

THE SURFACE RIGHTS BOARD OF MANITOBA

WINNIPEG, MANITOBA

Order No. 4/2011  
File No. 04/2011

IN THE MATTER OF:                    *THE SURFACE RIGHTS ACT C.C.S.M. c. S235*

AND IN THE MATTER OF:            LSD's 9, 10, 14, 14A, 15 & 16-21-11-26 WPM in  
Manitoba

BETWEEN:

Harmsworth Farms Ltd.

Applicant  
(Landowner)

- and -

Enerplus Resources Corporation

Respondent  
(Operator)

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VARIATION ORDER

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MANITOBA )  
The Surface Rights Board )

Order No. 4/2011  
File No. 04/2011  
Dated: JANUARY 25, 2012

BEFORE: T.A. (Art) Cowan, Presiding Member  
Margaret Hodgson, Member  
Claude Tolton, Member  
Ivan Carey, Member  
Barb Miskimmin, Administrator

IN THE MATTER OF: **THE SURFACE RIGHTS ACT C.C.S.M. c. S235**

AND IN THE MATTER OF: LSD's 9, 10, 14, 14A, 15 & 16-21-11-26 WPM  
in Manitoba

BETWEEN: Harmsworth Farms Ltd. Applicant  
(Landowner)  
- and -  
Enerplus Resources Corporation Respondent  
(Operator)

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**VARIATION ORDER**

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This application, under Section 30 of *The Surface Rights Act*, seeking a variation of the annual compensation for

(i) LSD's 9, 10, 14, 14A, 15 & 16-21-11-26 WPM in Manitoba

being paid under the lease for the aforementioned well sites, was heard in the Town of Virden on October 24 & 25, 2011.

Upon hearing the evidence and the submissions of the parties; decision being reserved until today's date:

It is the Order of This Board That:

1. The amount of the compensation for each well site be awarded as follows effective June 27, 2011:

(i) LSD 9-21-11-26 WPM	<u>\$3200.00</u>
(ii) LSD 10-21-11-26 WPM	<u>\$3200.00</u>
(iii) LSD 14-21-11-26 WPM	<u>\$3200.00</u>
(iv) LSD 14A -21-11-26 WPM	<u>\$3000.00</u>
(v) LSD 15-21-11-26 WPM (3.54 acres)	<u>\$2800.00</u>
(vi) LSD 15-21-11-26 WPM (3.19 acres)	<u>\$2800.00</u>
(vii) LSD 16-21-11-26 WPM	<u>\$3200.00</u>
  
2. The Respondent shall pay to the Applicant interest at a rate of 5% per annum on any unpaid portion of the said increased compensation from June 27, 2011 until date of payment.

Dated JANUARY 25, 2012

  
Presiding Member

**THE SURFACE RIGHTS BOARD OF MANITOBA**

**WINNIPEG, MANITOBA**

File No. 04/2011

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**REASONS FOR DECISION FOR VARIATION ORDER**

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**IN THE MATTER OF:** *THE SURFACE RIGHTS ACT C.C.S.M. c. S235*

**AND IN THE MATTER OF:** LSD's 9, 10, 14, 14A, 15 & 16-21-11-26 WPM in  
Manitoba

**BEFORE:** T.A. (Art) Cowan, Presiding Member  
Margaret Hodgson, Member  
Claude Tolton, Member  
Ivan Carey, Member  
Barb Miskimmin, Administrator

**DATE OF HEARING:** October 25 & 26, 2011

**DATE OF DECISION:** JANUARY 25, 2012

**BETWEEN:**

Harmsworth Farms Ltd.

Applicant  
(Landowner)

- and -

Enerplus Resources Corporation

Respondent  
(Operator)

**APPEARANCES:** J. Darryl Carter, Q.C.  
Jennifer Wilkie

for the Applicant  
(Landowner)

David E. Swayze

for the Respondent  
(Operator)

**WITNESSES:** Kevin Gabrielle  
Scott Andrew

called by the Applicant  
(Landowner)

David Chorney, Senior Surface Land Coordinator, Enerplus  
Curtis Dobbyn, Landman, Mammoth Land Services Ltd.  
Tyler Friesen, P.Ag., Millennium Land Ltd.  
Ron Tone, P.Ag., CCA, Tone Ag Consulting Ltd.

called by the Respondent  
(Operator)

## **EXHIBITS:**

### **For the Applicants (Landowners) and recorded into the records as Exhibit #1:**

- Table Titled "Sorted by Cropland vs Hayland vs Pasture"
- Table Titled "Sorted by Location"
- Table Titled "Sorted by Township"
- Table Titled "Sorted by Soil Productivity"
- Table Titled "Sorted by Size of Lease"
- Table Titled "Sorted by Annual Rental"
- Table listing lands under review showing cultivated or pasture / size in acres / current annual rental / masc soil rating
- Xerox copy of soil productivity index ratings from MAFRI intranet site
- Court of Queen's Bench of Alberta 2008 decision, Canadian Natural Resources Ltd. vs Bennett & Bennett Holdings Ltd. and Circle B Holdings Ltd.
- Comparable Surface Leases - document containing 33 tabs
- Soil Productivity – document containing 7 tabs
- Board Awards - document containing 3 tabs

### **For the Respondent (Operator) and recorded into the records as Exhibit #2:**

- Document containing 25 tabs

## **BACKGROUND:**

Harmsworth Farms Ltd. formed a coalition with Wallace Gabrielle and Andrew Management Ltd. and brought applications (filed with the Board as one document) for increased annual surface lease payments covering 39 well site locations to the Surface Rights Board. The application was filed with the Board on June 27, 2011.

The requested compensation review was filed in accordance with Section 30 of *The Surface Rights Act*. All of the 39 surface leases are held with Enerplus Resources Corporation. The current rates of compensation in all 39 surface leases were freely negotiated.

## **ISSUES:**

1. Whether the current lease payments for each of the well sites should be varied and if so, by how much?
2. Is the surface rights owner entitled to interest payments?
3. Costs?

## DECISION:

Harmsworth Farms Ltd. is the owner of seven of the well sites under review. The surface lease payments for five of Harmsworth Farms Ltd. seven well sites should be increased. The following shows the current amounts paid for each well site; amounts requested by the Lessor and amounts awarded by the Board:

	Current	Requested	Awarded
LSD 9-21-11-26 W	\$2800	\$3600	\$3200
LSD10-21-11-26 W	\$2800	\$3600	\$3200
LSD 14-21-11-26 W	\$2800	\$3600	\$3200
LSD 14A-21-11-26 W	\$2800	\$3600	\$3000
LSD 15-21-11-26 W(3.54)	\$2800	\$3600	\$2800
LSD 15-21-11-26 W(3.19)	\$2800	\$3600	\$2800
LSD 16-21-11-26 W	\$2800	\$3600	\$3200

## REASONS:

Pursuant to Subsection 25(2) of *The Surface Rights Act*, the Board inspected 11 of the 39 sites on October 24, 2011. Of the 11 sites, LSD's 10-21-11-26 WPM and 14-21-11-26 WPM were inspected. From these inspections, the Board determined these sites contained oil producing equipment and were determined to be "typical well sites".

The Board then proceeded with the October 24<sup>th</sup> hearing.

The applicants retained Darryl Carter as legal counsel for the matter. Mr. Carter filed technical documentation regarding agriculture land use, acreage of well sites and current annual rentals for selected well sites. In addition, Mr. Carter filed copies of all applicable surface leases, soil productivity and selected background Board Orders.

The oral part of the hearing was initiated by the applicants, Kevin Gabrielle (sworn) and Scott Andrew (sworn). The applicants outlined previous Board Orders, specifically the 1991 Gabrielle Board Award which covered "standard rate" of compensation for a "typical" well site. The applicants suggested that a high standard award was appropriate for the compensation using the overall average of high standard comparable leases. The applicants have requested compensation of \$3,600 per well site based upon their methodology and selected evidence presented.

Enerplus was represented by David Swayze of Meighen Haddad. Mr. Swayze filed background documentation including copies of all current surface leases as well as reports prepared by Ron Tone (sworn) and Tyler Friesen (sworn). The consultants provided expert opinion concerning the soils of the Virden and Waskada areas as well as adverse effects that petroleum infrastructure have on farming practices.

Counsel for Enerplus had requested the Board to change its compensation methodology and deviate from the Board practices since 1990. The Board seriously considered the request to use an empirical method for calculating the annual rent for surface rights, but have decided to follow the global approach for determining appropriate well site compensation.

The Board considered all of the evidence and the applicable factors under Section 26 of *The Surface Rights Act*. The Board also reviewed its "Reasons" in the Andrew vs Chevron and Gabrielle vs Chevron decisions.

In arriving at compensation, the Board looked at whether the existing well sites are typical well sites under the "typical well site" definition found in the March 19, 1990 Gabrielle vs Chevron decision and the April 9, 1991 Andrew vs Chevron. A typical well site is a well site that does not present any special conditions that would make it unduly costly for a farmer to farm the land on which the well site is located. On reviewing the material before it and on viewing several of the well sites, the Board does not feel that the size of the well sites differs to any significant extent as amongst each of them, or as compared to the normal area of land that is taken for a well site. In Manitoba, the average well site is between two to four acres, and unless there is a significant

deviation, either above or below this range, than the amount of compensation should not be affected. Therefore, the Board has concluded that the well sites are typical well sites in relation to Board practices. The Board considered all the evidence and the applicable factors under Section 26 of *The Surface Rights Act*. In particular, the Board assessed comparable leases and used its own knowledge and experience of farmland values and agriculture practices to determine the appropriate annual rental.

The respondent shall pay to the applicant interest at a rate of 5% per annum on any unpaid portion of the said increased compensation from June 27, 2011 until date of payment.

After arriving at the above noted decision, the Board then opened the sealed offers provided by the Respondent. As provided in section 26 of *The Surface Rights Act*, the amount of the sealed offer can have an effect on the costs ordered by the Board. The Board then considered whether the offers should be considered on an individual basis or as a whole and it was decided that since the applicants made one application, then costs would be determined as a whole. After examining the offers, the Board determined that the total offer was above 90% of the total award. Therefore, in accordance with section 26(3), the matter of costs is at the discretion of the Board. The Board makes no award for costs. However, the Board encourages the Respondent to negotiate costs with the Applicant and hopefully arrive at a financial settlement that would satisfy the applicants for their efforts.

Dated this 25<sup>th</sup> day of January, 2012.

  
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Presiding Member