Canadian Institute of Resources Law
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A Citizen's Guide to the Alberta Surface Rights Board

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Author's profile

John McCarthy was appointed to the Surface Rights Board and the Alberta Compensation Board in 2017 as a part-time member. John, who spent most of his career with the National Energy Board, has significant experience in regulatory and energy infrastructure issues from both the public and private sector. The opinions expressed in this paper do not represent the policies of the Surface Rights Board nor does the information provide advice on matters heard by the Board, but are offered as an educational tool for members of the public.

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I would like to thank the Alberta Law Foundation and the Canadian Institute of Resources Law for their generous support in the development of this paper. I would also like to thank Allan Ingelson, Susan McRory, Terri Mann, and others who wish to remain anonymous for their thoughtful review of the early drafts of this report. Any errors and omissions belong to the author alone.

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PREFACE

Institutions such as the Alberta Surface Rights Board[1] ("SRB" or "Board" throughout this document), can be intimidating and confusing. Many do not have a lot of experience with the administrative processes of government or the legal system, and many of the terms used by the Board are not common language. However, the Alberta *Surface Rights Act*[2] ("*SRA*" or "*Act*" throughout this document), provides Albertans with some important entitlements and protections. Understanding the Board and how it operates can allow Albertans better access to those rights.

The Alberta Surface Rights Board is a specialized administrative tribunal, similar to a court, that under the authority of the Alberta *Surface Rights Act* can give companies the right of entry onto private or public land to develop underground resources such as oil and gas, or to build and operate pipelines or power transmission lines. The *Act* also provides protections to landowners and tenants with respect to compensation, the recovery of damages caused by the company, and the recovery of unpaid compensation. The *Act* and the Board were established as a simple way to address disputes between landowners and corporations and to provide a level of certainty for both parties. The *Citizen's Guide to the Alberta Surface Rights Board* is intended to help Albertans understand the *Surface Rights Act* and the Surface Rights Board.

The *Citizen's Guide* focuses on the five key processes in the *Act*: the right of entry process (primarily described in sections 12 and 15 of the *Act*); determining the compensation payable (section 25); the review of the rate of compensation for surface leases (section *27*); damage claims against energy companies (section 30); and the recovery of unpaid compensation (section 36). While the *Act* has a broader jurisdiction, these are the Board processes most used by Albertans.

The *Citizen's Guide* is an attempt to explain these processes for general educational purposes only. The reader is cautioned that sometimes the concepts are simplified for ease of communication and certain exceptions to the general rules are not discussed. Where there is a conflict between this document and the *Act*, the *Regulations*, the *Rules*, or the Board's decisions, the latter will prevail.

The explanations included in this document are no substitute for a legal interpretation of the *Act* and should not be considered legal advice or a legal opinion. The Board is charged with interpreting and implementing the *Act* while adhering to the rules of natural justice and other requirements. The facts of every situation need to be assessed separately, the explicit wording in the *Act* may make a significant difference depending on the circumstances. Parties before the Board are entitled, and encouraged, to bring any position or evidence they wish to the Board and can argue its relevance or compliance with the legislation, regulations, and rules.

Consequently, you will find in the following pages many vague words such as "generally", "usually", or "often" in describing the Board's processes and interpretations of the *Act*. The decisions of the Board are based upon the evidence and information that the Board or panel had

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[1] At time of writing *Bill-48, Red Tape Reduction Implementation Act* has received Royal Assent. The Bill includes the *Land and Property Rights Tribunal Act* which serves to amalgamate four administrative tribunals, including the Surface Rights Board into a newly created Land and Property Rights Tribunal. Upon implementation, the Tribunal will be substituted for the Board in the *Surface Rights Act*.

[2] *Surface Rights Act*, RSA 2000, c S-24 [*SRA*].

before it. The reader is cautioned to carefully read the specific facts of a case and the rationale for the decision before assuming the decision would apply to another situation.

Where a case is cited to illustrate the Board's past interpretation of a point, often a few comments of explanation are offered. This is not intended to be an expansion or narrowing of the cited decision but only to alert the reader of a previous Board decision that may be relevant to understanding how the Board has interpreted the *Act* in the past.

There is no obligation for a panel of the Board to accept or adopt the reasoning or decisions of a previous panel. Each panel makes decisions based upon the information it has before it. However, the Board has a general respect for the previous decisions and panels will often review these decisions as background. It is a good practice, and one followed by the Board, to strive to make consistent decisions. Consistency helps everyone to understand how the Board may interpret a situation. This is useful to all who may have to deal with the Board and those involved with surface rights issues. Understanding the pattern of Board decisions can help to resolve a dispute between an energy company and a landowner early, even without resorting to the Board.

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CanLII Abbreviations:

SCC: Supreme Court of Canada
ABCA: Alberta Court of Appeal
ABQB: Alberta Court of Queen's Bench
ABSRB: Alberta Surface Rights Board

1.0 HISTORY AND STRUCTURE

1.1 Property Rights in Alberta and the *Surface Rights Act*

All private land in Alberta is held under a common law grant from the Crown which recognizes that all Albertans, as subjects of the Crown, have broad rights to own, use, and enjoy property. But these rights are not unlimited and there are several instances where Crown authority can restrict property rights. Through legislation, the government may regulate, and even confiscate, private land. However, common law principles also guard property owners against unauthorized government interference and the courts will view these restrictions carefully.

A principle in common law since the 19th century is the holder of the rights to mines and minerals has a right to access the surface to work those interests.[3] There is no obligation under common law for the mineral owner to compensate the surface owner unless the mineral owner has caused damage. Continued, this would have led to an unacceptable practice for landowners.

When common law principles conflict, or result in an unwanted outcome, legislators can make a new law to resolve the conflict to achieve the desired outcome. If there is a conflict between what the common law says and what a statute says, the statute takes priority. However, this priority of the statute is not absolute. For example, regardless of the wording of the statute, both the courts and legislators must adhere to the Constitution, including the *Charter of Rights and Freedoms*,[4] when they interpret or enact laws. The courts can interpret the laws and must sometimes interpret the intent of the legislators when the statute was drafted but courts do not have the ability to question the wisdom of government action as it was described in legislation.

Statute Law and Common Law:

In Alberta and most of Canada, there are two types of law: statute law and common law. The first is described in legislation or statutes, such as the *Surface Rights Act*. The second type, common law, is not written down as legislation. Rather, common law has evolved over time (centuries in fact) into a system of rules and principles based on decisions of courts. Much of the common law in Canada flows from the series of laws established in England in the 13th century. The common law system is amazingly flexible as it adapts to changes over the years.

The *Surface Rights Act*[5] ("*Act"* or "*SRA"*), as it now stands, is the latest in a series of legislative efforts to manage that conflict between property owners wanting to protect their lands and resource owners wanting to access their interests. Prior to 1947, the ownership of mines and minerals included the right to access them, and remedies for the owner of the surface were limited. In 1947, the *Right of Entry Arbitration Act*[6] was passed, which provided a mechanism for the mineral owner or operator to compensate the landowner for surface rights. The amount of the compensation would

[3] *Rowbotham v Wilson*, [1860] EngR 892, 8 HLC 348.
[4] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[5] *SRA, supra* note 2
[6] *Right of Entry Arbitration Act*, SA 1947 c 24.

be determined through negotiation, and if negotiation failed the Board of Arbitration would determine the amount payable.

The *Right of Entry Arbitration Act* was replaced by the *Surface Rights Act* in 1971. Successive amendments to the *Act* expanded the scope of the legislation, with compensation for damages added in 1973 and jurisdiction for pipelines, powerlines, and telephone lines added in 1977. In 1983, the requirement for an entry fee and pre-payment of a portion of the last written offer prior to entry onto the land was added. In 2009 the introduction of provisions for Alternate Dispute Resolution ("ADR") were introduced into the *Act*.

1.2 The *Surface Rights Act* and the Surface Rights Board

The *Surface Rights Act* in its simplist expression, requires an energy company to obtain the surface owner's consent prior to entering the property. If consent cannot be negotiated, the company can apply to the Surface Rights Board ("Board" or "SRB") for a right of entry order, and if granted, the Board will determine the compensation payable to the surface owner.

The SRB is a creature of legislation. The *SRA* established the SRB. All of its powers and authority flow from the *Act*. The *Act* provides the framework for all of the Board's processes and decisions. The Board has no power except that granted by the legislation.[7]

The words matter. One of the leading cases on interpreting a statute is *Rizzo & Rizzo Shoes Ltd*,[8] where the Supreme Court of Canada said: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[9]

Hierarchy of Courts

The Courts and its decisions are hierarchical. A decision by a higher court on a point of law is binding on all courts below it, including administrative tribunals such as the Surface Rights Board. For example, a Supreme Court of Canada decision is binding on all other courts in Canada, including the Alberta Court of Appeal. Similarly, an Alberta Court of Appeal decision is binding on the Alberta Court of Queen's Bench and Queen's Bench decisions are binding on the Surface Rights Board.

The *Rizzo* decision expressed that the words of the legislation cannot be considered in isolation but have to be interpreted in the context of the scheme and purpose of the legislation. The Alberta Court of Appeal has described the Board as

> a specialized tribunal … It is intended to be an expeditious yet fair method of determining compensation based in part on land values, comparable patterns of dealing, loss of use and adverse effect. The Board is not called upon to make policy decisions but rather to resolve a lis [dispute] between parties based on a procedure that is expeditious.[10]

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[7] Other legislation such as the *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*] and the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*] also affect the SRB and its activities, but the *Surface Rights Act* is the primary legislation under which it operates.
[8] See *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 [*Rizzo*].
[9] *Ibid* at para 21 citing Elmer Driedger in *Construction of Statutes*, 2nd ed (Toronto: Butterworths Tolley, 1983).
[10] *Imperial Oil Resources Ltd v 826167 Alberta Inc*, 2007 ABCA 131 at para 16.

The courts often reference this purpose when considering matters related to the SRB.

1.3 Structure of the Board

The Surface Rights Board is the responsibility of the Alberta Minister of Municipal Affairs ("Minister") who monitors the operations and performance to ensure compliance with applicable law and policy. The Minister is also accountable to the Legislature for the SRB and responds to questions regarding the Board. However, the SRB is an independent body with an arm's length relationship to the Minister with regard to its decision making. The website also has a Mandate and Roles Document developed collaboratively between the Board and the Minister to relfect a common understanding of their respective roles.[11]

Board members are appointed by Alberta's Lieutenant Governor in Council ("LGIC") on the advice of the Cabinet, including the Minister. Appointments are made following a public recruitment process. The term of an appointment is not set in legislation but generally varies from one to three years and a member can be reappointed. If the government changes, the members continue to serve until their term ends unless an order in council is issued terminating their appointment. Members, however, can and do resign from the Board before their term is completed for a variety of reasons.

Board members have a wide range of backgrounds and expertise related to the work of the Board, including property appraisal, law, oil and gas, and agriculture. The biographies of the current Board members are available on the SRB website. A few Board members are full-time while most Board members are part-time members and are compensated on a per diem basis. Some Board members are also members of other administrative tribunals.

Upon joining the Board, members receive a comprehensive orientation on the *SRA*, the rules of natural justice, as well as other areas relevant to the Board's operations. Board members are subject to a Code of Conduct which is available on the SRB website.[12]

The Chair of the Board is designated by the LGIC and is a Board member with additional responsibilities for the operation and management of the the Board. The Chair selects or assigns Board members to a case or a panel. If a panel has more than one member, the Chair of the Board may designate a chair for the panel. The Chair has additional administrative responsiblities for the staff of the Board and the administration of the Board, but does not have oversight responsibilities of individual Board members or panels and does not review, interfere, or influence the decisions of assigned panels.

A member selected to deal with an application or other matter has the full authority of the Board in that matter. A decision by that member or panel of members is a decision of the Board.

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[11] Surface Rights Board, Surface Rights Board mandate and roles document (20 February 2020), online: *Alberta Government* https://open.alberta.ca/publications/surface-rights-board-mandate-and-roles-document#summary.
[12] Surface Rights Board, "Code of conduct and ethics for the Land Compensation Board and Surface Rights Board" (13 May 2019), online: *Alberta Government* https://open.alberta.ca/publications/code-of-conduct-and-ethics-for-the-land-compensation-board-and-surface-rights-board#detailed.

The Board is supported by approximately 36 staff who assist in processing the applications, answering questions from parties, organizing the cases, identifying technical deficiencies, providing requested advice on the Board's processes, and publishing the Board's decisions. In addition, Board administration provides all the necessary requirements of a modern office. Although these individuals provide invaluable support, they do not have the authority to make Board decisions, only Board members can make Board decisions.

In 2017, the staff of four administrative tribunals were integrated: the SRB, the Land Compensation Board, the Municipal Government Board, and the New Home Buyer Protection Board. The staff levels reflect the integrated organization. As part of Bill 48, the *Red Tape Reduction Implementation Act, 2020*,[13] which received royal assent on December 09, 2020, the four boards will be amalgamated into the Land and Property Rights Tribunal ("LPRT"). This initiative will not affect rights of parties or existing applications or appeals. The LPRT will have common rules of procedure and Mandate and Roles to simplify and streamline processes for parties.

1.4 Other Regulatory Authorities

It is important to distinguish the role of the SRB from regulatory authorities involved in resource development. The Alberta Energy Regulator ("AER") has the responsibility to ensure that companies develop the province's energy resources in a safe and environmentally responsible fashion, without waste. The AER performs its mandate through the review of tens of thousands of proposed energy projects each year, overseeing all aspects of energy resource activities. Among other functions, the AER performs regular inspections of energy activities, penalizes companies that do not meet AER requirements, and conducts hearings on proposed energy developments.

Another regulator, the Alberta Utilities Commission ("AUC"), regulates Alberta's investor-owned electric, gas, and water utilities and certain municipally owned electric utilities to ensure that customers receive safe and reliable service at just and reasonable rates. The AUC also regulates the routes, tolls, and tariffs of energy transmission through utility pipelines and electric transmission and distribution lines. Companies who propose to construct or rebuild electric generation, transmission, or distribution facilities in Alberta must apply to the Commission for siting approval. When reviewing the utility's application, the Commission considers the social and environmental impacts as well as any economic implications for the ratepayers.

The AER and AUC both have the authority to issue approvals for activities and facilities that may also require a right of entry order from the SRB. In these cases, the *Act* states that the SRB right of entry order cannot be inconsistent with the other regulatory approvals. The SRB processes are not available to overturn an AUC or AER approval.

[13] *Red Tape Reduction Implementation Act, 2020 (No. 2)*, SA 2020, c 39.

The Alberta Court of Appeal has also examined the relationship between the Board's authority and the regulatory authority and determined the two bodies must work together.[14]

The courts have also determined that the SRB process cannot be used to challenge a decision made by a regulatory authority. Right of entry proceedings before the Alberta Surface Rights Board are ancillary, and in aid of the oil well activities authorized by the AER.[15]

In Alberta, there are pipelines and power lines that are federally regulated by the Canada Energy Regulator. The Alberta *Surface Rights Act* does not apply to these facilities.

1.5 The Rules of Natural Justice

In addition to the *SRA*, the SRB in its proceedings is required to adhere to the common law principles of natural justice and fairness. These rules, developed by courts over the centuries, provide a safeguard for individuals in their interactions with the Government. These principles stipulate that whenever a person's rights will be affected by a statutory decision maker, like the SRB, there is a duty for the decision maker to act in a fair manner. Many of these requirements have also been set out in the *Administrative Procedures and Jurisdiction Act*,[16] a statute which is binding on the SRB and other administrative tribunals.

The rules of natural justice help to ensure that the decision maker follows a fair procedure in arriving at their decision. In their most simple form, the rules of natural justice provide that affected persons have the right to be heard by unbiased decision makers. The rules go beyond that simple statement to include the reasonable notice that their rights may be affected, adequate access to the evidence that is being used to make the decision that might affect them, the right to be heard and an adequate opportunity to respond to what others have submitted, an adequate opportunity to provide evidence to contradict or explain the facts or allegations that are contrary to their interests, and the right to a reasoned decision.

The Board follows these rules in its work. For example, if a party makes a submission related to a file, the Board will provide other affected parties with an opportunity to respond. Another example is the steps taken by the Board's administrative staff to ensure that information passed to the Board members is available to other parties. Only the Board members assigned to a case can discuss the details of the evidence. Board members must recuse themselves from matters where they may have a personal or professional relationship with one of the parties or other interests that may raise a reasonable apprehension of bias.

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[14] See *Togstad v Alberta (Surface Rights Board)*, 2015 ABCA 192 [*Togstad*], leave to appeal to SCC refused, 2015 CanLII 81621.
[15] See *Windrift Ranches Limited v Alberta Surface Rights Board*, 1986 ABCA 158.
[16] *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3.

1.6 SRB Regulations, Rules, and Guidelines

Three important documents govern the SRB: the *Act*, the *Surface Rights Act General Regulation* (the "*Regulations"*),[17] and the *Surface Rights Board Rules* (the *"Rules"*).[18]

The *Act* authorizes the Minister to make regulations regarding several matters related to the *Act*, including the content of a right of entry ("ROE") order application.

The *Rules* are issued by the Board. Section 8.2 of the *Act* allows the Board to make rules governing the procedure and practice of its proceedings. The purpose of the *Rules* is to provide a means by which applications filed with the Board can be resolved in a timely and cost-effective way. The *Rules* assist with dispute resolution by helping to identify the real issues; facilitate the most effective way of resolving the dispute at the least expense; encouraging the parties to resolve the dispute themselves, by agreement, as early as possible; encouraging parties to communicate; and provide for an independent, effective, efficient, and fair process.

Guidelines are also documents created by the Board which provide greater detail to applicants on how to complete applications. In 2020 some of the content of previous guidelines was included into the *Rules*.

All parties must comply with these *Rules* and any Board Guidelines issued unless the Board orders otherwise. However, if any of the *Rules* conflict or are inconsistent with the *Act* or *Regulations*, the *Act* or *Regulations* prevail.

2.0 RIGHT OF ENTRY

A company interested in pursuing an energy project must first seek approval from the regulatory authority, either the AER or AUC. Even after the regulator approves the project, companies cannot enter private or public lands without the consent of the owner or occupant.

The *SRA* states that no "operator" can enter the surface of any land for the removal of minerals, including oil and gas, or for any related mining or drilling operations, or for the construction of any related facilities, such as tanks or access roads, without the consent of the owner or occupant of the land. This restriction also applies to activities related to the construction, operation or removal of a pipeline, power transmission line or telephone line. In most cases the consent is given through a lease or other agreement negotiated between the landowner and the operator.

If an operator is unable to reach an agreement with the landowners or occupants, and the operator still wants to proceed, the operator may apply to the Board for a ROE order. The Board received 135 ROE order applications in 2019 (Figure 1).

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[17] *Surface Rights Act General Regulation*, Alta Reg 195/2007 [*Regulations*].
[18] Surface Rights Board, *Surface Rights Board Rules* (16 November 2020), online: *Alberta Government* https://open.alberta.ca/publications/surface-rights-board-rules

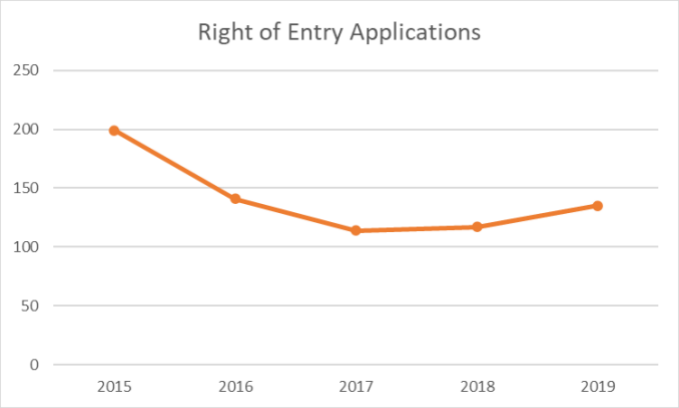

Figure 1: *Number of Right of Entry Applications received by the Board per year.*

A ROE order is "like" an expropriation but with some key differences. A ROE order gives the operator an exclusive right, title, and interest in the surface of the land only for specific purposes. The land title remains with the owner. The order does not provide the operator with a certificate of title and does not alter the municipal tax role. The owner retains certain rights related to the land, such as the ability to sell the land. In the case of buried facilities such as pipelines, the owner or occupant retains the right to farm the surface. And when the order is eventually terminated, the operator's interest in the land will end and revert to the owner. Because of these differences between a ROE order and an expropriation, the courts have considered a ROE order to be an "imperfect" analogy to expropriation.[19]

2.1 The Process for Obtaining a Right of Entry Order

The process for a company to obtain a right of entry order is set out in the *Act*, the *Regulations*, and the *Rules*. The *Regulations* contain the ROE order application form that must be submitted. The application must include a copy of the AER or AUC approval and a plan of survey showing the exact location and dimensions of the land needed. The *Regulations* also require the operator to provide a copy of the certificate of title from the Land Titles Office. The certificate of title confirms the legal description of the land and those with registered interests in the lands. The operator must provide a list of the respondents, that is, the owners and occupants who may have an interest in the land and could be affected by the order. The application requires a copy of the most recent written offer made by the operator and evidence that the offer was served on and was refused by the respondent.

Upon receipt of a complete application from the operator, Board administration returns the application to the operator with a notice as described in schedule 2 of the *Regulations*. The operator then must serve the notice, along with a copy of the application, on all identified respondents. The schedule 2 notice advises that the Board may issue a ROE order in not less than 14 days and advises the respondents that if they wish to object, to do so in writing, and provides instructions on how to do so.

The operator may have obtained signed letters of consent from the respondents. The form of the letter of consent is set by the *Regulations* (schedule 3) and states that the respondent has received a copy of the application and the schedule 2 notice. If a respondent signs the letter of consent, it indicates the owner does not object to the Board issuing a ROE. Signing a letter of consent does not affect the owner or occupant's right to compensation.

[19] *Cabre Exploration Ltd v Arndt*, 1988 ABCA 212 (CanLII), 51 DLR (4th) 451 at para 42.

2.2 Objecting to a Right of Entry Application

A respondent can object to the ROE application by contacting the SRB in writing and providing reasons. When the Board receives an objection, it may hold a hearing with respect to the application and objection prior to issuing an order.

The respondent(s) could object to the ROE because they disagree with the AER or AUC decision. However, the Board may not accept that rationale. The courts have stated that the SRB process cannot be used to overturn or appeal the regulator's decision. The case often used to illustrate this guidance is the *Mueller v Montana Alberta Tie Line* decision where the court found that:

> "Right of entry proceedings before the Alberta Surface Rights Board are ancillary, and in aid of the oil well activities authorized by the E.R.C.B."
>
> *Windrift Ranches Limited v Alberta Surface Rights Board*, 1986 ABCA 158 at para 5.

> Following the issuance of a permit or license by the Energy Resources Conservation Board [now the AER] or the AUC within which the party has authorization to seek entry onto the land, the Surface Rights Board has no alternative but to issue a Right of Entry Order.[20]

The Alberta Court of Appeal has also stated:

> The legislative intent in having two bodies [the AUC and the SRB] is not that they duplicate each other's work but that they work together. Moreover, the Board cannot exercise its jurisdiction so as to effectively repeal a permit granted by the Commission… In interpreting its home statute, the Board is entitled to decide that it will rely on the determination of the Commission. Indeed, the Board is statutorily prohibited from making an order which is inconsistent with the Commission's permit.[21]

As previously found by the Board, disagreement regarding compensation is also not a valid reason for an objection.[22] Section 23 of the *Act* states that once the order is issued, a separate proceeding will be held to determine the amount of compensation. Any dispute related solely to compensation can be resolved after the order is issued.

2.3 Conditions to a Right of Entry Order

Section 15(6) of the *Act* says that when the Board makes a ROE order it may make the order subject to any conditions it considers appropriate. However, the Board must ensure that the order, including the conditions, is not inconsistent with the previous approval by the AER or AUC. The courts have given the Board guidance on the scope of its condition-making authority. As observed by the Court in *EnCana Corporation v Campbell*:

> On a plain reading of s. 15(6), the section is designed to ensure the SRB balances the landowner's concerns against the operator's need to enter onto those lands to carry out its specific operations… If the SRB grants a right of entry order, it then has a statutory

[20] *Mueller v Montana Alberta Tie Line*, 2011 ABQB 738 at para 34.
[21] *Togstad*, *supra* note 14 at para 7.
[22] For example, see *ATCO Electric Ltd v Berry Creek (Municipal District)*, 2012 ABSRB 714.

> discretion to impose appropriate conditions on that right of entry so long as those conditions are not inconsistent with the license, permit, or other authorization.[23]

In that case, the Court found the SRB-imposed conditions relating to waste disposal, water testing, and the creation of crossings for landowner access were reasonable and not inconsistent with the regulator's approval.

The Board generally attaches standard conditions to a ROE order which reflect the types of terms and conditions that are commonly found in surface leases. Appendix A contains the standard ROE conditions: *Canadian Natural Resources Limited v Jim Blacklock Farming Ltd,* 2017 ABSRB 1079 for a well site and pipeline and *Alberta PowerLine General Partner Ltd v Guenther,* 2018 ABSRB 017 for a power transmission line.

2.4 Terminating a Right of Entry Order

Right of entry orders remain in place until terminated by the Board. Any party to the order, the operator, or the respondent, can apply to have the order terminated under section 28 of the *SRA.*

Where part 6 of the *Environmental Protection and Enhancement Act*[24] applies, which generally includes land used or held for well sites, pipelines, or transmission lines, a reclamation certificate issued by the AER or by Alberta Environment and Parks (for powerlines) is required before a ROE order can be terminated.

A right of entry order can also be terminated if the land was never entered, or the land is acquired or expropriated by Government or the local authority. A partial termination is also possible, for example, when the operator receives a reclamation certificate for the wellsite but not the road.

In 2019, there were 33 termination orders issued by the Board.

3.0 COMPENSATION FOR RIGHT OF ENTRY

3.1 Entry Fees

The *Act* establishes an entry fee, payable by the operator to the landowner or respondent (in the case of a ROE order) for the right to enter private land for any of the purposes listed in the *Act*. Section 19 of the *Act* requires the operator to pay the landowner or respondent an entry fee which is calculated as the lesser of $5,000, or $500/acre, for each titled unit that contains land that is granted to the operator. The payments are payable in advance of any entry onto the land. Entry fees are not considered to be compensation and are in addition to any compensation payable in respect to the ROE.

3.2 Settlement Agreements

The Board encourages parties to arrive on a settlement on their own, without the Board's intervention, as this will generally decrease costs and time and result in both sides being content with the outcome. Most agreements between companies and landowners are private matters and

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[23] *EnCana Corporation v Campbell*, 2008 ABQB 234 at para 16.
[24] *EPEA, supra* note 7.

do not involve the Board. If a landowner and an operator reach an agreement, they can sign a surface lease and there is no need to involve the Board.

There is a provision in the *Act* for the Board to adopt a settlement agreement as a Board Order. If an operator has applied for or received a ROE order and parties agree to compensation, they may request that the Board adopt their agreement as a compensation order as per section 8 (3.2) of the *Act*. Often these agreements are achieved during the Board's alternative dispute processes. Adopting an agreement does not require a hearing but may require some information to ensure the agreement is consistent with the *Act*. Rule 27 of the *Rules* sets out how to apply for a compensation order based on a settlement.

In 2019, 119 compensation orders were issued related to right of entry orders. Only two oral hearings to determine compensation were required, which is a result directly attributable to the Board's alternative dispute resolution processes.

3.3 Prepayment Requirements

Companies, in negotiating a surface lease or easement with a landowner, will offer compensation for the right to enter the land. In most cases these negotiations are successful, and the company and landowners sign a lease or similar agreement. However, if the negotiations are unsuccessful, the company may apply to the Board for a ROE order and the issue of compensation will be left to the Board following a proceeding.

If the Board grants the order, section 20 of the *Act* requires the operator to pay the landowner or occupant 80% of the offered first-year compensation prior to entry onto the lands.

In cases where the landowner or occupant does not wish to accept this payment or there is a dispute about who should receive the payment, the operator must pay the funds to the Board to be held until it is distributed after the Board's decision on compensation. If the final compensation exceeds the 80% level, the Board will order the company to pay the difference to the landowner or occupant. If the final award is less than the pre-payment, the Board will order a re-payment of the funds.

3.4 Determining compensation

A ROE order results in an infringement of the rights of the landowner. The order reduces the ability of the landowner to use and enjoy their land, and the operations of the operator may result in damage to the taken lands or losses in terms of disturbance and inconvenience. The *Act* sets out a mechanism to compensate the landowner for any infringement of those rights.

> "Under the statutory compensation scheme, the test is what is the appropriate compensation for actual infringement on the landowners' use?"
>
> *Sproule v Altalink Management Ltd*, 2015 ABQB 153 at para 38.

Section 23 of the *Act* says the Board must hold proceedings to determine the amount of compensation payable and the persons to whom it is payable. The Board will conduct an oral (in person or remotely via telephone or video conferencing) or written hearing to collect and examine evidence from the landowner and operator, and attempt to quantify the loss and compensate the respondent. The courts have provided guidance on how the Board should determine compensation.

> In general, the Act requires the board to determine the compensation payable to the landowner for the loss he suffers.[25]
>
> The factors which might cause an operator to pay any given amount for the consent of the owner are not necessarily the same factors which the board must use in arriving at compensation. The board is never justified in awarding more or less than that which fairly compensates the owner or occupant for his loss. The operator, on the other hand, is free to strike any deal he wants with the owner or occupant, whether or not the deal amounts to equivalency for the loss.[26]
>
> There is no mandate in the Act to overcompensate a surface owner. It is an error to overcompensate.[27]

Section 25(1) of the *Act* lists the factors the Board may consider in arriving at the compensation for a right of entry order.

Excerpt from Alberta *Surface Rights Act*
25(1) The Board, in determining the amount of compensation payable, may consider
(a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,
(b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,
(c) the loss of use by the owner or occupant of the area granted to the operator,
(d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,
(e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and
(f) any other factors that the Board considers proper under the circumstances.

The Board may consider these items but does not necessarily have to consider them separately or all of them. They are not mutually exclusive. In addition to the listed factors, the last factor is "any other factors that the Board considers proper under the circumstances." The parties may submit that some factors are more important than others or propose new factors to be considered. In some cases, operators and landowners adopt a "global approach" in providing evidence which combines all or some of these elements. For example, loss of use and adverse effect into one value for the taking.

Section 25 of the *Act* also allows for the Board to determine the compensation payable for the requirement to relocate residences and for any damage to the landowner's or occupant's remaining land caused or arising from the operations. Losses related to the loss of or damage to livestock or other personal property of the owner or occupant are also compensable under section 25(5).

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[25] *Cabre Exploration Ltd v Arndt*, [1986] 4 WWR 529, 1986 CanLII 1680 (ABQB) at para 31.
[26] *Lecuyer Cattle Company v Co-operative Energy Development Corporation*, [1985] 5 WWR 555, 1985 CanLII 1208 (ABQB) at para 21.
[27] *Sandboe v Coseka Resources Ltd* (1990), 108 AR 226, 1990 CanLII 5536 (ABQB) at para 19.

3.5 Pattern of Dealings

Section 25 provides the list of factors that may be considered by the Board in determining compensation. However, following a 1978 Alberta Court of Appeal decision in the case of *Livingston v Siebens Oil & Gas Ltd*,[28] it is the practice of the Board to first determine if a "pattern of dealings" exists, and if one does exist, follow the pattern in determining compensation unless there are persuasive reasons not to.

> "Section 25 of the Act sets out the kinds of matters the board may consider, but it is not an exclusive list, nor is it a list of headings under which compensation is to be assessed individually and totalled."
>
> *Cabre Exploration Ltd v Arndt*, 1986 CanLII 1680 (ABQB) at para 34.

A pattern of dealings means that a company or companies have negotiated or compensated similar situations in a similar way. The courts have provided advice as to what establishes a pattern. A pattern of dealings may exist if the agreements are similar in terms of "the rights granted, the type of land, proximity, date, acreage and nature of the parties."[29]

> "[W]here there are such a number of deals established so that it may be said that a pattern has been established by negotiations between the landowners and oil companies in a district, then the Board should only depart from such compensation with the most cogent reasons. I think it should be accepted that no matter how expert outsiders are that the oil companies and landowners have the better judgment as to what compensation should be paid in their own interests."
>
> *Livingston v Siebens Oil and Gas Ltd*, 1978 AltaSCAD 83 at para 11.

This approach is based on the underlying premise that the marketplace, as represented by successfully negotiated agreements between willing sellers and willing buyers, is usually the best determinant of fair and reasonable rates of compensation. The pattern of dealings approach reflects equal treatment among landowners. The Board has found patterns of dealings in linear facilities such as powerlines or pipelines where landowners are compensated equally and agree to consistent rates of compensation. Patterns have also been found with respect to the specific section 25 factors, such as loss of use or general disturbance (also referred to as first year adverse effect), and the remaining factors have been determined through a hearing. The Board has even found patterns within one aspect of adverse effect but not all.[30]

If a pattern of dealing is established, the Board should only deviate from that pattern if there is a cogent or persuasive reason. There must be something unique about the property or the arrangement that justifies a different approach to compensation.

Often, parties will use a sample of comparable locations to support their claim for compensation. The courts have clarified that comparable locations differ from a pattern of dealings and can be considered like comparable sales in real estate, providing an illustration of how the market values

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[28] *Livingston v Siebens Oil & Gas Ltd*, 1978 AltaSCAD 83, [1978] 3 WWR 484 [*Livingston*].
[29] *Imperial Oil Resources Ltd v 826167 Alberta Inc*, 2007 ABCA 131 at para 21.
[30] See *ATCO Electric Ltd v Pratch*, 2019 ABQB 466.

properties with similar attributes. Also, there may be properties that are excluded from or included in the party's sample such that the sample may not be truly representative.

3.6 Value of Land

Although the courts have found a ROE order to be an "imperfect" analogy to expropriation, the value of the land is an important consideration in determining compensation for infringement on the landowners' use of the land. Two of the distinctions between expropriation and a ROE order is the residual and reversionary value which remains with the landowner. Residual value means the landowner may retain some rights with respect to the land, such as the ability to farm on top of the right of way. Reversionary value implies the full entitlement to the land would be returned to the landowner when the right of entry order is terminated. Section 25(2) of the *Act* says the Board may ignore these values when considering compensation.

The first two factors under section 25(1) of the *Act* are different methods to establish the value of the land granted to the operator. Rarely is there a perfectly comparable property that sold on the open market, so determining the market value of the land necessary for a well site, access road, or right of way can be an imprecise exercise.

The Appraisal Institute of Canada defines market value as:

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and the seller each acting prudently, knowledgeably, and for self-interest, assuming that neither is under duress.[31]

More simply, the first section 25(1)(a) speaks to the amount the taken land might be worth if it had been sold in the open market on the date that the ROE order was made. This methodology is often referred to as "the small parcel value." Often, the taken lands are irregular in shape or have unique characteristics and establishing the value of small parcels may be difficult if there is no evidence of a clear market or recent comparable sales.

"Four Heads of Compensation"
The term "the four heads of compensation" is sometimes used when describing compensation, namely:
(a) value of land;
(b) general disturbance;
(c) loss of use; and
(d) adverse effect.
The legislation includes the additional factors, but the "four heads" term is often used.

The second method, described in section 25(1)(b), uses the per acre value of the titled unit, often the quarter section in agricultural areas, based on the highest approved use of the land on the day the ROE order was made. This per acre value is multiplied by the acreage of the taken land to result in the land value. This methodology is often referred to as "en bloc" which means "as a whole."

Parties may argue before the Board, which is the most appropriate method of valuation: the "small parcel value" or the "en bloc" value.

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[31] Appraisal Institute of Canada, "Canadian Uniform Standards of Professional Appraisal Practice" (1 January 2020), online: *AIcanada* https://www.aicanada.ca/wp-content/uploads/CUSPAP-2020-1.pdf at 10.

The market value of land is determined by considering the "highest approved use," often referred to as "the highest and best use." The Appraisal Institute of Canada defines highest and best use as "the reasonably probable use of Real Property, that is physically possible, legally permissible, financially feasible, and maximally productive, and that results in the highest value."[32] For example, land currently in agricultural use but zoned for residential use may be valued at the higher level, particularly if residential development is likely to occur in the near term.

In a 2014 case, the Board summarized this view:

> The Panel finds that market value includes the present value of any future use. The Panel finds it inconceivable that buyers and sellers would not consider zoning, development potential, future revenue, future costs, probability, and risk in making their decisions. Market value already includes all of these factors properly discounted.[33]

An owner can argue the highest and best use is different than the current use of the land. The courts have advised that:

> These cases illustrate that if a landowner's claim is for loss related to conversion of lands to a higher use (e.g., from farmland to multi-unit residential or commercial uses), thereby raising the market value of the lands, there must be some evidence that the landowner had taken some concrete steps towards the conversion of the lands.[34]

There are three general approaches to determine the value of land: comparable sales; income analysis; and cost analysis. Comparable sales approach is the most common valuation methodology used before the Board. Recent sales of similar lands are presented and analysed, and adjustments are made for location, size, and other features which affect value. The income analysis considers the potential future earnings of the land, net of any development costs. This methodology is used on occasion with developed or soon to be developed land. The cost analysis considers the replacement cost of the property, including any improvements that have been made.

The date of the ROE order, referred to as the "effective date," is a key factor when determining the value of the land. The section 23 hearing may be held one or two years after the order, and evaluators may have to adjust for price changes and economic developments that occurred after the date of the order to estimate the land value at the effective date.

3.7 Loss of Use

The next consideration in determining compensation is the loss of use by the owner or occupant of the area granted. In this instance, it is recognized that because of the ROE order, the landowner or occupant will no longer have full use of the taken land. For crop land, loss of use is often evaluated as lost revenue on a per acre basis. The loss could be limited to the project construction period and could also be dependent on the surface facilities and the infringement they present. If the loss is ongoing, the loss of use is often compensated in annual payments. Although set annual

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[32] *Ibid* at 8.
[33] *AltaLink Management Ltd v Royal West Property Corp.*, 2014 ABSRB 221 at 11.
[34] *ATCO Electric Ltd v Pratch*, 2019 ABQB 466 at 24 at para 101.

payments are the norm, section 25(7) of the *Act* allows the Board to fix the amounts payable in a manner and over the periods it decides.

The Board generally considers gross revenue rather than net revenue when determining loss of use in agricultural areas. The value of the lost yield is considered without considering the lower input costs such as seed and fertilizer. The courts have supported the Board in this approach as it leads to a simpler process. In commenting on the use of gross rather than net revenue, the Court of Queen's Bench has noted:

> Not every landowner has access to expensive electronic devices to prove their actual compensatory claims and, as a result, would be at a disadvantage from the onset. The process would become expensive and riddled with expert evidence and details leading to protracted and inaccessible hearings. Further, inquiries could lead to operator interference with farming practices.[35]

In instances where there are specialty crops or other unique situations, the Board will often base the award for loss of use on net revenue, which is the loss of production less the reduced input costs.

The Board includes the entire lease area when considering loss of use. Typically, the entire area of the lease is used in the first years as the drilling occurs. In subsequent years, the footprint of the disturbed area decreases as land is relinquished and returned to the farmer for agricultural use. Rarely is the lease restructured to account for this reduction. The Board and the courts have recognized that the operator has rights under the lease for the full area and may at any time exercise these rights.

3.8 Adverse Effect

The next consideration listed in section 25(1) of the *SRA* is:

> (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant **and** the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator (emphasis added).

There are two parts to this consideration, although they are usually collectively referred to as "adverse effect."

The first part is the impact on the remaining lands. This is often referred to as the "tangible" adverse effect. Basically, what is the impact of the ROE order on the adjacent lands, the lands not taken? The location and orientation of the taken lands could have an impact on the farming operations as the farmer has to manoeuvre around access roads, power lines, and well pads.

The second part, often referred to as the "intangible" adverse effects, is the nuisance, inconvenience, and noise that might result from the operations. This could be related to having to monitor livestock more frequently, odours and noise coming from the well site, traffic, the requirement for continued interaction with operators, or increased costs associated with weed

[35] *Husky Oil Operations Limited v Scriber*, 2013 ABQB 74 at para 70.

control in adjacent lands. These adverse effects could be ongoing and be reflected in an annual payment.

In the first year of construction or operation there could be a significant adverse effect related to heavy equipment traffic, noise and nuisance, and inconvenience. Sometimes this first-year impact is called "general disturbance" and is recognized as an adverse effect that is not anticipated to be ongoing.

A subset of adverse effect is referred to as "injurious affection," which is related specifically to the loss of land value on the remaining lands. The Board has found instances of injurious affection related to power lines, and this has been supported by the courts.[36]

3.9 Damages to Granted Land and Other Losses

The next item on the list of possible considerations is under section 25(1)(e): "damage to the land in the area granted to the operator that might be caused by the operations of the operator." This factor relates to damages to the granted land. This could include crop loss or other damages on the taken lands due to construction activities.

The last consideration, section 25(1)(f), is intended to account for any circumstances that might arise in a situation but are not itemized in subsections 25(1)(a) through (e). Some panels have used this category for awards for general disturbance or first year adverse effects related to construction.

Section 25(3) addresses the situation where the owner's residence must be relocated because of the ROE order.

Section 25(5)(a) enables the Board to determine the compensation payable for a ROE order that results in damages to the owner or occupant outside the land granted. Examples of this could be flooding or damage to property outside the land covered by the ROE order. One case ("*Daylight*")[37] involved trees cut by the operator outside the granted site, and damage to the landowner's private driveway and borrow pit road.

Section 25(5)(b) allows for any losses to livestock or personal property caused by or arising out of the operations of the operator. The previously mentioned case, *Daylight*, also included an award for lost grazing and damage to agricultural equipment.

Section 25(5)(c) relates to compensation for time spent or expense incurred by the owner or occupant in recovering any livestock that has strayed due to an act or an omission by the operator.

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[36] See *Koch v Altalink Management Ltd*, 2016 ABQB 678.
[37] See *Daylight Energy Ltd v Bell View Ranch Ltd*, 2006 ABSRB 120 [*Daylight*].

4.0 FIVE-YEAR COMPENSATION REVIEW

Under section 27 of the *SRA*, both the operator and landowner are entitled to a review of the amount of compensation paid every 5 years from the effective date of either a surface lease or ROE order. A review is not automatic. If both parties are satisfied with the current amount, there is no reason for a review. The obligation is on the operator to notify the landowner of their rights to have a review. If the operator and the landowner cannot agree, either party can apply to the Board to review the compensation. In 2019, the Board received 235 compensation review applications, about 100 less than the average over the past five years (Figure 2).

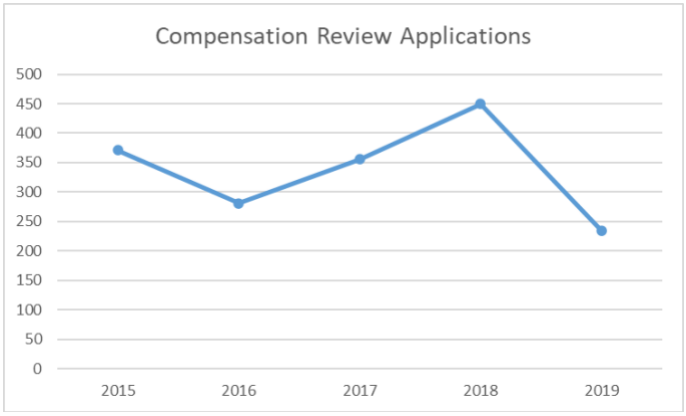

***Figure 2**: Number of Compensation Review Applications received by the Board per year.*

Section 27 applies to compensation orders and surface leases that provide for payment on an annual or other periodic basis or relate to major power transmission line structures.

4.1 Notice Requirements

The operator is responsible for giving notice that a five-year anniversary of the effective date of the original lease or ROE order is approaching, but the review can be requested by either party. If either party indicates that it wishes to have the rate of compensation reviewed or fixed, the *Act* requires parties to "enter into negotiations in good faith."[38] If the parties are unable to agree on a rate of compensation, either party may apply to the Board to have the rate of compensation reviewed.

The specifics in section 27 of the *Act* are complicated but basically describe a five-year cycle. On or within 30 days of the fourth year of the cycle, the operator must provide the landowner or the respondent (in the case of a right of entry order) a notice as prescribed in the *Act*. If neither party requests an adjustment, usually the existing amount in the lease continues. If both parties agree on the new rate, a new lease or amendment is made. In the case of a ROE order, if parties agree to a new rate, the Board is notified, and the ROE order is amended as of the fifth anniversary date. However, if by the end of the fifth year, an agreement cannot be reached, either party can apply to the Board for a proceeding to set the rate. If the rate is adjusted, it would be effective on the fifth anniversary.

This process is repeated for as long as the lease or ROE order is in effect (Figure 3). Notice by the operator is required on the fourth anniversary and every subsequent 5-year period thereafter.

[38] *SRA*, *supra* note 2, s 27(6).

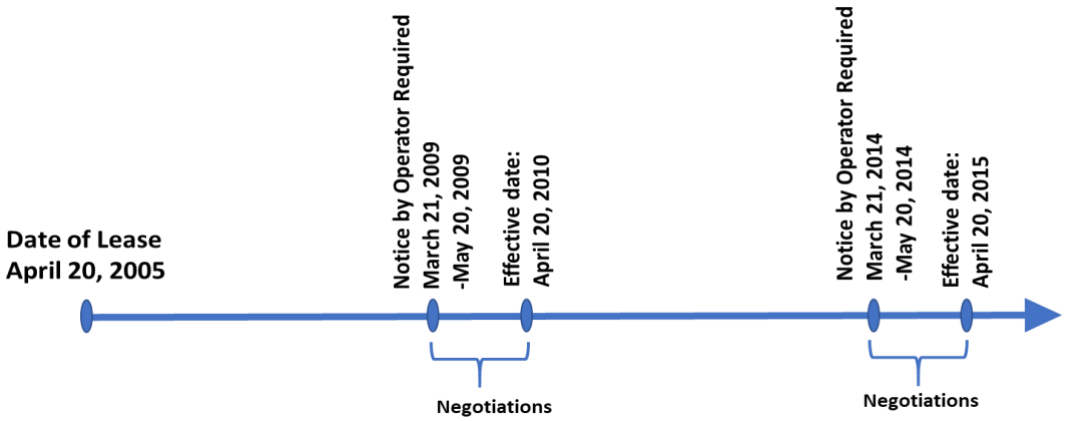

***Figure 3**: Illustration of timelines for Section 27 Compensation review.*

The form of the notice by the operator is set out in section 27(5) of the *Act*. In the notice, the operator must state if it wants the rate reviewed and that the lessor or respondent has the right to have the rate reviewed.

If the operator fails to provide the notice as required under section 27, the lessor may give its own notice to the operator, "within a reasonable time" after the failure, that it wants to have the rate of compensation reviewed. In this case the same process applies, and if an agreement is not reached, either party can apply to the Board. In the event the operator failed to provide notice, section 27(15) of the *Act* allows the Board to make an order regarding the payment of interest.

4.2 Requesting a Compensation Review

If parties cannot agree on the new rate, the party wanting the rate reviewed may make an application to the Board for a proceeding to determine the rate of compensation. Application forms are available on the Board's website. The required content of the application is set out in the *Act* and includes the current rate and the amount the applicant believes to be a reasonable and fair rate.

Under section 27 of the *Act*, when an application is received that meets the requirements of the *Act*, the Board must hold a proceeding to determine the rate of compensation. If the Board determines that the rate of compensation should be revised, it would be effective on the fifth anniversary.

4.3 The Basis of the Review

When reviewing the rate of annual compensation of a surface lease or a ROE compensation order, the Board is limited to considering loss of use (section 25(1)(c)) and adverse effect (section 25(1)(d)). Other matters listed in section 25(1) that may have been considered at the time of the initial compensation order, such as value of the land or damage to the land, are not part of the compensation review under section 27. The objective of the review is to establish the annual rate for the next five years or until the next review, so only issues that affect the ongoing rate of compensation are considered.

> When reviewing the rate of annual compensation of a surface lease or a right of entry compensation order, the Board is limited to considering loss of use and adverse effects.

Sometimes the two factors, loss of use and adverse effect, are combined into a global amount, based primarily on how the evidence is presented.

When commencing a compensation review, the Board is bound by *Livingston*[39] and must first consider if a pattern of dealing exists, as described earlier in this report. If a pattern exists, the Board must then determine if there is a cogent or compelling reason to depart from that pattern.

Once either party triggers a review, the entire question of annual compensation is open, and will be determined by the Board based on the evidence it has before it. The previous rate is not a default. In fact, the courts have been clear that the current rate is only a factor to be considered and the Board can decide to confirm that rate or raise or lower it.

The courts have emphasized that "the function of the Board is to look forward."[40] The Alberta Court of Appeal explained in *Jorsvick v Pennzoil Petroleums Ltd* that what happened earlier is merely a factor to be considered. The onus is on the applicant to provide evidence of actual losses and impacts being experienced on the land at the relevant effective date, and there is no presumption for or against the previous award. The Board's role is to fix an annual award that would be fair for the next five years, and the parties will determine at that time whether the rate should be reviewed again.

The resulting order has the effect of amending the surface lease in respect of the rate of compensation but does not change any other aspect of the lease. All the other terms of the lease or right of way order remain the same.

5.0 DAMAGES

In most cases, operators will settle with the landowner or occupant for any damages related to their operations and there is no need to involve the Board. However, if that is unsuccessful, section 30 of the *Act* allows the Board to award compensation to resolve disputes between the operator and landowners and occupants who are parties to a surface lease or a ROE order. The Board received 28 section 30 damages applications in 2019, approximately ten applications fewer than the five-year average (Figure 4).

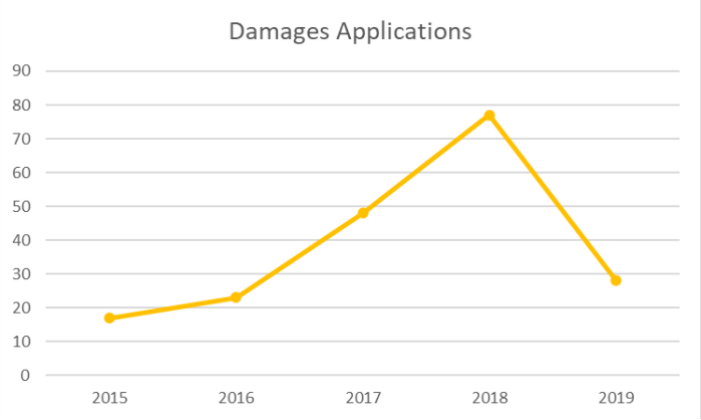

***Figure 4**: Number of Damages Applications for damages received by the Board per year.*

The structure of section 30 is similar to sections 25(1)(e) and 25(5), which were discussed earlier in this paper, and that relate to compensation for damages associated with an initial right of way order.

[39] *Livingston, supra* note 28
[40] *Jorsvick v Pennzoil Petroleums Ltd.*, 1988 ABCA 108 at para 7.

There are several considerations related to a damage claim under section 30. The damages to any land of the owner or occupant must be outside the area granted and must be caused by or arising out of the operations of the operator.

Section 30 covers any loss or damage to livestock or other personal property arising out of the operations of the operator, regardless of whether it occurred on the granted land or not. Compensation for time spent or the expense incurred by a landowner or occupant in recovering any of the owner's or occupant's livestock that have strayed due to an act or omission of the operator is also recoverable under section 30.

The Board is limited to awards of $50,000.00, and the *Act* specifies an application must be made within two years from the last date upon which the alleged damage is to have occurred.

An issue that arises in cases related to damages is the duty to mitigate. The courts have ruled "that the duty to mitigate losses is applicable in surface rights claims as well as to claims for other losses."[41] That means that the applicant has a responsibility to take reasonable steps to mitigate its losses. In these cases, the Board has awarded compensation to cover the costs of the mitigative measures where the actual damages were avoided.

Section 30 has an explicit statement that "[t]his section does not apply to a claim for compensation the amount of which may be determined by the Board under section 25." Section 25 relates to compensation in regard to a ROE order as well as compensation related to the five-year review of rate of compensation for adverse effect or loss of use. Any of the factors in section 25 related to the initial taking or the annual rate of compensation would not be recoverable under section 30. This section is primarily applicable to one-time losses rather than recurring losses. Recurring losses, such as ongoing weed control,[42] are usually addressed through the adverse effects component of the annual rate of compensation.

Instructions on how to file a damage claim under section 30 of the *Act* are available on the Board's website.

6.0 RECOVERY OF COMPENSATION PAYABLE

Section 36 of the *SRA* allows persons entitled to receive money under a surface lease or compensation order and who have not been paid to submit evidence of non-payment to the Board. This enables the person entitled to the payment (usually the landowner) to recover the outstanding amounts. The basic process is upon sufficient proof of non-payment, the Board will send written notice to the operator. If the notice is not complied with, the Board may suspend the operator's right to enter the site without affecting the operator's obligations for the purposes of shutting-in, suspension, abandonment, and reclamation of the site.

[41] *Gulf Canada Resources Inc v Moore*, 1982 CanLII 1212, 22 Alta LR (2d) 328 (ABQB) at para 23.
[42] See *Golden Coast Energy Corp v Dake*, 2018 ABSRB 614.

After providing notice to the operator, the Board can terminate all of the operator's rights under the lease or right-of-way order. If the operator does not make payment in full, the Board may direct the Minister to pay the landowner out of the Provincial Government's General Revenue fund. Any money paid by the Minister would be considered a debt the operator owes the Crown.

The Board has seen a significant increase in the number of rental recovery applications in the last four years, reaching 3,678 applications in 2019 (Figure 5). This compares with a historic average of 300 applications per year. The increase in section 36 applications coincided with the drop in oil and gas prices experienced since 2015, which has affected the solvency of many energy operators.

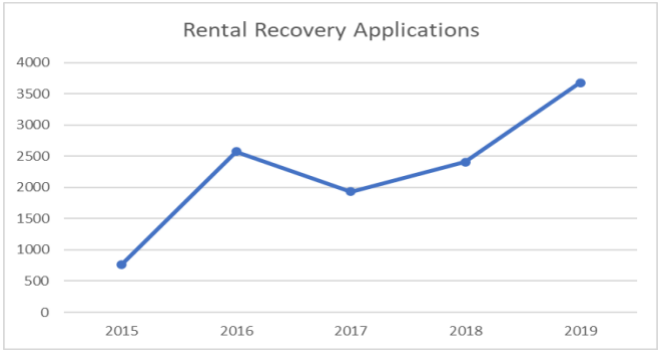

***Figure 5**: Number of Rental Recovery Applications received by the Board per year.*

Managing the exponential growth in claims for unpaid rentals has been a significant challenge for the Board and it has steadily refined its administration processes to address the increased demand, including going to an e-filing portal.

The landowner must establish that they are entitled to funds and the funds have not been paid. This gets complicated when there is an inactive operator. Detailed filing requirements for a landowner applying for rental recovery are set out on the Board's website. Generally, they include:

- A complete application.
- A signed copy of the original surface lease, including the survey plan, if available, or Consent of Occupant Agreement (in the case of Crown land) or reference to the ROE order.
- A signed copy of the most recent amendment to the lease or Consent of Occupant agreement referencing the legal land description and the compensation currently payable.
- A copy of the annual letter received from the operator at the time of the last payment referencing the date of the original and the legal land description and the amount of the compensation that is currently payable.
- Copies of any other documents that could support the claim, for example, e-mail exchanges with the operator or cheque stubs from the last payment.
- A declaration from the applicant that the money due has not been received.

There is a simplified process for recurring applications, that is for a second or third year after the first claim. Applicants should consult the SRB website for details of filing requirements. Incomplete applications will delay processing.

> "The Board must not be patently unreasonable in exercising its discretion whether or not to direct the provincial treasurer to pay the surface owner rental arrears owing by an operator."
>
> *Devon Canada Corp. v Surface Rights Board*, 2003 ABQB 7 at para 31.

In most cases, applications under section 36 are decided by a panel of the Board solely on the written evidence presented with the application. This may include publicly available information collected by the Board administration, including information from the Land Titles Office or AER records. However, the Board can also choose to ask for more information from the Applicant. On rare occasions where the claim is very complex or contested,

the Board could hold an oral hearing about the claim. If the Board is not presented with enough evidence to support the claim, the application may be dismissed.

In some cases, there could be delays in the processing of an application resulting from the operator's insolvency proceedings and a court ordered stay of any enforcement proceedings, including a section 36 application. If this occurs, the application may be paused by the Board administration until the stay is lifted.

Part of the Board's assessment is identifying the operator of a site, and this may be a different party than the party who made the last lease payment. The definition of "operator" in section 36 is broader than the rest of the *Act* and includes working interest participants in a well, in addition to successors, receivers, and trustees (for the complete definition of "operator," see section 31(1)). Contacting the operator and responding to any comments received may affect the processing time of a section 36 application.

Under section 36, the Board cannot modify the amount payable by the operator under the lease or compensation order. However, applicants should be aware that the Board may decide to order the Minister to pay all of the amount outstanding, a reduced amount, or none. This is consistent with Court direction in *Devon* that the "Board should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears."[43] For this reason, the application requires information on the use of and condition of the leased land. The landowner or occupant is asked how the leased area is being currently used, whether any part of the area is being used for farming, grazing, or personal use and for a description of the current state of the property including whether any fencing or operator facilities remain on the site. A general statement as to the harm or disturbance being experienced by the landowner is also requested.

The Board has reduced the payment ordered from the Minister where there have been situations, as the Court said in *Devon*, such as where the "surface owner's claim is unjustified, patently absurd, or provides an unjust enrichment."[44] The *Devon* case itself related to a situation where the applicant had claimed 24 years of rental arrears. Another example of the Board reducing the amount the Minister was directed to pay is where "the loss of [agricultural] production has clearly been reduced and there has been virtually no [operator] activity on the site."[45]

The suspension of the operator's access rights does not affect any of the operator's obligations regarding the site, including shutting-in, suspending, or abandoning the well and reclamation of the site.

7.0 REVIEW OF A BOARD DECISION

Under section 29 of the *Act*, the Board may rescind, amend, or replace a decision or order. Parties can request reconsideration of a Board Decision or Order as set out in the *Rules*. On occasion, the Board may do so on its own if it discovers an error in a decision. The Board has previously stated

[43] *Devon Canada Corp v Surface Rights Board*, 2003 ABQB 7 [*Devon*] at para 29.
[44] *Ibid* at para 29.
[45] *Juhar v Ocelot Energy Inc*, 2012 ABSRB 0308 at 4.

that a request to reconsider a decision of the Board is not an opportunity to re-argue the merits of the case as in an appeal.[46]

Rule 36 deals with reviews that relate to clarifications or corrections. Usually these are relatively minor amendments to correct clerical or typographical errors, or accidental or inadvertent mistakes. In these cases, the Board may make the correction without engaging all the parties and only advise parties of the correction afterwards.

Requests for reconsideration of Board Decisions and Orders pursuant to section 29 of the *Act* must be made within 6 months of the date of the decision or order and follow the procedure set out in rule 37 of the *Rules*. The Board's website provides an application form for the request, which includes the specific issue or issues being contested, the reasons for the request, a brief explanation of how the applicant is adversely affected by the challenged decision, and a description of the desired remedy.

The Board received 24 applications for review in 2019, the same number as the five-year average (Figure 6).

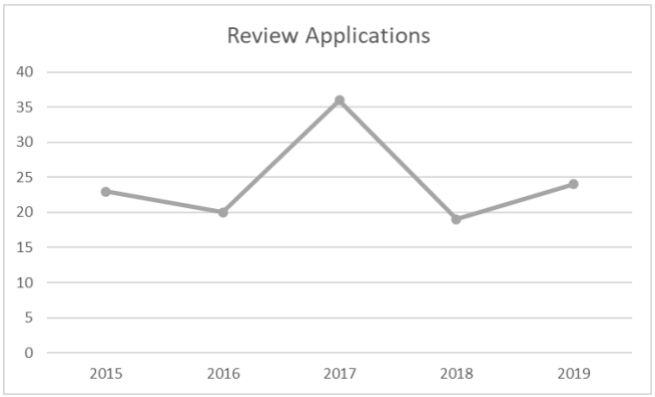

Figure 6: *Number of Review Applications received by the Board per year.*

A reconsideration request is assigned by the Chair to a panel comprised of one or more Board members different than that of the original decision. The panel will decide the preliminary question as to whether the decision should be reconsidered due to a serious error or omission in the earlier decision. It is not based upon a disagreement with the findings by the earlier panel. As stated in rule 37, a reconsideration will only be undertaken if the preliminary decision finds:

> (a) the decision or order shows an obvious and important error of law or jurisdiction;
>
> (b) the decision or order shows an important error of fact, or an error of mixed fact and law, in the decision that affects the decision;
>
> (c) the decision was based on a process that was obviously unfair or unjust;
>
> (d) the decision or order is inconsistent with an earlier Board decision or order, binding judicial authority, or provision of the relevant legislation, regulation, or rules; or
>
> (e) there was evidence at the time of the hearing that was not presented because it was unavailable to the party asking for review, and which is likely to make a substantial difference to the outcome of the decision or order. [47]

[46] See *Canadian Natural Resources Limited v Penson*, 2016 ABSRB 1.

[47] A reconsideration application based on evidence that was unavailable at the time of the hearing must be made within 6 months of the date the evidence was discovered.

The Board will not grant a request for review without providing all parties with the opportunity to make submissions and may consider the application by written submissions or by some other method.[48] Upon consideration of an application for review, the Board may

> (a) dismiss the request; or
> (b) provided that all parties have had an opportunity to make a submission,
> (i) confirm, amend, rescind or replace any decision or order previously made by it, or
> (ii) order a rehearing or any other proceeding in accordance with these rules on all or part of the matter.

7.1 Appeal to the Alberta Court of Queen's Bench

After the Board issues a compensation order under sections 23 (right of entry), 27 (five-year review), or 30 (damages), any party may appeal the order to the Alberta Court of Queen's Bench, pursuant to section 26 of the *SRA*. The scope of the appeal is limited to the amount of compensation payable and to whom it is payable. The party who is appealing must file a notice of appeal with the Court within 30 days after the date the party received the compensation order.

The appeal to the Court of Queen's Bench is a fresh consideration of the matter and parties can introduce new evidence following the Alberta Rules of the Court. The Court may either confirm the decision of the Board or direct that the order be varied. The Court also has discretion to order costs of the appeal.

In conducting the appeal, the Court considers the Board's original decision.

> There is no issue that s.26 of the *Surface Rights Act* … provides a right to appeal a compensation order to the Court of Queen's Bench and that such an appeal is in the form of a new hearing. There is also no issue that reasonableness is the appropriate standard of review on such an appeal. Nor is there any issue that this Court can scrutinize matters of fact, but such scrutiny should consider the basis for the board's decision. Since the board has expertise in the matter of compensation those orders are entitled to deference. However, new evidence introduced on appeal may affect the reasonableness of the board's decision.[49]

Following the judgment of the Court of Queen's Bench, a party may appeal that decision to the Alberta Court of Appeal.

As illustrated by the numerous examples cited in this report, judicial review by a higher court is reviewed by the Board and incorporated into its practices.

8.0 ALTERNATIVE DISPUTE RESOLUTION

SRB hearings, like many quasi-judicial tribunal decisions, can be expensive in terms of time and money and often can lead to a win–lose result. Consequently, the Board has adopted a policy of promoting alternative dispute resolution ("ADR") as a means of resolving conflicts between

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[48] If the request falls into the scope of rule 36, clarifications and corrections of technical errors, the Board may not request input from other parties and may only advise them afterwards.
[49] *Sproule v Altalink Management Ltd*, 2015 ABQB 153 at para 5.

parties. ADR includes a variety of techniques, including a) case management, where the Board's administrative staff contact parties to identify key issues and establish schedules; b) Dispute Resolution Conferences ("DRCs"), which are facilitated meetings between parties; and c) formal mediation involving Board-appointed mediators. ADR has been successful in significantly reducing the need for oral hearings in recent years. In 2019, the Board reported 217 DRCs involving 736 separate files. Approximately 90 percent of these files were resolved without a hearing.[50]

8.1 The Dispute Resolution Conference ("DRC")

One of the first steps to ADR is the dispute resolution conference for each application shortly after filing. The DRC is an informal meeting between parties organized by the Board administration and facilitated by a Board member before a hearing is scheduled. DRCs are conducted pursuant to rules 18 and 19 of the *Rules*. These meetings are not open to the public and help to identify the issues in dispute and determine how likely the parties are to settle the dispute outside of a Board hearing. The meeting may result in a mediation session between parties as an alternative to a hearing.

The DRC is often the first time that the parties have met directly to discuss the issues. Only representatives of the parties with full knowledge of the matter and the authority to resolve the matter can participate in a DRC. These meetings are usually conducted by conference call but on occasion and upon request can be conducted in person.

Parties often discover that their positions are more closely aligned than previously considered. For example, the parties might already agree on many of the facts, such as effective dates, size of the land, and some portions of the compensation. The Board's experience has been that DRCs frequently result in agreements to settle and the withdrawal of the application.

If parties are unlikely to settle, the Board Member and parties can use the DRC to agree on a hearing date and location, possible evidence and witness lists, the dates when each side exchanges its evidence (disclosure), and any other details needed to prepare for a hearing.

In certain instances, the Board Chair may assign an experienced Settlement Officer, rather than a Board member, to a DRC. The Settlement Officer performs the same function as a Board member but cannot issue a Board Order.

No detailed minutes will be taken at the DRC, although a DRC record will be sent out to the parties who attended that outlines the outcomes and actions required. Unless parties agree, confidential information is not included in the DRC record. If the application proceeds to a hearing, usually the DRC record is entered into the record.

The next steps for handling the application will be discussed at the DRC. There are many potential outcomes from a DRC. If the parties reach an agreement, they may enter into private agreements

[50] Municipal Affairs, "Alberta Municipal Affairs Annual Report 2019-2020" (27 August 2020), online: *Alberta Government* https://open.alberta.ca/publications/1925-9247#summary at 96.

or request a Board Order as a settlement agreement. If the parties do not come to a resolution, the matter may proceed to either another DRC, mediation if both parties agree, or a hearing.

8.2 The Mediation Option

Mediation is an optional process where an experienced, Board-appointed mediator helps parties to reach a voluntary, mutually acceptable solution on some or all the issues in dispute. It may replace a hearing if the parties come to an agreement.

Mediation can help parties better understand each other's perspective. It can help improve communication and future relations between the parties. Mediation led by an experienced mediator allows parties to deal with both the immediate problem and its possible causes. It also allows them to craft creative solutions together. Mediating a dispute as soon as possible can help parties solve the problem quickly and keep it from getting worse.

All parties must agree to mediation. Mediation can be suggested to parties at the DRC or one or both parties can contact the SRB and request a mediation. The Board has experienced mediators, including current and past Board members. It is important that, because of the confidentiality of the discussions, a Board member assigned to mediate cannot participate in the subsequent hearing.

The process for mediation is detailed on the SRB website and is generally as follows:

- the mediator meets all parties and sets out the ground rules and process.
- a brief overview by each party of what they view as the issue in dispute and their position.
- discussion between the parties of the basis for their position.
- confidential meetings of the mediator with each party.
- discussion of possible methods to resolve the dispute.
- a decision by the parties whether to agree to the proposed methods of resolution.

The mediation process is confidential. Information provided is on a without prejudice basis and cannot be used for any other purpose or referred to at a hearing or subsequent proceeding. All conversations between the mediator and the parties are confidential unless the parties waive the confidentiality.

The only documents which will be kept by the Board from a mediation will be a mediation agreement, a Report of Mediation, and if achieved, a Memorandum of Agreement. All other documents and notes will be destroyed.

If mediation does not resolve the issues, then the Board may schedule a hearing. The mediator who guided the mediation will not be assigned to hear the matter, nor will they discuss the mediation process with the assigned panel. The mediator cannot be compelled as a witness in any further proceedings.

9.0 PREPARING FOR A HEARING

Although more and more disputes are resolved through a dispute resolution meeting(s) or mediation, the public hearing, either written or oral, is often necessary. Oral hearings may be held in person or through remote technology. Planning for an efficient and effective hearing is important. The DRC is useful for all parties to discuss and focus the issues and establish a timeline

and schedule for a hearing. It is also an excellent opportunity for parties to ask questions about the Board's role and processes and to develop an appreciation of what to expect in a hearing.

Once the schedule is set and agreed to by the parties, each group will be asked to exchange their positions and supporting information on an agreed date. The Board usually uses joint disclosure, where both parties exchange their information on the same date. If necessary and as requested, parties will have an opportunity to exchange rebuttal evidence on a subsequent agreed date. Board administration may schedule a second or third DRC if it might help in clarifying the issues requiring resolution.

If there are any preliminary issues, these should be disclosed to the other party and Board administration at a reasonable time before the hearing date. These matters may affect the ability of the Board to conduct a fair proceeding and should be resolved early. Preliminary matters could include the status of land ownership, the exclusion of witnesses, a perceived bias of panel members, or the adequacy of notice. If it appears the resolution of these preliminary issues would speed the process, the Board may decide to hear these issues first, perhaps in writing, before the hearing. Otherwise, the Board may decide to consider these matters at the commencement of the hearing.

In preparing for a hearing, parties are encouraged to review recent Board decisions in that area and to carefully read the applicable section of the *Act* and *Rules*. Board administrative staff are available throughout the preparation process for information and consultation; however, they are not able to provide any legal advice to parties.

9.1 A Word on Evidence

Section 8(3) of the *Act* states: "in conducting proceedings, the Board is not bound by the rules of law concerning evidence." This allows a less formal process than that of a criminal or civil court for which the *Alberta Evidence Act*[51] establishes the basic requirements for evidence. Even though the Board has flexibility regarding the admissibility of evidence, "good" evidence is preferred. Generally, witnesses should only speak to things of which they have personal knowledge. Facts should be supported by some level of independent verification, such as, a dated photograph, date stamped emails, signed and dated copies of correspondence and legal documents, a dated bank statement, or government published agricultural data. Expert witnesses, those who can offer opinions without being a direct observer to an event, should be able to explain and support their area of expertise and its relevance.

The rules of natural justice provide that the other party has the right to examine, question, and respond to any evidence submitted. That is one reason why the disclosure schedule is important, to allow the other party to understand the case it must meet and be given sufficient time to prepare and respond.

As set out in section 28(5) of the *Rules*, the panel at a hearing has the discretion to determine how the hearing will be conducted, including the admissibility of evidence, the exclusion of witnesses, requiring the production of evidence, and the attendance of witnesses.

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[51] *Alberta Evidence Act*, RSA 2000, c A-18.

9.2 The Oral Hearing Process

The hearing is normally heard by a panel of three members, led by a panel Chair. On occasion, based on the complexity of the matter, a single member may be appointed to hear a case. The panel has discretion on how the hearing will be conducted, however, the sequence of events at most hearings is as follows:

- The Chair outlines the procedures to be followed at the hearing. A schedule for the hearing will be discussed.
- If there are any unresolved preliminary matters, the Chair may require submissions on these before the hearing commences. Generally, the party raising the issue goes first, followed by the other party, and then the first party rebuts. Following the submissions on the preliminary matter, the panel may decide the matter or defer it and then provide the reasons.
- Both parties provide an opening comment on the case. Usually, the Applicant goes first. In the case of a ROE compensation hearing, it is the operator that goes first. In the case of a five-year review, it is the party that filed the application (either the landowner or the operator). In the case of a section 30 application for damages, the landowner is the Applicant. The Board uses the terms "the Applicant" and the other party is often referred to as "the Respondent."
- Prior to the presentation of evidence, any witness will be "sworn in" either by taking an oath on a Bible or making an affirmation.
- The Applicant presents their case to the panel. The Applicant may make a written presentation, provide verbal evidence, call witnesses, and present documents. The Board strongly discourages the introduction of previously undisclosed evidence at hearings because it may prejudice the opposing party and may interfere with the disclosure schedule agreed to at the DRC.
- Any documents provided as evidence are marked as exhibits and the Panel retains a copy for the official record of the proceedings.
- The Respondent can then question the Applicant and any witnesses who testify on behalf of the Applicant. Occasionally, the questions may require information not readily available, and the witness may undertake to provide this evidence after the hearing. This is not encouraged as it can complicate and delay the closing of the hearing record.
- The panel will also have a chance to question the Applicant and their witnesses.
- Following the completion of the presentation of the Applicant's case, the other party (the Respondent) will make its presentation.
- The Applicant will then be given an opportunity to question the Respondent and its witnesses, and the panel may also question the Respondent.
- After all of the evidence has been presented and parties have had the opportunity to cross-examine, the Chair will order final arguments. In some cases, parties may request a brief amount of time to prepare their final remarks. In some cases, parties may request an opportunity to file their final argument in writing.
- Generally, the Applicant makes their final argument first: elaborating on their position and highlighting the key points of their evidence and commenting on the opposing party's position. Final argument is not the time to introduce new information. The other party follows, highlighting the key points of their evidence and commenting on the Applicant's

position. The Applicant then has an opportunity to reply to the other party's argument. The panel may ask some clarifying questions to parties upon completion of their arguments.

- Following final arguments, the Chair will adjourn the hearing.
- If there was an undertaking to provide information after the hearing, both parties will be given an opportunity to comment on the new evidence.

10.0 RECOVERY OF COSTS

Section 39 of the *Act* allows the Board to award "costs of and incidental to a proceeding (a written or oral hearing) under the Act." Costs awards are not automatic and are at the discretion of the Board.

This practice is in accord with the Supreme Court's view: "It is well established that '[a]n owner whose land has been taken involuntarily is entitled to indemnification for the necessary expenses of pursuing his or her statutory rights to compensation', the only limitation being that 'these expenses be reasonable.'"[52]

Rule 31 of the *Rules* provides guidance on cost recovery applications. The Board may award costs to a party if the Board is of the opinion that the costs are directly and necessarily related to the proceeding. There is no specified form provided for the recovery of costs. A request for costs must include:

(a) reasons to support the request;

(b) a detailed description of the costs sought; and

(c) copies of any invoices or receipts for disbursements or expenses.

Typical costs recovered are out-of-pocket expenses such as accommodation, photographs, postage, courier fees, copying costs, stationary materials needed to make a presentation to the Board, invoices for experts, representative/legal fees, and witness fees and expenses. Landowners can recover reasonable personal costs related to the hours spent preparing the evidence package, researching comparable sites, settlement discussions, travel, and attending the hearing.

In making an order for the payment of a party's costs, rule 31 states the Board may consider:

(a) the reasons for incurring costs;

(b) the complexity of the proceeding;

(c) the contribution of the representatives and experts retained;

(d) the conduct of a party in the proceeding;

(e) whether a party has unreasonably delayed or lengthened a proceeding;

(f) the degree of success in the outcome of a proceeding;

(g) the reasonableness of any costs incurred; or

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[52] *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at para 66.

(h) any other factor the Board considers relevant.

Sometimes these criteria are assessed individually or globally when reaching a decision. Usually, a costs application is considered by the Panel at the end of an oral hearing. However, it is sometimes conducted by written submissions after the hearing, at an agreed to timeline. Generally, the landowner or occupant presents their costs and provides copies to all parties, and the operator provides comments, usually in terms of the criteria cited in rule 31, and the landowner or occupant has an opportunity to respond.

The decision on costs, in most cases, is released as part of the decision on the main application.

APPENDIX A: STANDARD CONDITIONS TO A RIGHT OF ENTRY ORDERS

For a Well Site:

Source: *Canadian Natural Resources Limited v Jim Blacklock Farming Ltd*, 2017 ABSRB 1079

Conditions

Use and Access

Access to the Lands shall only be by employees, authorized contractors or agents of the Operator and shall only be to the area granted by this Right of Entry Order.
The Operator shall contain its operations to the area granted by the Order, including the travel and movement of vehicles and other equipment.
The Respondent owner shall have the right to use the area granted by this Order and the Operator shall provide such crossings and other works as may reasonably be required for:
(a) gaining access to the parts of the Land severed or otherwise affected by this Order, and
(b) for livestock at large.

Registration at Land Titles Office
The Operator shall not allow a claim of builder's or other lien arising out of the construction and operation of the project to be filed or claimed against the Lands.

Operator's Responsibility During Construction and Operation
The Operator shall conform to all applicable legislation and regulations and shall follow good oilfield practices including but not limited to:
(a) The Operator shall conserve the topsoil in a good and workmanlike manner, having regard to good soil conservation practices and any reasonable request or direction of the Respondent owner.
(b) The Operator shall not obstruct or impede the natural drainage of the remainder of the Land, and to that end shall install or construct such culverts and other works as the Respondent owner may reasonably require.
(c) The Operator must promptly remove all debris from the area granted.
(d) The Operator shall construct and maintain such fences and other works and to such standard as the Respondent owner may reasonably require to ensure the safety of and to prevent the straying of livestock.
(e) Except as may be authorized by any other Act, the Operator shall not drill any well on the area granted for the purpose of obtaining water for domestic use without the written consent of the Respondent owner.
(f) The Operator shall control noxious weeds from growing on the area granted, in compliance with the *Weed Control Act* as to the prevention and destruction of weeds.
(g) Domestic animals in the keeping of the Operator, contractors, or employees shall not be allowed to roam at large in the area granted by this right of entry.

Maintenance
The Operator shall practice good stewardship of the surface and operate and maintain the area granted in accordance with good oilfield and environmental practices.

Communication
The Operator shall immediately notify the Respondents of any spill, leak, or problem with the well. Notification includes identifying the location of the leak or break and the measures being taken to contain, repair and clean up the spill or leak.

For a Pipeline:

Source: *Canadian Natural Resources Limited v Jim Blacklock Farming Ltd,* 2017 ABSRB 1079

Conditions

Use and Access
The Respondent owner shall have the right to use the right of way for agricultural purposes, subject to the Operator's right to enter to exercise the rights granted by this Order.
Any land affected by this Order previously acquired by a Respondent named in this Order shall be held in common by the Operator and the said Respondent.
Following installation of the pipeline, other than in an emergency, the Operator shall give the Respondent owner at least 24 hours notice, and more notice where possible, of access to the Lands. Access to the Lands shall only be by employees, authorized contractors or agents of the Operator and shall only be to the right-of-way outlined in green in the plan(s) attached to the Right of Entry Order.

Registration at Land Title Office
The Operator shall not allow a claim of builder's or other lien arising out of the construction and operation of the company project to be filed or claimed against the Lands.

Operator's Responsibility During Construction and Operation
The Operator shall conform to all applicable legislation and regulations and shall follow good oilfield practices including but not limited to:

(a) The Operator shall conserve the topsoil in a good and workmanlike manner, having regard to good soil conservation practices and any reasonable request or direction of the owner.
(b) The pipeline shall be installed using equipment that minimizes damage to the land.
(c) The Operator shall, during the construction of the pipeline and subsequent reclamation work, take all reasonable precautions to ensure that the natural drainage of the land is not obstructed or impeded.
(d) If any above-ground installation is authorized by the pipeline permit in connection with the pipeline, the installation shall, subject to any superseding requirement of sound engineering principles, be located to cause minimum inconvenience to farming operations and shall be adequately marked and protected by a pipe or other metal structure clearly visible to the farm operator.
(e) Following installation of the pipeline, the Operator must leave the surface of the right-of-way in a condition that is as close to its condition prior to installation of the pipeline so that farming operations can continue to be uniform across the Lands.
(f) All equipment and debris must be promptly removed from the Lands at the end of construction.

(g) Weed and disease control on the right-of-way shall be co-ordinated and integrated into the Respondent owner's weed and disease control of the entire property.
(h) The Pipeline must be constructed to a standard such that any surface equipment may cross it at any location.

Maintenance
The Operator shall practice good stewardship of the surface and operate and maintain the right-of-way in accordance with good oilfield and environmental practices.
The Operator shall be responsible for any damage to crops or personal property of the owner or occupant of the land caused by any entry or re-entry by the Operator.

Communication
The Operator shall immediately notify the Respondents of any spill, leak, or problem with the pipeline. Notification includes identifying the location of the leak or break and the measures being taken to contain, repair and clean up the leak or break.

For a Power Transmission Line

Source: *Alberta PowerLine General Partner Ltd v Guenther*, 2018 ABSRB 017

Conditions

Use and Access
The Respondent owner shall have the right to use the right of way for agricultural purposes, subject to the Operator's right to enter to exercise the rights granted by this Order.
Any land affected by this Order previously acquired by a Respondent named in this Order shall be held in common by the Operator and that Respondent.
Following installation of the transmission line, other than in an emergency, the Operator shall give the Respondent owner at least 24 hours notice, and more notice where possible, of access to the Land.
Access to the Land shall only be by employees, authorized contractors or agents of the Operator and shall only be to the right-of-way outlined in green in the plan(s) attached to the Right of Entry Order.

Registration at Land Title Office

The Operator shall not allow a claim of builder's or other lien arising out of the construction and operation of the company project to be filed or claimed against the Land.

Operator's Responsibility During Construction and Operation
The Operator shall conform to all applicable legislation and regulations and shall:

(a) prior to commencing actual construction (excluding surveying) of the transmission line, consult with the Respondent owner in determining the location of the towers to reduce the inconvenience to the Respondent(s) and their day-to-day activities or farming operations;
(b) not use any soil sterilant for control or eradication of weeds or other vegetative growth in its operations on the right of way, unless requested by the Respondent owner;

(c) immediately repair any fences damaged as a result of its operations;
(d) upon completion of construction immediately clean the right of way of all construction debris or any debris resulting from its operations;
(e) repair any damage on the right of way by the travel of vehicles and equipment during any of its operations;
(f) to the extent that the *Surface Rights Act* applies, be responsible for and shall cause the owner or occupant to be compensated for any damage to crops or personal property of the Respondent owner or occupant resulting from any entry or re-entry on the right of way by the Operator;
(g) conserve the topsoil in a good and workmanlike manner, having regard to good soil conservation practices and any reasonable request or direction of the owner;
(h) ensure that the transmission line is installed using equipment that minimizes damage to the Land;
(i) during the construction of the transmission line and subsequent reclamation work, take all reasonable precautions to ensure that the natural drainage of the Land is not obstructed or impeded;
(j) ensure that all equipment is promptly removed from the Land at the end of construction;
(k) ensure that weed and disease control on the right-of-way is co-ordinated with and integrated into the Respondent owner's weed and disease control of the entire property.

Maintenance

The Operator shall practice good stewardship of the surface and operate and maintain the right-of-way in accordance with good environmental practices.
The Operator shall be responsible for any damage to crops or personal property of the Respondent owner or occupant of the Land caused by any entry or re-entry by the Operator.

Communication

The Operator shall immediately notify the Respondents of any damage or problem with the transmission line.
Notification includes identifying the location of the damage and the measures being taken to repair the damage.