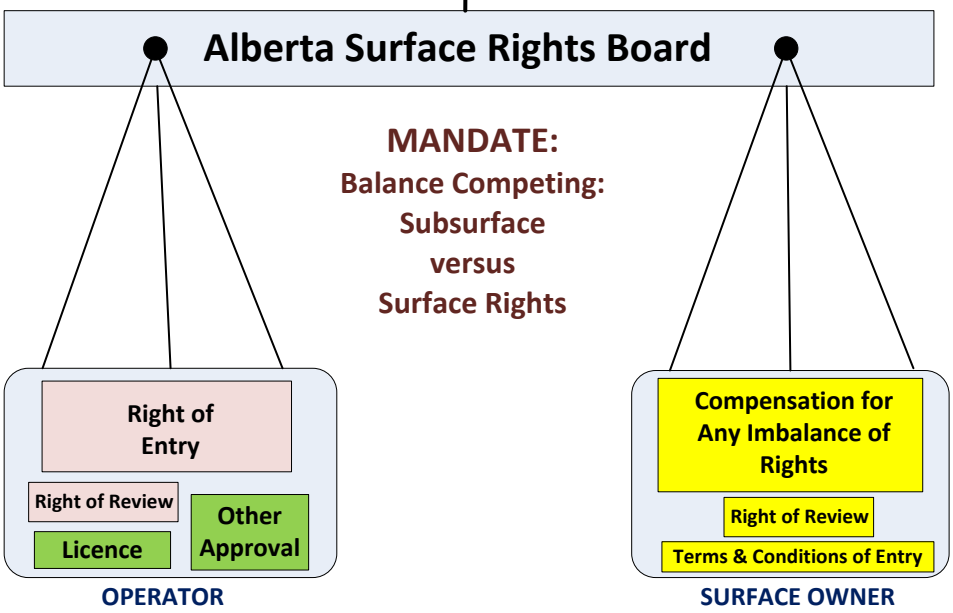
DORIN LAND AND OILFIELD MANAGEMENT INC.

Residential and Oil and Gas Development Can Co-Exist



OPERATOR
Person with Rights to Subsurface Minerals

SURFACE OWNER

An imbalance of rights is deemed to be created when the Regulatory Body issues a licence and/or other approval for surface activities contemplated by the *Surface Rights Act*, and the licensee or approval holder obtains a surface right of entry to conduct such activities (operations) on the surface of land.

For oil and gas activities the Regulatory Body is the Alberta Energy Regulator, and was formerly the Energy Resources Conservation Board

Legislation or the statutory scheme provides the Surface Rights Board, by way of the *Surface Right Act*, with certain tools, or the jurisdiction and mandate to balance rights:

- The powers to order a surface right of entry and the terms and conditions of entry, provided such terms are not inconsistent with licencing and Regulatory Body approvals.
- The power to reconsider any decision or order made by the Board
- The requirement to determine and order compensation to offset any imbalance of rights

The Surface Rights Board, deemed expert, has wide discretion under the *Surface Rights Act* to grant rights of entry, by way of issuance of a right of entry order, when the operator and surface owner or occupant cannot agree on the terms and conditions, or compensation, for a surface right of entry.

Subsurface and surface rights holders enjoy equal rights of review of Board decisions and orders.

RIGHTS NOT TO BE DENIED:

The Board should not deny an operator right of entry to the surface; **provided** the operator **has met all legislated requirements** to apply to the Board for a right of entry (negotiations failed, licences and necessary approvals obtained, and the proposed activity is contemplated by the *Surface Rights Act*).

Similarly the following rights of the surface owner are fundamental and cannot be denied:

- The right to be free of Board or operator interference in fee simple estate surface rights ownership in respect of any surface activity not contemplated by the *Surface Rights Act*
- The right to be compensated for actual losses incurred arising from a right of entry
- The right to have the Board review terms and conditions of a right of entry to mitigate losses
- The right to have “specified land” as defined in Part 6 of the *Environmental Protection and Enhancement Act* (any surface area used by the operator) conserved and reclaimed, for any surface area granted to an operator to revert back to the surface owner on termination of the right of entry, and to be compensated for any loss of use of “specified land” until it is certified as reclaimed.

Surface Rights and Wrongs
May 23, 2015

RIGHTS NOT TO BE DENIED

The "Flip Side" of *Mueller v. Montana Alberta Tie Line*

Ruling: ***Right of entry orders are not to be denied - <u>except in certain circumstances</u>***

The Flip Side: ***Landowner review, compensation, and reversion rights are similarly not to be denied.***

Introduction

The Court of Queen's Bench of Alberta, in a surface rights case known as *Mueller v. Montana Alberta Tie Line*, 2011 ABQB 738 (CanLII) ("***Mueller***"), discussed what we have attempted to illustrate on the first page of this, our first article, in new publication *Surface Rights and Wrongs*.

Surface Rights and Wrongs is the name we have chosen for our newsletter, a publication also designed to raise awareness of government officials and Albertans, particularly urban Albertans.

This article addresses topics left out of an article entitled: *Right of Entry Orders: Not to be Denied*, published by a Calgary law firm: The rights of surface owners, which are similarly not to be denied by the Alberta Surface Rights Board.

Some of our landowner clients have been denied for decades, and continue to be denied, their most fundamental rights guaranteed by the *Surface Rights Act* and related legislation.

Moreover, their fundamental rights to live safely on, and to enjoy, their land, free from trespass and interference from others, have been illegally and improperly denied, because:

1. The Operator did not meet the legislated requirements to apply to the Surface Rights Board (the "**Board**") for a right of entry order. Nonetheless, an order purporting to grant a legal right of entry was issued.
2. The Operator engaged in operations prohibited by the Regulatory Body (the former ERCB).
3. The Operator engaged in activities not contemplated by the *Surface Rights Act*, including:
    - The taking of additional surface area not granted to the Operator by way of a private lease agreement or order of the Surface Rights Board.
    - Illegal venting of oil well solution gas to atmosphere.
4. The Board has yet to consider the above.

More importantly, the Board has yet to reconsider its initial right of entry decisions, despite decades of illegal and unsafe surface operations having taken place, recorded by the licencing body.

In Alberta by law, no operator has any legal right to conduct unsafe or illegal activities on the surface of land pursuant to a right of entry by surface lease or private agreement, or an order of the Surface Rights Board granting rights of entry.

The provisions of the law have not stopped operators on lands we manage from illegally venting solution gas, or entering on the surface of valuable lands and devaluing such lands without obtaining legal rights of entry pursuant to the *Surface Rights Act*.

Operator Double Standards

Irresponsible operators, who relied on the wide discretion of the Board to obtain right of entry orders, have conveniently overlooked ***<u>why</u>*** the Board cannot deny a legitimate application for a right of entry order, as discussed in some detail by Justice Miller in *Mueller*. They exercise illegally obtained rights of entry.

Such issues were glossed over in the Calgary law firm's somewhat myopic article.

Justice Miller concluded, at paragraphs 79 - 82 of *Mueller*, that landowner's rights have been weakened to the degree that the Board must not refuse to issue a right of entry order, <u>provided that</u> the legislated requirements to apply to the Board for a right of entry order have been met (*Mueller* paragraph 78):

1. the Board must be satisfied that consent to entry could not be obtained from the surface owner and/or occupant and that the Operator's final offer for entry by private agreement was rejected; and,
2. the applicant operator requires the surface of the land for valid purposes outlined in the *Surface Rights Act*.

Justice Miller reviewed the statutory scheme at paragraphs 39 and 40 of *Mueller*. The conclusion was that the Board may issue a right of entry order pursuant to a more relaxed essential duty of fairness (than might otherwise be the case) because:

- the Board places a significant emphasis on the compensation process after a right of entry order is rather expeditiously provided for; and,
- the landowner has the ability to seek judicial review of Board decisions, and has, pursuant to the provisions of Section 29 of the *Surface Rights Act*, the opportunity to ask the Board to rehear a matter.

The double standards operators on our clients' lands seek to have the Board apply, involve denial of landowners rights:

1. for no right of entry to be ordered when legislated application requirements were not met and prohibited and illegal operations were conducted;
2. to access the very compensation process Justice Miller found Board emphasis was placed on;
3. to avail themselves of the very review provisions of the *Surface Rights Act* Justice Miller referred to, in concluding the Board has wide discretion to issue right of entry orders expeditiously; and,
4. to be compensated until land reclamation is complete.

The review provisions in question most landowners are not invoking, or aware of the extreme importance of, are those set out in Section 29 of the *Surface Rights Act.*

The Review Provisions of Section 29 of the *Surface Rights Act*

The Statutory Scheme Relied on in *Mueller*

In *Mueller* at paragraph 39, Justice Miller reviewed and quoted Section 29 of the *Surface Rights Act*, which provisions we have found have rarely been invoked, to the degree that the Surface Rights Board appears paralyzed in respect of how a Section 29 application dealing with anything other than change in operator, or land ownership, should be dealt with:

> "**29** *The Board may*
>
> *a) rehear an application before deciding it;*
>
> *b) review, rescind, amend or replace a decision or order made by it;*
>
> *c) repealed 2009 c31 s13;*
>
> *d) notwithstanding anything in this Act, and with or without a hearing, amend a compensation order to show as a respondent a person who is neither an owner or occupant of the land concerned, and to make compensation payable to that person, when the Board is satisfied that that person is legally entitled to receive the compensation that would otherwise be payable to an owner or occupant."*

Dorin v. Whitecap Resources Inc. Cases

Pursuant to urban lands we manage, whereby we are arguably entitled to be named respondent in the subject right of entry order pursuant to Section 29(d) of the *Surface Rights Act* quoted above, we filed several pending S. 29 applications in June of 2011.

After a 2003 oral Section 29 hearing, which resulted in Board Decision No. 2003/0140 dated October 1, 2003, the Board had previously declined to vary the right of entry order, or to review or vary the compensation awarded by the Board in 1978.

In another oral Section 29 hearing conducted on September 23, 2013, the Board amended the subject right of entry order to name Whitecap Resources Inc. the Operator in such order, to be consistent with the subject well licence.

Then strangely, before proceeding to hear additional oral arguments in respect of other pending Section 29 applications, the Board panel chair made the following statement, recorded in oral hearing transcripts:

> *"An oral Section 29 hearing is an extremely rare event. In fact it is possible that this is the first time this has occurred. We don't have a nice template to follow."*

The subject hearing was certainly not the first, but is one of few, to be conducted orally under Section 29.

Either the Surface Rights Board has done an excellent job of ensuring its orders are properly issued and are not inconsistent with Energy Resources Conservation Board ("ERCB") licences and other approvals, or the review provisions of Section 27 of the *Surface Rights Act*, applicable when annual or other periodic compensation is paid by providing for five-year reviews of rates of compensation, takes care of errors and changed circumstance in most cases.

Despite the existence of illegal surface activities, the Board awarded no ongoing compensation in respect of Dorin lands.

The Templates for Section 29 Reconsiderations

With the greatest respect for the statements of Board Members, we disagree there is no template to follow for simple, or unnecessarily perceived to be complex, Section 29 Board inquiries or hearings.

Indeed there are numerous templates, including the decision of Justice Miller in *Mueller* and the very procedure employed by the court in *Mueller* and similar cases.

Justice Miller applied factors known as the *Baker* Factors, used to gauge if a reasonable degree of procedural fairness has been employed in quasi-judicial or administrative decision making.

Set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 ("***Baker***"), the Baker Factors are:

1. The nature of the decision being made and the process followed in making it.
2. The nature of the statutory scheme and the statute or terms under which the administrative body operates.
3. Importance of the decision to the individual or individuals affected.
4. The legitimate expectations of the person challenging the decision.
5. The choices of procedure made by the administrative body or decision maker itself.

The Board has established rules, available on the Board's website, where Section 37 of the *Surface Rights Board Rules* (the *"Rules")* is a template for dealing with reconsiderations, which are patently applications filed with the Board pursuant to Section 29 of the *Surface Rights Act*.

When we filed pending Section 29 applications in 2011, Section 37 of the *Rules* was all one had to go by. Since such time the Board has belatedly developed a form for reconsideration requests, and set out some limited guidance on its website.

Pursuant to the provisions of the Board's *Rules*, the Board must conduct mandatory reconsiderations of former decisions or orders:

- if a decision or order contains an obvious error of law or jurisdiction, errors of law and fact, or mixed fact and law;
- when a decision or order is rendered pursuant to a process that was obviously unfair or unjust.

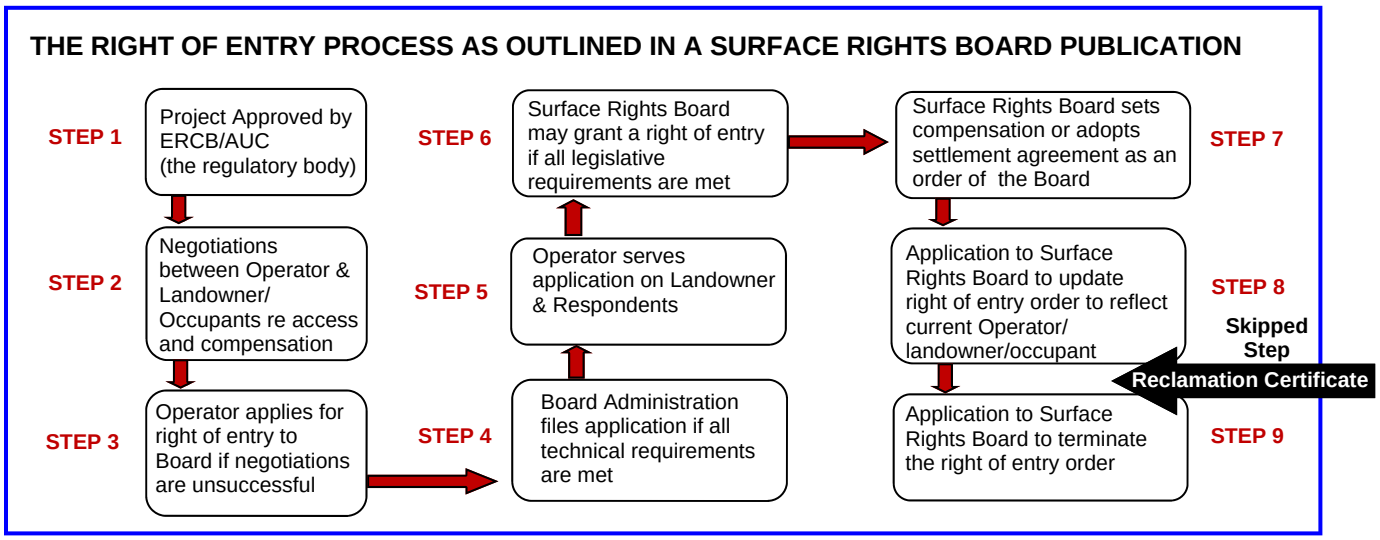
In situations where evidence, unavailable at the relevant time, later comes to light, or if a Board decision is inconsistent with a previous decision or a binding authority, the Board may reconsider a former decision or order.

Will all Landowners Lose Rights to Annual Ongoing Compensation?

If the Operator prevails in respect of pending Section 29 applications related to urban Didsbury lands, all landowner rights to annual compensation for surface takings are jeopardized.

The Board deems simple matters of jurisdictional error discussed herein to be complex in respect of the numerous pending Section 29 applications, triggering the need for more S. 29 applications.

Landowners are Indemnified by Law From Absorbing Damages



The Right of Entry Process

Above the right of entry process, as illustrated by the Board, is outlined. We have numbered the "steps" in the process for reference. In the Dorin case Steps 1, 2, 4 and 6 were skipped.

Steps 1, 2, 4 and 6 relate to what Justice Miller identified in *Mueller* as the only reasons the Board should deny an application for a surface right of entry - if the technical or legislated requirements have not been met by the applicant operator. Issuance of a right of entry under such circumstances constitutes an order issued by way of an error of jurisdiction.

Once again the requirements are:

1. The Board must be satisfied that consent to entry could not be obtained from the surface owner and/or occupant and that the Operator's final offer for entry by private agreement was rejected. The requirements and tests are set out in Sections 15(1) and 15(2) of the *Surface Rights Act*. **The Board must satisfy itself of jurisdiction to act, or any resultant order is voidable.**
2. the applicant operator requires the surface of the land for valid purposes outlined in the *Surface Rights Act*.

Valid purposes are listed in Section 12(1) of the *Surface Rights Act,* where the activities an operator can obtain a right of entry to the surface of Alberta land to conduct, licensed and approved by regulatory bodies other than the Surface Rights Board, are:

a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,

b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,

c) *for or incidental to the construction, operation or removal of a pipeline,*

d) for or incidental to the construction, operation or removal of a power transmission line, or

e) for or incidental to the construction, operation or removal of a telephone line

Obvious Errors

Obvious errors of jurisdiction and law, for which mandatory Section 29 reconsiderations should be triggered pursuant to the Board's *Rules*, would be if the Board accepted and acted on an application that did not meet technical or legislative requirements and issued a right of entry order.

Another example would be if the activity was not one listed in Section 12(1) of the *Surface Rights Act* quoted in the previous section, or contemplated by the statutory scheme - an unlicensed activity or an activity for which the regulatory body possesses no power or jurisdiction to issue a licence.

Correcting Errors of Quasi-Judicial Tribunals

In our rather extensive experience managing urban lands ripe for residential development, surface leases, Board right of entry orders, well, facilities and pipeline licences, and the like are overflowing with obvious errors such as the above, as are any related compensation orders of the Board.

The problem landowners face is the most flawed order of the Board is as binding on the parties as the most impeccable order of the Board, until quashed, set aside, amended, or replaced. Invoking the reconsideration provisions of Section 29 of the *Surface Rights Act* is the first step in the process.

Landowners Are Absorbing the Costs of Errors and Oversights

The Board process as outlined in the diagram above overlooked that the Board has no jurisdiction to terminate a right of entry unless a reclamation certificate has been issued.

Case law related to *Mueller* overlooks other critical factors discussed in the next sections, and assumes errors shall be corrected by the Board through the reconsideration process.

Such is not the case. Our clients are absorbing the costs of incorrectly licenced, and highly unsafe, surface operations on their valuable urban lands. This is against Alberta law.

Operators alone are responsible under Alberta law to ensure their activities are licenced, regulatory compliant, and safe, and to obtain a valid right of entry to the surface of Alberta lands.

Cross Jurisdictional Issues, and the Rule Against Collateral Attack

The Board's Role in the Statutory Scheme

Mueller built on previously established case law, including *Encana Corporation v. Campbell* 2008 ABQB 234 (CanLII) ("***Encana***"), which dealt with the overlapping jurisdictions of the regulatory or licencing body and the Surface Rights Board.

Encana Corporation had taken a step to ensure it possessed a valid right of entry. Operators on our clients' lands could do the same to ensure a legal right of entry exists, but have not.

When the Campbells refused consent to assignment of a surface lease, Encana applied to the Board for a right of entry order, which was granted. Encana clearly did so to ensure it possessed a legal right of entry to conduct surface operations.

Justice Crighton found the following at Para: 15 of *Encana*:

> "*The SRB is empowered to consider imposing conditions with every right of entry order it grants. In every case it is therefore required to consider the well licence, permit or authorization and determine if the condition it seeks to impose is consistent with the well licence."*

Justices Crighton and Miller both relied on the Alberta Court of Appeal' description of the Board's role being ancillary and in aid of the oil well activities authorized by the ERCB.

The Court of Appeal noted that S. 15(6) of the *Surface Rights Act* prioritizes the existence of the well licence such that the Board cannot exercise its jurisdiction to deny entry to the well site and in doing so frustrate (collaterally attack) the ERCB's jurisdiction to grant that licence (see *Windrift Ranches Ltd. v. Alberta (Surface Rights Board)*, 1986 ABCA 158 (CanLII)).

The other finding was, despite the fact that the Board possesses exclusive jurisdiction to grant right of entry orders, the Board's role is essentially that of a compensation tribunal.

Our clients wonder why irresponsible operators on their lands enjoy a right of entry for activities expressly prohibited by the ERCB, or regulations drafted and enforced by the ERCB. The simple answer lies in the flip side of the case law discussed above. Operators possess no legal right of entry to engage in any non-permitted surface activity.

Neither *Mueller* nor *Encana* discussed the interrelationship between Sections 15(3) and 15(6) of the *Surface Rights Act*:

- Pursuant to Section 15(3), the Board has discretion to request the ERCB for all well licencing or other approval information, and the ERCB must comply with the request.
- Pursuant to Section 15(6), when ERCB documents have been obtained by the Board under a Section 15(3) request, the Board must ensure right of entry order terms and conditions are consistent with the ERCB's approval.

Justice Crighton in *Encana* clearly assumed the Board uses Section 15(3) discretion pursuant to standard Board practice.

On lands we manage, the Board has invoked Section 15(6), but has never obtained documents from the ERCB under S. 15(3).

> ***"The most important thing to be aware of in surface rights is that notwithstanding that right of entry orders are obtained from the Surface Rights Board, it is the Energy Resources Conservation Board which really grants the right to enter.***
>
> ***In Surface rights, it is the E.R.C.B which determines whether the entry is fair, sound and reasonably necessary…"***
>
> In *Mueller*, Justice Miller quoted the above, from an unpublished paper by now Alberta Court of Appeals Judge Brian O'Ferrall

Board Mandate: Timely, Expert, Low Cost, Solutions

In the matter of *Camino Industries v. Dorin*, 2014 ABSRB 802 (CanLII) in respect of urban lands we manage, the Board amended the subject right of entry order to replace the Operators named, by way of reliance on a Section 15(6) consistency mandate (between well licence and right of entry)

However, no Section 15(3) request was made whereby the Board obtained ERCB records. Rather the Board relied on snippets of Operator-supplied ERCB correspondence and a printout from a data base of ERCB records to find what person (the Well Licence Holders) should be named Operator.

It is reasonable for surface owners to also request consistency and expedient solutions pursuant to Board reviews of ERCB information.

Mueller and *Encana* are Distinguishable

In both *Muellller* and *Encana*, the operators met the legislated requirements to apply to the Board for right of entry orders.

The Board clearly obtained ERCB information, set out terms and conditions in the right of entry orders, and took care to ensure consistency between the right of entry and the approvals or licences issued. Justice Crighton went so far as to find the Board must do so in every case.

Mueller is in respect of a right of entry for a power line. Unlike power lines, well bores are permanent, particularly in urban locations with permanent regulated setback distances to surface improvements, and permanent access routes required.

Oil well site takings, particularly where the operator engages in more than one Section 12(1) activity (well bore and related single well battery facilities are licenced, regulated, and approved under very differing statutory schemes), simply require more Board scrutiny and expertise than power line takings.

Mueller and *Encana* are also in respect of surface takings after amendments to the *Surface Rights Act* in 1983. Sections 15 (3) and 15(6) did not exist when right of entry orders our clients are impacted by were issued.

The Board's role changed in 1983, such matters have been overlooked, and differentiate the takings on our clients lands from those in *Mueller* and *Encana*.

Withheld ERCB Documents

In the Dorin matters referenced in this article, the Operator withheld the ERCB's original findings from the surface owners, the Operator's own expert witnesses, the Board, and Justice Moore of the Court of Queen's Bench of Alberta on appeal of the Board's original compensation decisions.

Had the Board exercised its Section 15(3) discretion and obtained ERCB documents, the Board would know from a review of ERCB documents that the ERCB shut in illegal operations on Dorin lands.

In essence, the ERCB decided the entry was not fair, sound, or necessary. The Board right of entry is the very type of collateral attack on ERCB decisions Justice Miller condemned in *Mueller*.

Real Problems Require Real, Low Cost, Expert, Board Solutions

Armisie Oil Field, in the City of Edmonton

Our Edmonton clients face the same problems, but in some ways, in reverse.

The Operator obtained well licences in 1951, which state on their face the Operator was to obtain a legal right of entry prior surface entry to drill the wells. Yet no surface leases or right of entry orders were obtained until 1962.

Two of the surface leases were for terms of 10 years, with a possible ten year extension. They expired at latest in 1982; however, the Operator still relies on such lease agreements. The Operator's land agent/appraiser overlooked the fact that there is no legal right of entry, as the Board did.

In 2005, the ERCB also simply took the Operator's word that there were pipeline rights of way and surface leases granted by surface owners, where such is simply not the case.

Other problems in the City of Edmonton are more or less the same as in respect of the previously discussed Didsbury lands :

1. The Operator engages in all manner of prohibited and improperly licenced, and life threatening, surface operational activities, alongside Anthony Henday Drive.
2. ERCB intervention is insufficient to interrupt illegal, unsafe and regulatory non-compliant operations, or trespass.
3. The lands have been contaminated by surface operations and there is no compensation payable to incent the Operator to conserve and reclaim contaminated lands as required by law.
4. The Operator claims it has legal right of entry, and thus there is no legislated time frame for land conservation and reclamation - the Regulator knows not what to do.

Alberta Energy Regulator Actions Required

In 2005 the ERCB unwittingly licenced a new well bore in Edmonton, in part by taking the Operators' word that a valid surface lease existed, and that pipelines were in rights-of -way, which have never been legally granted or registered (Land Titles).

The ERCB licenced a battery by way of a routine application, when the facts are that a non-routine application requiring a far higher degree of licencing authority scrutiny, was required by law.

The battery is closer than the regulated distance from a major highway intersection, and a cell phone tower has been built too close to the battery, causing illegal and preventable risks to exist.

The former ERCB felt it possessed no jurisdiction to review private surface lease or pipeline rights-of-way or easement agreements. The current Energy Regulator must do so to carry out its added reclamation certificate issuance mandate.

In short, the statutory scheme has changed and so has the overall mandate of the licencing or regulatory body. Simple low cost solutions (shut in operations conducted by trespass, improperly licenced) are now available, which previously were not.

The ERCB made jurisdictional errors in Armisie Field, as did the Surface Rights Board, which must be reviewed.

Board Expertise is a Key Issue, But is Lacking

In all instances the Surface Rights Board overlooked facts and key aspects of he statutory scheme.

In all instances the Board was urged to overlook applicable law by so-called expert land appraisal witnesses, whose testimony and reports in respect of compensation hearing are silent as to the actual applicable regulations or statutory scheme.

In all instances land agents, rather than qualified engineers or operational staff:

- conducted meetings with the surface owners but failed to identify the issues or operational risks, and how such risks were to be mitigated by the operator;
- failed to ever meet with the surface owners in respect of the nature of actual operations and related risks;
- misled the Surface Rights Board, albeit clearly unknowingly in some instances, through ignorance of the provisions of the laws of Alberta .

Sarg Oils Ltd. v. Environmental Appeal Board

In the matter of *Sarg Oils v. Environmental Appeal Board*, 2005 ABQB 553 (CanLII), Justice Langston of the Court of Queen's Bench of Alberta described what constitutes expert quasi-judicial decision making at paragraph 41:

> *[41] The unique factors surrounding the Applicants' case called for a more complete examination of the ERCB's conduct and failure to do so went to the very heart of the EAB's decision. Expertise is not defined as applying a myopic view to issues. Expertise has as it's root an adaptive exploration of all relevant circumstances.*

The Surface Rights Board, encouraged by operators, simply assumes all operations are properly conducted, legal, safe etc. unless the surface owner produces evidence to the contrary.

In the Dorin matters, evidence to the contrary exists in ERCB files the Board has never reviewed, all of which has been produced to the Board, which the Operator objects to the surface owners producing in relation to Section 29 hearings.

Yet the Board accepted a letter from the ERCB approving a well licence transfer as cogent evidence to amend the right of entry to name a new Operator.

Conclusions

What is taking place in Alberta is simply illegal and wrong. Affected owners and occupants are entitled to intervention by the Alberta Energy Regulator, and to be compensated, particularly if such licencing body (or the ERCB) fails to carry out its mandate.

Section 29 of the *Surface Rights Act* exists to correct errors or discrepancies. The purpose of such reconsideration provisions are not to put the onus to ensure safe and regulatory compliant operations, and/or the cost of same, on landowners.

The Surface Rights Board must ensure it is not complicit with illegal actions of irresponsible operators, does not apply double standards, and compensates owners and occupants for all losses.