under the excavation slope within the permitted area is presently not developable, I find that loss cannot be attributed to Murphy Oil's use and occupation of the right of way. That loss, if any, arises from the requirements of the permit itself. The only deposit potentially lost as a result of Murphy Oil's right of way is the portion under the right of way itself. Tryon's calculations on the basis of the depth information provided suggest there is 11,866 $m^3$ of gravel under the 113 metre length of the right of way adjacent to the mine although, as discussed above, I do not accept this calculation as conclusive evidence of the quantity of gravel at this location.

[42] The only evidence of any demand or market for a potential source of gravel is DGS's letter of intent with respect to the mine area on SE 12 offering an annual minimum payment of \$3.50/$m^3$ for 10,000 $m^3$, or \$35,000. DGS is prepared to commit to payment based on extraction of 10,000 $m^3$ although the mine permit allows annual extraction of up to 55,100 $m^3$. Mr. Shore has put his own plans to mine the permitted area on hold because of market conditions. Even if I was prepared to infer that the quality and depth of gravel on SE 12 extends under the right of way on Block A SW 12, there is no evidence of a current market or demand for additional gravel beyond the commitment DGS is prepared to make for gravel from SE 12.

[43] Extraction of gravel from the permitted area has not yet commenced. Once mining starts, it will take 15 years at the maximum allowable extraction rate for the mine to be depleted. If extraction only occurs at the rate DGS is willing at present to guarantee, it will take over 80 years to deplete the reserve.

[44] The alignment drawings indicate that the depth of the reserve increases to the east. Mr. Spletzer's evidence is that best practices indicate the permitted area should be mined from west to east in accordance with the natural slope of the land. Given the alignment drawings and Mr. Spletzer's evidence respecting best practices, it is likely that when the need for further gravel development arises, that development will continue to work the face of the gravel heading in an easterly direction. Mr. Shore's evidence is the gravel deposit extends to the north of the permitted area on SE 12 and to the west of the permitted area into SW 7. He expressed confidence that there is

room for four or five more developments of the same size on SE 12 and SW 7. If Mr. Shore is right about the extent of the gravel reserve on SE 12 and SW 7, it will likely be many more years before there is any immediate need to mine any deposit under the right of way.

[45] There is no evidence before me as to the likely length of service for the flow line but, generally, it is the Board's understanding that gathering lines may remain operational for approximately 40 years. If there was an immediate or near need to develop the gravel under the right of way, and a ready market for it, it would not be reasonable to expect a landowner to forego that lost opportunity for 40 years without compensation. But the evidence in this case does not support an immediate or near need to develop the gravel, assuming an economic deposit of gravel exists under the right of way. The landowners have not applied for a permit to develop the gravel under the right of way or conducted any tests to establish the extent or quality of the deposit. Mr. Shore has a permit to extract gravel on the adjacent parcel but has not commenced those operations, constructed the access road or commenced site clearing. He has no contracts in place for the purchase of the gravel that is readily available to him, let alone evidence of a demand for the gravel that is not. If he wishes to expand the permit area, he will need to seek the approval of the Ministry and the Agricultural Land Commission, and may need an environmental assessment. The evidence of best practices before me suggests it is likely that future expansion of the mine, if approved, would occur first to the east not to the west where the right of way is located. The evidence does not support a conclusion of any likelihood that gravel under the right of way will be developed within the time frame that the flow line is operational.

[46] Mr. Schafer of Murphy Oil indicated in his evidence that Murphy Oil consents to the right of entry order being amended to require Murphy Oil to remove the flow line from the right of way upon abandonment if required for the landowners to develop the land. In the circumstances of this case, the Board should make that order regardless of Murphy Oil's consent to ensure the landowners' future capability to develop any gravel under the right of way if and when the opportunity arises.

[47] Even if I was prepared to infer that the depth and quality of the gravel under the right of way is at least equal to the reserve within the mine area, the evidence does not support the conclusion the landowners would be able to or have the need to develop the deposit in the near future but for Murphy Oil's use of the right of way. Any gravel under the right of way will still be there when the flow line is taken out of service. Murphy Oil has not taken the gravel and has no right to take the gravel. Mr. Shore has not, as he suggested in his evidence, donated the gravel to Murphy Oil. The landowners' future opportunity to develop a gravel resource under the right of way is not lost as a result of Murphy Oil's use and occupation of the right of way.

[48] The evidence does not establish that the landowners have lost, or will lose in the foreseeable future, income from the development of gravel as a result of Murphy Oil's use and occupation of the Lands.

## Claim based on BC Hydro Right of Way

[49] Mr. Shore entered into an agreement in June, 2013 with BC Hydro for a right of way across NW 12, NE 12 and NW 7. The right of way comprises 17.74 acres and is for the purpose of a 230 kV transmission line. Mr. Shore received approximately $220,000 in total from BC Hydro comprised of initial payments of $10,000 per parcel, closing compensation of $170,000, and compensation for merchantable timber of $13,729. The closing compensation includes market value for the land calculated at 75% of $900/acre, compensation for eight above ground transmission structures at $5,000/structure, injurious affection based on 5% of the market value of the land, and amounts for replacement fencing and tie-ins.

[50] Mr. Shore submits that if the amounts for timber and fencing are removed, this agreement indicates compensation of just over $10,200/acre. He seeks compensation of that amount for Murphy Oil's right of way.

[51] I find the compensation paid for the BC Hydro right of way is not indicative of Mr. Shore's loss arising from Murphy Oil's right of way. The BC Hydro right of way includes compensation for several factors that are not relevant to Murphy Oil's right of way. In addition to the payments for timber and fencing that Mr. Shore concedes are not relevant, the payments for above ground transmission structures and injurious affection are also not relevant. There are no above ground structures in Murphy Oil's right of way. Mr. Wasmuth's evidence is that he has never observed a reduction in the price of agricultural land as a result of an underground pipeline. In his opinion, based on his more than 30 years experience as a professional appraiser, the flow lines will not cause a reduction in the value of the land outside of the right of way. There is no basis, therefore, for any compensation for injurious affection.

[52] I am not able on the evidence before me to equate the initial compensation paid by BC Hydro with actual loss incurred by the landowners arising from the entry. It is possible that the "up front meeting" payments were intended to compensate the landowners for their time spent in negotiations. I have no evidence of the amount of time lost by the landowners as a result of BC Hydro's entry. Nor do I have evidence of the amount of time, if any, lost to the landowners as a result of Murphy Oil's entry. It is also possible that BC Hydro made some or all of the initial payments gratuitously in order to create goodwill and avoid the expense of expropriation.

[53] The compensation paid by BC Hydro as market value compensation for the right of way is based on 75% of $900/acre. The only appraisal evidence before me as to the market value of the Lands indicates a market value of the fee simple interest at $750/acre. Mr. Wasmuth's evidence is that the market value of the partial interest taken by a right of way is less to reflect the residual value retained by the owner of the fee. Presumably, although not explained in the evidence before me, the payment by BC

Hydro of 75% of market value is to reflect that its taking is of a partial interest and to account for the residual value.

[54] Other agreements are one of the factors the Board may consider in determining compensation. One other agreement, however, particularly an agreement allowing entry for a completely different purpose of an above ground high voltage transmission line, does not establish a pattern of dealings indicative of the probable loss arising from this right of entry for underground flow lines.

[55] The evidence does not support a finding that the compensation paid by BC Hydro pursuant to its agreement with Mr. Shore is a reflection of Mr. Shore's probable loss arising from Murphy Oil's entry to and use of the Lands.

## Other Considerations

[56] It remains to determine the appropriate compensation payable by Murphy Oil to the landowners arising from its entry to and use of the Lands considering the evidence relevant to the various factors the Board may consider under section 154 of the *PNGA*.

### Land Value

[57] John Wasmuth appraises the market value of the Lands at $750 per acre effective September 26, 2012. This conclusion is based on an analysis of six sales of comparable land between October 2010 and July 2013. He estimates the value of the temporary workspace at $96.00/acre based on a market rent for agricultural land of $32.00/acre for a period of three years. While this is Mr. Wasmuth's opinion of the market value of the temporary workspace, he bases his conclusion of value for this space on the industry practice of valuing temporary workspace at 50% of the value attributed to land in the right of way.

[58] Mr. Wasmuth's evidence is the only evidence before me respecting the value of the Lands. On the basis of this evidence, I find the probable market value of the fee simple interest in the Lands is $750/acre. As a right of way is only a partial interest in land, the market value of the partial interest taken is likely less than $750/acre.

[59] Murphy Oil offers $900/acre for the right of way and $450/acre for the temporary workspace area calculated as follows: (6.05 acres x $900) + (4.97 acres x $450) = $7,681.50. Murphy Oil offers an additional $500/acre for the 6.05 acre right of way area, or $3,025, as compensation for the compulsory aspect of the entry.

### Loss of income or profit

[60] John Wasmuth also provides an estimate of the forage crop loss from the right of way based on two scenarios. The first scenario assumes the Lands were used for hay production prior to installation of the flow lines, and the second scenario assumes the

Lands were used for livestock grazing. Although his understanding is that a portion of the right of way area was used for forage production and a portion was treed, for the purpose of estimating crop loss, he assumes the entire right of way and temporary workspace areas were used for forage production. Due to the unavailability of data respecting yields and commodity prices within the Peace River District of BC, he uses data from the Peace Region of Alberta, where agricultural practices, soil and climate are similar. For the purpose of his analysis, he assumes 100% crop loss for 2013 and 2014, 75% loss for 2015, 50% loss for 2016 and 25% loss for 2017.

[61] In the first scenario, he estimates total forage loss over five years from the right of way area at $3,583 and from the temporary workspace at $2,943 using the combined average yield (1.88 tons/acre) and price ($0.045 per pound) for the Peace Region of Alberta for 2011-2013 for mixed hay and alfalfa hay. He does not deduct for fixed or variable expenses. Mr. Wasmuth's estimated total crop loss under this scenario is $6,526.00

[62] In the second scenario, he estimates total forage loss over five years from the right of way area at $2,558 and for the temporary workspace at $2,101 assuming yield to support grazing cow/calf pairs at the high end of the carrying capacity range and using the average price ($0.04 per pound) for mixed hay for 2011-2013. He does not deduct for fixed or variable expenses. Mr. Wasmuth's estimated total loss under this scenario is $4,659.00.

[63] Murphy Oil offers $6,887.50 for crop loss based on 11.02 acres x $625/acre.

[64] Mr. Shore's evidence is that the cleared area of the right of way had been used to graze horses and one part used to grow hay. A portion was covered with small diameter second growth timber that was no good for stacking and decking. He told Murphy Oil they could burn the timber. Murphy Oil offers Mr. Shore $1,500 for loss of timber.

[65] The evidence establishes that the landowners will likely incur some loss of income from an inability to use the right of way and temporary workspace areas for either grazing or production of hay during construction of the flow lines, and for a period of time after construction while the area is reseeded and the crop reestablishes. It is likely that the landowners' loss in this regard is less than that estimated by Mr. Wasmuth given his estimate is based on gross, rather than net, yields for the total right of way and temporary workspace area, and given that only a portion of the area was actually used for either grazing or hay production.

[66] I find Murphy Oil's offer for crop loss and timber likely exceeds the landowners' actual or reasonably foreseeable future loss of income as a result of Murphy Oil's use and occupation of the Lands.

Other right of way agreements

[67] Mr. Shore entered into a right of way agreement with Murphy Oil in August of 2011 for a 20 metre wide right of way across the northwest corner of SW 7. This was to be the route for the flow lines ultimately constructed on the Lands, but the route turned out not to be feasible. The compensation payable for this right of way would have been $1,611. Mr. Schafer's evidence is that compensation was based on $900.00/acre. This agreement incudes a surrender clause requiring Murphy Oil, following decommissioning and abandonment of the flow lines, to remove at its expense any portions of the abandoned flow lines that directly and materially interfere with an approved development of the landowner.

[68] Mr. Shore also provides copies of two right of way agreements entered in 2009 between himself and Shell Canada Limited for the construction and operation of pipelines on land owned by Mr. Shore approximately 32 kilometres from Dawson Creek. Mr. Shore's evidence is he received $34,096 as compensation for these entries involving 7.88 acres of permanent right of way and 2.3 acres of temporary workspace. He says the agricultural quality of these properties is not as good as the Lands and the pipeline goes around his hay field. As I read the agreements, they only require payment of $14,308. The agreements do not contain any indication of how the compensation was determined. They do not contain a surrender clause similar to the clause in the Murphy Oil agreement.

[69] Mr. Schafer's evidence is that Murphy Oil entered into agreements with three other landowners impacted by the flow lines. In each case, the landowners received $900/acre for the land and $500/acre for compulsory aspect. His evidence is the Murphy Oil agreements also include $625/acre for tamed pasture and $525/acre for bush pasture as compensation for crop loss. The $625/acre for tamed pasture is calculated as 100% of $250/acre for two years, and 50% of $250/acre for the third year.

[70] Mr. Schafer provides a large map showing all of Murphy Oil's flow lines in the area. His evidence is that all agreements with landowners in this area are based on $900/acre plus $500/acre plus crop loss. His evidence is Murphy Oil does not generally pay an amount for second growth tree stands. Murphy Oil's offer in this case is consistent with these other agreements, with the exception of the offer to compensate for timber in addition to the offer to compensate for tamed pasture for the whole of the right of way and temporary workspace area.

[71] Murphy Oil's use of $900/acre in compensating for the right of way is consistent with the value attributed to the land by BC Hydro in its agreement with Mr. Shore except that Murphy Oil offers 100% of this amount for the right of way (50% for the temporary workspace), while BC Hydro only paid compensation on the basis of 75% of this amount.

[72] The evidence of other agreements before me is not useful in determining the actual or probable loss incurred by the landowners as a result of this entry. The most it can do is indicate what others have received for similar entries.

## CONCLUSION

[73] The evidence does not establish that there is gravel of the depth and quality alleged under the right of way. Nor does it establish that there is any probability that the landowners are prevented now or in the near future from developing any gravel deposit under the right of way, or that the landowners have lost an economic opportunity from gravel development as a result of Murphy Oil's right of way.

[74] Murphy Oil remains willing to pay the landowners $19,094.00 based on various assumptions about probable loss. Murphy Oil's assumptions in estimating loss are favourable to the landowners, and some of the assumptions are not borne out by the evidence. The evidence is that only a portion of the right of way was used to grow forage for grazing or hay production and yet crop loss is estimated on the basis of the whole of the right of way area. The evidence is that the timber removed from the site was not merchantable, yet the offer includes a payment for timber. The evidence is that the probable market value of the fee simple interest in the Lands is $750/acre, yet Murphy Oil offers $900/acre for the right of way area. The evidence does not support a finding that the landowners have incurred or are likely to incur loss equaling the amount offered by Murphy Oil.

[75] Murphy Oil's offer is consistent, however, with agreements entered with other landowners in the area for entry to land for the purpose of constructing and operating flow lines.

[76] I conclude that Murphy Oil's offer of $19,094.00 likely exceeds the landowners' loss arising from Murphy Oil's entry to, and use and occupation of, the Lands, but that this offer provides appropriate compensation as it is consistent with other agreements in the area.

## ORDER

[77] Murphy Oil Company Ltd. shall forthwith pay to Willis Morley Shore and Mitchell Todd Shore the sum of $19,094.00 less any amount already paid as partial compensation.

[78] The Board's Order 1745-2 dated September 26, 2012 is amended to add the following clause:

Following the decommissioning and abandonment of the flow lines authorized by OGC Pipeline Permit 9706395, in the event the flow lines directly and materially interfere with or restrict an approved development proposed by the landowners, Murphy Oil shall, upon reasonable notice prior to commencement or construction of such approved development, remove at its sole cost and expense that portion of the abandoned flow lines which directly and materially interfere with or restrict the landowners' development, or shall compensate the landowners for any loss arising from the interference of the decommissioned and abandoned flow lines with the landowners' approved development.

[79] The Board will issue an amended version of Order 1745-2 that may be filed in the Land Title Office so the appropriate notations may be made on the Titles to the Lands.

DATED: May 13, 2014

FOR THE BOARD

Cheryl Vickers, Chair