

**THE SURFACE RIGHTS BOARD OF MANITOBA**  
**WINNIPEG, MANITOBA**

Order No. 1/2011  
File No. 01/2011

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

**AND IN THE MATTER OF:** SE 25-10-26 WPM in Manitoba

**BETWEEN:**

John Fefchak and Norma Tibbits-Fefchak

Applicants

- and -

Enbridge Pipelines (Virden) Inc.

Respondents

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**SURFACE LEASE AND ANNUAL COMPENSATION ORDER**

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# THE SURFACE RIGHTS BOARD OF MANITOBA

Order No. 01/2011

File No. 01/2011

~~September~~ <sup>Oct 3rd</sup>, 2011

**BEFORE:**

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

**IN THE MATTER OF:**

***THE SURFACE RIGHTS ACT C.C.S.M. c. S235***

**AND IN THE MATTER OF:**

SE 25-10-26 WPM

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Applicants

- and -

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## SURFACE RIGHTS ANNUAL COMPENSATION PAYMENT ORDER

Upon reading the application and hearing the evidence and the submissions of the parties on September 14, 2011 decision being reserved until today's date:

It is the Order of this Board that:

1. John Fefchak and Norma Tibbits-Fefchak are not entitled to receive annual compensation under *The Surface Rights Act* for the valve site that is located on part SE 25-10-26 WPM.
2. The application to the Board is dismissed.
3. No costs are awarded pursuant to Section 26 of The Surface Rights Act.

<sup>T.A.C.</sup>  
<sup>Oct 3rd</sup>  
DATED: September \_\_, 2011

  
Presiding Member

**THE SURFACE RIGHTS BOARD OF MANITOBA  
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**REASONS FOR DECISION FOR SURFACE LEASE  
AND ANNUAL COMPENSATION ORDER**

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## REASONS FOR DECISION

### BACKGROUND:

The applicant applied under Section 21(1) of *The Surface Rights Act* for a determination of entitlement to annual surface lease compensation payments for the existing valve site and a protective culvert installation. The applicant referenced Section 5 of *The Surface Rights Act* as part of the reasoning for the application. The valve site and protective culvert were established in 1960 under the authority of Caveat R14833, Grant of Right of User.

### ISSUES:

1. Is the applicant entitled to receive annual surface lease payments?
2. Do Section 21 and Section 5 of *The Surface Rights Act* apply retroactively?

### DECISION:

1. John Fefchak and Norma Tibbits-Fefchak are not entitled to receive annual compensation under *The Surface Rights Act* for the existing valve site that is located on part of SE 25-10-26 WPM.
2. The application to the Board is dismissed.
3. No costs are awarded pursuant to Section 26 of *The Surface Rights Act*.

### REASONS:

Pursuant to subsection 25(2) of *The Surface Rights Act*, the Board inspected the site on September 14, 2011. From this inspection, the Board determined that there was a valve site and protective culvert located on the subject property.

The Board then proceeded with the scheduled September 14, 2011 hearing.

John Fefchak (sworn) and Norma Tibbits-Fefchak prepared written documentation as evidence for the hearing and is recorded as Exhibit 1, containing:

- (a) document "Questions for the Board to Consider"
- (b) document "Background"
- (c) document "Surface Rights Board Members"
- (d) copy of "Notice of Hearing"
- (e) June 23, 2011 letter to Enbridge with attachments
- (f) September 2, 2011 to R. J. M. Adkins with four attachments

Mr. Fefchak provided an overview of his concerns with the Enbridge surface infrastructure located on his property. In Mr. Fefchak's opinion, the surface land owner is entitled to receive annual compensation payments for the valve site and related infrastructure. Mr. Fefchak argued that the development fell under the authority of *The Surface Rights Act* and subsequently, a surface lease and annual compensation were appropriate.

Evidence filed by Robert J. M. Adkins (on behalf of the respondent) is recorded as:

Exhibit 2 – September 15, 1980 letter (Buckingham, McNeill & Smith to Fefchak)

Exhibit 3 – Documents of the Respondent (document containing 12 tabs)

Exhibit 4 – Legislation (document containing 7 tabs)

Enbridge Pipelines (Virden) Inc. was represented by Robert J. M. Adkins of Thompson Dorfman Sweatman. Mr. Adkins suggested that the existing 1960 Grant of Right of User Agreement permits Enbridge to have infrastructure including the valve site and culvert in exchange for compensation that has already been paid as a one time lump sum payment. The existing agreement does not require additional annual compensation. Mr. Adkins also indicated that Enbridge pays separately for access whenever work is performed. He submitted that in light of the fact that the 1960 Grant of Right of User does not provide for additional annual rent, the applicant's request should be declined. Mr. Adkins argued that *The Surface Rights Act* was not intended to be retroactive, it is not necessary for it to be retroactive to achieve its objectives and that the legislature cannot have intended to interfere with pre-existing contractual rights.

The Board agrees with the Respondent's submission. The Board does not have the jurisdiction to grant compensation for infrastructure established prior to the enactment of *The Surface Rights Act* and for which a comprehensive and perpetual agreement was made at the time.

Therefore, all evidence considered, it is the Order of the Board that the annual rent request be denied. The Board makes no order as to costs.

*TRE Oct 3<sup>rd</sup>*  
DATED: ~~September~~ \_\_\_\_\_, 2011

  
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Presiding Member