THE SURFACE RIGHTS BOARD OF MANITOBA
BOARD ORDER
Under *The Surface Rights Act*, C.C.S.M. c. S235

Hearing:

Town Municipal Office
Virden, Manitoba
May 12 & 13, 2015

Order No: 10-2015

File No: 01-2015

Date issued: July 7, 2015

BEFORE: Clare Moster, Presiding Member
Gordon Lillie, Deputy Presiding Member
Russell Newton, Board Member
Goldwyn Jones, Board Member

Barbara Miskimmin, Board Administrator

BETWEEN:

Applicant (Landowner)	**Carlyle Glenn Jorgensen**
	- AND –
Respondent (Operator)	**Tundra Oil and Gas Partnership**
Occupant	***(none)***

CONCERNING:

Lsds 9 and 13 in Section 19-8-29 WPM in the Province of Manitoba (the well sites, their related access roads and surface leases, hereinafter referred to as the "**well sites**").

PURPOSE OF HEARING:

To hear and receive evidence regarding two (2) applications under Sec. 30 of *The Surface Rights Act* of Manitoba ("the Act") received from the Applicant for variation of compensation payable for the well sites.

VARIATION OF COMPENSATION

BACKGROUND:

On December 29, 2014 the Applicant applied to the Board, via two (2) applications requesting a variation of the compensation payable for the well sites.

The Board via letter dated February 5, 2015 informed both parties that due to weather conditions and snow cover, a viewing of the sites was not practical, and that a hearing of the matters would occur in the spring. The Board encouraged the parties to continue deliberations in an attempt to resolve the issues without Board involvement.

On April 2, 2015 the parties were advised that the Board was scheduling a hearing, and requested the parties provide dates they would be available to participate.

By email dated April 8, 2015, Counsel for the Respondent suggested that a "pre-hearing" conference call be scheduled to allow the parties to discuss their witness lists, the timing for disclosure of reports, and the amount of time required to hear the matter.

As the parties could not reach a consensus on a hearing date, the Board set a hearing date of May 12 (and if necessary, May 13), 2015. The formal Notice of Hearing was sent out on April 15, 2015. In recognition that there could possibly be significant reports presented at the Hearing, the Board advised the parties that a full exchange of evidence was to be done at least ten (10) days before the Hearing (the normal deadline being at least five (5) days). The notice also advised the parties that the Board would be viewing the sites the day before the Hearing (May 11, 2015) at 4:00 p.m. and asked to be informed if the party wished to attend the viewing.

The viewing of the two (2) sites of the Applicant took place on May 11, 2015, as planned with both parties attending.

On the same day, the Board also viewed the 8-6-9-29WPM site owned by Evelyn Jorgensen. Mrs. Jorgensen had also filed an application requesting a variation of compensation payable for her site. Her application was scheduled to be heard on the same May 12, 2015 hearing day as Carlyle's. Carlyle (her son) is the occupant on her land (SE1/4 6-9-29WPM). With their sites being in close proximity to each other, the Board considered it reasonable and appropriate to view their respective sites on the same day.

At the start of the Hearing on May 12, 2015, Counsel for the Respondent raised a preliminary issue. He stated that the Respondent's Surface Leases contained a condition that required a party to the Lease who was requesting a review of compensation, to submit such request to the other party before a deadline date specified in their respective surface lease. He stated that the requests submitted by the Applicant to the Respondent for the well sites had not met the deadline condition. Due to the deadline date not being met, the position of the Respondent was that the well sites did not qualify for review of compensation payable, and for the same reason, the Board should not be hearing the variation of compensation applications for the well sites.

The position of the Applicant regarding this missed deadline issue, was there is no limiting deadline in the Act regarding the request for a review of compensation, and that Section 5 of the Act states that where there is a conflict between the provisions under the Act and any lease, the provisions of the Act prevail.

After deliberation, the Board advised the parties that the Hearing would proceed. The Board would consider the review of compensation deadline issue, and make a ruling in its final decision.

Other than the above described preliminary issue, the parties confirmed that the only other issue being heard was the determination of the amount of annual compensation payable for the well sites.

ISSUES:

1. **Preliminary issue: Is the restrictive deadline condition in the surface leases covering the well sites pertaining to review of compensation payable made ineffective (over-ridden) by the non-restrictive provisions of the Act regarding review of compensation payable?**
2. **Determination of whether the annual compensation payable on each well site should be varied, and if so, by how much?**
3. **The amount of Costs, if any, to be awarded?**
4. **Is a party entitled to interest on any moneys owed to it?**

APPEARANCES:

APPLICANT: Carlyle Glenn Jorgensen - land owner (sworn)
Witnesses: Diane Elliott - Lessor of Tundra surface leases (sworn)
Aurel Poirier - Lessor of Tundra surface leases (sworn)

RESPONDENT: Tundra Oil and Gas Partnership
Counsel: David E. Swayze, Meighen Haddad LLP
Connor Smith - Articling Student
Witness: Chris Masson - Surface Land Manager, Tundra (sworn)

EXHIBITS:

Exhibit #1 Submitted by Swayze – Binder containing tabs 1 – 18
Exhibit #2 Submitted by Jorgensen – Binder containing tabs 1 – 4
Exhibit #3 Submitted by Swayze – Board Order 2/2011 – T. Bird Oil Ltd. V Jorgensen
Exhibit #4 Submitted by Jorgensen – Board Order No. 02-2013 – Gabrielle V Corex Resources Ltd./Enerplus Resources Ltd.
Exhibit #5 Submitted by Jorgensen – Binder containing tabs 1 – 15
Exhibit #6 Submitted by Jorgensen – Binder containing tabs 1 – 14
Exhibit #7 Submitted by Jorgensen – case law (Court of Queen's Bench of AB - Lemay case)
Exhibit #8 Submitted by Jorgensen – case law (1990 Decision Gabrielle V Chevron), and
- case law (1991 Decision Andrew et al V Chevron)
Exhibit #9 Submitted by Jorgensen – Board Order No. 07-2014 – Kris & Gwen Jorgensen V Tundra
Exhibit #10 Submitted by Swayze – case law (Court of Appeal of Alberta) Omers Energy Inc./Energy Resources Conservation Board/Eva Cymbaluk, and
- case law (Supreme Court of Canada) Neelon & City of Toronto/Lennox

DECISION:

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 two (2) applications filed with the Board dated December 29, 2014 are applications the Applicant may file with the Board under Section 30 of the Act, and the Board has jurisdiction to determine the compensation to be paid in accordance with the applicable provisions of Section 26 of the Act.**

2. **The amount of annual compensation payable for each well site, effective December 29, 2014, shall be as follows:**

   Lsd 9-19-8-29WPM: $4,000
   Lsd 13-19-8-29WPM: $4,000

3. **The Applicant is entitled to costs in accordance with the provisions of Subsections 26 (2) to (5) of the Act, and the Respondent shall pay the Applicant costs in the amount of $2,600.**

4. **The Respondent shall pay to the Applicant interest at a rate of 3.0% per annum on any unpaid portion of:**
   a) the amount of the above ordered compensation from December 29, 2014, to the date of payment.
   b) the above ordered costs unpaid following 30 days of the issuance of this order.

REASONS FOR DECISION

1. **Preliminary issue: Is the restrictive deadline condition in the surface leases covering the well sites pertaining to review of compensation payable made ineffective (over-ridden) by the non-restrictive provisions of the Act regarding review of compensation payable?**

The review of compensation condition in both leases is Clause 18 which reads as follows ***(underlining added for emphasis)***:

> *"18. Review of Compensation*
>
> *Notwithstanding anything contained in this Surface Lease, upon the request of any party to this lease, the amount of compensation payable (except the element of forceable taking) in respect to the Demised Premises shall be subject to review within the three months before or within three months after the expiration of each three year interval following the date of this lease. Such request shall be in writing and given to the other party within the three month multiple period aforementioned. In the case of any disagreement as to the amount of compensation to be paid or any matter in connection therewith, the relevant provisions of the Surface Rights Act or any similar legislation later enacted, each as amended from time to time, shall apply. In the event that the compensation cannot be mutually agreed upon in sufficient time to meet the anniversary date, the Lessee shall pay to the Lessor the rental for each year based upon the existing rental amount and upon the new rental being agreed the necessary adjustments, together with interest, shall be made between the parties."*

Pertinent evidence provided, and agreed to by both parties, included the following:

Pertaining to LSD 9-19-8-29WPM:

1) Initial Surface Lease (*Exhibit 1, Tab 10*) was dated July 5, 2005 with Carlyle Glenn Jorgensen as Lessor and Tundra Oil and Gas Ltd. as Lessee.
2) Surface Lease provided for first year compensation at $6,000 with subsequent annual compensation of $2,300.
3) Surface Lease contains the above described "Review of Compensation" Clause 18.
4) The current annual compensation is $2,800 which became effective with the July 5, 2011, anniversary date of the Surface Lease.
5) The Applicant by written notice dated December 12, 2014, requested the Respondent review the compensation on this LSD.
6) The Applicant by written application dated December 29, 2014, requested the Board determine a variation of annual compensation payable for this Surface Lease.
7) Tundra's Surface Land Manager (Chris Masson) wrote Carlyle Jorgensen on January 9, 2015, advising that a review showed the anniversary date for the well site was July 5 and stated that the (6 month) review window for the Lease had been missed and Tundra was "respectfully declining your request" for review of compensation.

Pertaining to LSD 13-19-8-29WPM:

1) Initial Surface Lease (*Exhibit 1, Tab. 9*) was dated August 6, 2005, with Carlyle Glenn Jorgensen as Lessor and Tundra Oil and Gas Ltd. as Lessee.
2) Surface Lease provided for first year compensation at $6,000 with subsequent annual compensation of $2,300.
3) Surface Lease contains the above described "Review of Compensation" Clause 18.
4) The current annual compensation is $2,800 which became effective with the August 6, 2011, anniversary date of the Surface Lease.
5) The Applicant by written notice dated December 12, 2014, requested the Respondent review the compensation on this LSD.
6) The Applicant by written application dated December 29, 2014, requested the Board determine a variation of annual compensation payable for this Surface Lease.
7) Tundra's Surface Land Manager (Chris Masson) wrote Carlyle Jorgensen on January 9, 2015, advising that a review showed the anniversary date for the well site was August 6 and stated that the (6 month) review window for the Lease had been missed and Tundra was "respectfully declining your request" for review of compensation.

The requirement in the subject Clause 18 states that the amount of compensation payable "*shall be subject to review within the three months before or within three months after the expiration of each three year interval following the date of this lease*." The three (3) month interval following the anniversary date of the Surface Lease for the Lsd 9-19 well site would end October 5, 2014. The three (3) month interval following the anniversary date of the Surface Lease for the Lsd 13-19 well site would end November 6, 2014. The Respondent submitted that as it had not received the requests to review the compensation on the two (2) well sites until December 12, 2014 [more than two (2) months past the deadline for the 9-19 well site and over one (1) month past the deadline for the 13-19 well site]. The Respondent further stated that the subject deadline condition in Clause 18 in the respective Surface Leases precluded the Lessee from conducting a compensation review. The Respondent also argued that this condition was part of a binding contract between the two (2) parties, and the Board should not hear the subject two (2) applications for review of compensation payable which was barred by the terms of the contracts.

In addition, the Respondent pointed out that the subject Clause 18 "Review of Compensation" condition had been used by industry for many years and that the Board itself had included the Clause in its own Board Orders related to right of entry and compensation.

The Applicant, in speaking to the preliminary issue presented by the Respondent, directed the Board to Section 5 of the Act (***provided below***). The Applicant said there was nothing in the Act which placed a deadline on a request for a review of compensation. Therefore, the provisions of the Act should preclude the restrictive deadline imposed by Clause 18 of the Surface Lease, and the Board should exercise its power under Section 32 (***provided below***) of the Act and determine the compensation to be paid.

Section 32 of the Act states:

"Board to determine compensation

32 Upon receipt of an application under section 29 or 30 the board shall determine the compensation to be paid in accordance with the applicable provisions of section 26."

Section 5 of the Act states:

"Conflict between Act and other instruments

5 Where there is a conflict between the provisions of this Act and any grant, conveyance, lease, licence permit, or other instrument or document, whenever made or executed the provisions of this Act prevail."

The Board is cognizant that a primary purpose of the Act is to provide a statutory mechanism that protects the rights of landowners, including just and reasonable compensation, while providing a means for the holders of oil and natural gas rights to access and produce their rights. ***(Clause 2(b) of Act provided below)***

Section 2 of the Act states, in part, that one (1) of the purposes of the Act is:

"Purposes of Act

2 The purposes of this Act are

(a) --------

(b) to provide for the payment of just and equitable compensation for the acquisition and utilization of surface rights; "

Subsection 21(1) of the Act states:

Application to board for hearing

21(1) An operator, owner or occupant, if any, may

(a) where there is disagreement as to the surface rights that are required by the operator or as to the compensation to be paid therefore; or

(b) where there is a dispute between any of them as to

(i) the interpretation of a lease or agreement,

(ii) the exercise of any right or the performance of any obligation under a lease or agreement or this Act, or

(iii) the location of access roads; or

(c) where a provision of the Act authorizes an application on any other matter;

apply to the board for a determination of the matter and shall serve a notice of the application upon each party that is or may be involved in, or directly affected by, the application and shall forthwith file a copy of the notice with the board.

Section 25 of the Act, in part, states:

"Powers of board following hearing

25(4) On the date fixed under subsection (1) for a hearing, the parties involved are entitled to appear before the board and to be represented by counsel; and the board may, after consideration of all the evidence adduced before it at the hearing, issue an order

(a) granting part or all of the order applied for;

(b) refusing part or all of the order applied for;

(c) fixing the compensation to be paid by an operator;

(d) awarding interest at a rate established by the regulations;

(e) where rights are granted, specifying those rights in detail, including the location of the access to a site, together with a full description or a plan of the land involved in the order; or

(f) prescribing the terms and conditions that go with the order."

Sections 30, 31 and 32 of the Act pertain specifically to applications for variation of amount of compensation payable. They read as follows:

"Application for change in compensation after lease
30 Subject to section 31, an owner, occupant or operator who has entered into, or who is affected by, a lease may apply to the board for a variation of the amount of compensation payable under the lease for the surface rights.
When applications for change not to be made
31 An application under section 29 or 30 for a variation of compensation may not be made within the three year period next following the date of the determination of the compensation sought to be varied.
Board to determine compensation
32 Upon receipt of an application under section 29 or 30 the board shall determine the compensation to be paid in accordance with the applicable provisions of section 26."

The Board notes that the Act does not restrict the time period within which an application for a variation of compensation payable may be made, other than for the three (3) year period following the date the compensation was last determined. ***(refer to Section 31 of the Act above)***

Section 10 of the Act, in part, states as follows:

"Powers of board
10 Without restricting the generality of section 9 the board may
(a) administer and enforce the Act and the regulations;
(b) ---------"

The Board is mindful that in carrying out its powers (and duties) to administer and enforce the Act, it may at times be required to interpret parts of the Act, always keeping in mind the purposes of the Act.

The Board interprets the Act as allowing a party to request a review of compensation at any time after the date the compensation was last reviewed and/or varied, other than within the three (3) year period following the effective date of the last review or variation in compensation.

As already noted, the annual compensation payable for the well sites was last varied on July 5, 2011, for Lsd 9-19 and on August 6, 2011, for Lsd 13-19. Therefore the three (3) year restricted period imposed by Section 31 of the Act has passed.

The Board is cognizant of the "Review of Compensation" Clause 18 now being used in most, if not all, surface leases common in the industry. It is also aware that the same Clause has been used in right of entry/compensation Orders issued by the Board since approximately 2000.

The Board takes the position that the portion of Clause 18 which reads "***or within three months after***" as not being in accordance with the less restrictive provisions under the Act, and should not be included as part of a condition in a surface lease or in an Order of the Board.

By missing the six (6) month window described in the Clause, one might interpret the Clause as requiring a party to wait another full three (3) year period, before the party could again request a review of compensation payable or apply to the Board for such determination. This could lead to a party not being eligible for a review of compensation for a period of six (6) years. This would not be in keeping with the intent of the Act.

This interpretation does not encourage a Lessor to delay requesting a review of compensation. The earlier the effective date of a compensation variation , the more beneficial for the Lessor. If the parties agree on a variation of compensation (in accordance with Clause 18) the effective date would remain the anniversary date of the surface lease. However, should the results of the review not be acceptable to a party, that party may still apply to the Board to determine the compensation payable. The effective date of any change in compensation as a result of an Order of the Board and in accordance with Subsection 33(1) of the Act, is the date of the application, and in almost all cases will be after the anniversary date of the lease. This new effective date is of less benefit to the Lessor. Also, the effective date for the next three (3) year restricted rent review period will be set at a later date [i.e. three (3) years following the effective date of the compensation ordered by the Board).

The imposition of further restrictions on variation of compensation review in a lease or order would not be in keeping with the purpose and intent of the Act. The less restrictive provision of the Act (***Section 31***) prevails over the more restrictive condition (***Clause 18***) in the Surface Lease.

Therefore, the Board has determined that the subject two (2) applications for determination of compensation payable for the well sites satisfy the provisions of the Act and fall within the jurisdiction of the Board. The hearing of the application is therefore considered to be in accordance with the intent and provisions of the Act.

2. Determination of whether the annual compensation payable on each well site should be varied, and if so, by how much?

The following provides relevant information pertaining to the well sites which the Board considered when determining compensation payable:

LSD 9-19-8-29WPM site:

a) This well site is used to accommodate a single "vertical well".

b) The well site has dimensions of 120 metres per side giving it an area of 1.44 ha (3.56 ac), similar to most newer well sites for vertical wells.

c) The well site has an access road 20 metres in width connecting its east side to the neighboring road allowance.

d) The well site is not directly in the center of the Lsd but skewed approximately 22 metres north and 61 metres east.

e) Because of the well site's skewed location, the access road is only 71.4 metres in length, with an area of 0.143 ha (0.35 ac).

f) The total leased area is 1.583 ha (3.91 ac).

g) The land is gently rolling cropland, and the well site is situated between low wet areas near its south and north boundaries.

h) At the time of viewing, the well was shut-in, and the Operator indicated it was on their list to be abandoned.

i) It was noted that the access road at one time had been elevated (evidence of some gravel remnants), but had subsequently been graded level with the adjacent land and was now a trail, which would enable the trail to be farmed over.

j) It was also noted that at one time this N1/2 section contained eight (8) well sites with associated access roads. At the time of viewing, only four (4) well sites were still active, with the other four (4) sites having been abandoned and the sites at some stage of abandonment or rehabilitation, allowing those abandoned sites to be farmed over.

LSD 13-19-8-29WPM site:

a) This well site is used to accommodate a single "vertical well" and a tank.

b) The well site has dimensions of 120 metres per side giving it an area of 1.44 ha (3.56 ac).

c) The well site has an access road 20 metres in width connecting its north side to the neighboring road allowance.

d) The well site is not directly in the center of the Lsd but skewed approximately 60 metres to the north.

e) Because of the well site's skewed location, the access road is only 80 metres in length, with an area of 0.160 ha (0.40 ac).

f) The total leased area is 1.60 ha (3.96 ac).

g) The land is gently rolling cropland, and the well site is situated between low wet areas near its east and west boundaries.

h) At the time of viewing, the well was shut-in, and the Operator indicated it was on their list to be abandoned.

i) It was noted that the access road was a slightly raised gravel road.

j) It was also noted that at one time this N1/2 section contained eight (8) well sites with associated access roads. At the time of viewing, only four (4) well sites were still active, with the other four (4) sites having been abandoned and the sites at some stage of abandonment or rehabilitation, allowing those abandoned sites to be farmed over.

Position of the Applicant regarding amount of compensation:

The Applicant presented the following arguments in support of his position that the annual compensation payable on these two (2) sites be increased.

1. The "global" approach should relate compensation to inflation. Referring to a 2.47 acre well site initially leased in 1984 at an annual rental of $2,000 (including access road), he applied Consumer Price Index (CPI) increases of 31.3% (1985 to 1994) and 38.3% (1995 to 2014). In addition, he applied a further 44% increase to reflect the increase in average well site size (2.47 ac to 3.56 ac). The result was annual compensation of $5,230 for a 3.56 acre well site. *(Exhibit #5, Tab 2)*

2. The Applicant also filed evidence to show the increase in "land value" for his land. He showed the assessed value from 1985 (@ $20,000 per quarter) to 2012 (@ $101,000 per quarter) had increased by 5X. *(Exhibit 6, before Tab 1)*

   Similarly he showed the purchase price of his land over the same period had increased from $266 per acre to $1,100 per acre or by 4.1X.

   Using an average of these two (2) amounts he stated that the value of his land over this period (1985 to 2012) had increased 4.5X.

   Using a comparison of assessed values (*Exhibit #5, Tab 6*) he also showed that the assessed value of his land *(N1/2-19-8-29WPM)* in 2012 was approximately 40% higher than the assessed value of the adjoining south half section.

3. "Comparable lease" evidence filed by the Applicant (*Exhibit #2 - Tab 2*) provided copies of rent review correspondence in 2013 from the Respondent to approximately 60 landowners pertaining to annual surface lease rentals on approximately 250 lease sites. This evidence shows that the majority of landowners requesting compensation reviews were offered, and accepted, annual rentals of $2,800 for pasture land and $3,000 for hay land and crop land. The information provided did not include the size of the lease areas or whether or not an access road was part of the lease. Nor did it appear that the size of a lease affected the amount of rental compensation offered. Some additional detailed lease information was provided under Tabs 3 & 4 which showed a few anomalous lease sites with longer access roads and higher annual rent.

   This evidence would suggest that "comparable leases" submitted by the Applicant, for which the Respondent was the Lessee, had annual rentals in 2013 of $3,000 for crop land. The position of the Applicant was that these comparable leases should not be considered as freely negotiated and voluntarily agreed to by the lessors. He then proceeded to present two (2) witnesses to support his position.

Ironically, the two (2) witnesses called by the Applicant were Lessors on a number of "comparable" leases filed by the Respondent. Diane Elliott, lessor to a number of sites with the Respondent as lessee (***Exhibit #1, Tab 18***) contradicted the Respondent's position that the compensation offered by the Respondent was in general, willingly accepted by the majority of landowners. She contended that she, like so many others, felt pressured to accept an offer made by the Respondent, as they were told that was the going rate being paid, and that her only option if she did not accept the amount offered, was to apply to the Board for a determination. She indicated pursuing such option would require considerable time and expense, to prepare for, and appear at, a hearing. She said most landowners were very uncomfortable in the adversarial environment of a hearing, and thought that any gain in compensation achieved may only cover the costs of the hearing process, never mind the stress and anxiety caused by the process. She indicated that landowners often agree to offers from lessees with reluctance, not because they are satisfied with the offer, as lessees' would lead everyone to believe.

The Applicant's second witness, Aurel Poirier, was also a Lessor to a number of "comparable" leases filed as an exhibit by the Respondent (***Exhibit #1, Tab 15***). He too indicated that there is never any negotiation by the Respondent when it came to review of compensation. He stated the Respondent is not prepared to discuss unique situations that may pertain to a specific site, but simply offers their standard rate, which the landowner must either accept or be prepared to go through the hearing process. He stated this approach differs from that of other operators with whom he has dealings. His opinion was that rental rates should reflect increased land values. Under cross-examination, he acknowledged that he had a large number of surface leases on his land.

4. Another approach presented by the Applicant to determine compensation for surface leases was to correlate their historical increase compared to increases in other major components of farming. *(Exhibit #6, info before Tab 1 and throughout the binder)*

   His information indicates that from 1985 to 2012, the assessed value of land has increased by 5X, and the purchase prices for land have increased by 4.1 X. He uses an average increase of **4.5X** for the increase in the **value of land.**

   During that same period his average increase in the **cost of machinery** was between 2.1X and 6.1X and he used an average of **3.28X.**

   Also during that same period his **input costs** (fertilizer, chemicals, fuel) increased between 2.5X to 6.6X and for these he used an average of **3.6X.**

   Using the average of these three (3) main cost component increases for farming (4.5 + 3.28 + 3.6) results in an average increase of **3.79X.**

   He then applied this average increase to his previously referenced $2,000 surface lease rental rate for 1985, resulting in an increase in annual compensation for a surface lease of (3.79 X $2,000) = **$7,580.** On this value he then determined and applied an increase in lease size factor of 4.79 ac/ 2.95 ac = **1.6X.**

   Applying this increase in lease size factor results in an inflation adjusted surface lease value of 1.6 X $7,580 = **$12,128** for **2012,** equating to an annual rental rate of **$2,530 per acre.**

5. The major part of the case presented by the Applicant centered around determining the cost of the "**adverse effect**" caused to his normal farming operation due to the presence of the Respondent's well sites on his farm land.

   The Applicant stated that it had been his practice to farm over leased sites where possible. He stated that because of safety and liability concerns of having crop on well sites where an operator's equipment could potentially start a fire, as well as his strategic plan to minimize the possibility of the spread of disease (e.g. club root), he was now "planning" to farm around the entire leased area of each site.

The approach used by him to determine a defendable value for the cost of "tangible" adverse effect, was to determine a cost for each of the relevant matters listed under Subsection 26(1) of the Act. This methodology is commonly referred to as the "empirical" method.

Exhibit #7 provides a detailed description of an Alberta compensation review case in which two (2) brothers were the landowners. The landowners presented their case regarding the additional costs ("adverse effect") of farming around oil field installations. The case was first heard and decided by the Alberta Surface Rights Board (2006) and then by the Alberta Court of Queen's Bench (2009), and is hereinafter referred to as the "Lemay Bros" case. The Lemay Bros were successful in having their "empirical" methodology recognized and accepted by both the Board and by the Court.

The Applicant's methodology has been modeled after the Lemay Bros. approach, whereby the total compensation amount is broke down into three (3) components, namely: " Loss of Use", "Tangible" Adverse Effect and "Intangible" Adverse Effect.

For this hearing, the Applicant developed and presented a substantial amount of empirical data for two (2) of the sites (13-19-9-28WPM and 8-6-9-29WPM) being heard.

In his attempt to devise an empirical method to determine the cost of the adverse effect of having to contend with an oil field installation on his farming operation, the Applicant attempted to calculate the additional costs associated with "tangible" adverse effects.

To determine those tangible effects, the Applicant assumed that over the next three (3) years he would be farming around the entire leased area. This assumption resulted in eight (8) additional corners for each of the (11-12) annual farming operations he carries out on the N1/2 19-8-29WPM.

To place a cost factor on each farming operation, the Applicant calculated the extra time to conduct each operation and the cost per hour associated with each operation. First the Applicant determined the extra travel distance by using a sketch drawing showing the site (well site and access road) and the travel pattern used for each farming operation around that site. The extra time was calculated by determining the extra travel distance and dividing by the speed at which that operation would be conducted. The calculated time was then applied to the cost per hour to perform that operation. The cost per hour was determined using rates from the "Farm Machinery Custom and Rental Rate Guide 2014/15 in Manitoba" as they would apply to the type of machinery the Applicant owned and used.

The following is a description of a sample operation ("seeding operation") showing how the Applicant determined his additional costs in farming around the 13-19 well site and access road.

He uses a 9520T tracked tractor, with a 75 ft seed master air drill (covering 72 ft per pass, with independent openers), travelling during these additional maneuvers at 4 mph (5.86667 ft/sec).

To perform the first 2 passes to cover the headlands and the reduced areas created by the road allowance was calculated to require 564 seconds, while the extra turns caused by the headlands on two sides of the well site required another 761 seconds, totaling 1,325 seconds or 0.37 hr of extra equipment utilization time.

1. The cost to operate the tractor, air drill and liquid fertilizer add on were determined from the "Farm Machinery Custom and Rental Rate Guide 2014/15 in Manitoba" to be as follows:

   $288.75/hr (custom rate): 9520T track tractor
   $519.93/hr (custom rate): 75 ft air drill:
   $22.78/hr (rental rate): liquid fertilizer applicator (add on), for 60-75 ft applicator, with 4,300 gal tank and cart, less tillage tool)
   ($98.92/hr) (rental rate): minus 450 hp 4WD tractor:
   $732.54/hr Total cost per hour for extra equipment utilization

   The cost of this extra utilization time for equipment calculates to be:
   $732.54/hr X 0.37 hrs = $271.04

2. The overlap of seeded area was calculated to be 231,372.2 sq ft. / 43,560 sq ft/ac = 5.31 acres
   His calculated inputs were $130/ac (for Canola, would be less for Wheat & Rye)
   The cost of these extra inputs = 5.31 ac X $130/ac = **$690.50**

3. The service truck used by the Applicant is charged at $100.00/hr.
   The additional cost charged for this truck during the 0.37 hr of extra time = 0.37 hr X $100/hr = **$37.00**

4. The Applicant also has a "Biosecurity unit" on site charged at $100.00/hr.
   The additional cost charged for this unit during the 0.37 hr of extra time = 0.37 X $100/hr = **$37.00**

5. The A train used for transporting seed and fertilizer is charged at $120.00/hr.
   The additional cost charged for this unit during the 0.37 hr of extra time = 0.37 X $120/hr = **$44.40**

6. A 5-axle truck used to transport liquid fertilizer is charged at $120.00/hr.
   The additional cost of this truck during the 0.37 hr of extra time = 0.37 X $120/hr = **$44.40**

The total of the extra equipment costs, as described above, charged by the Applicant for the "seeding" operation total **$1,124.34**

Note:
For most field operations the Applicant shows an additional charge of $60.00 for the creation of headlands. It is not clear as to why this charge is applied over and above the extra utilization time which includes the first two (2) passes which create the headlands. The Applicant determined the creation of these headlands on average required an extra travel distance totaling 5,900 ft, with average travel speed of 5 mph (7.33 ft/sec).

This calculates as 5900 ft X 7.33 ft/sec = 804 sec.
At 3600 sec/hr the added time is 804/3600 = 0.22 hr.
The Applicant assumed an average operating cost of equipment to be $581.14/hr.
The calculated cost for headlands of 0.22hr X $581.14/hr = $127.85
This was reduced by 50% on the premise that if the lease was not present, the farmer would still have the distance travelled over the lease (was also the methodology used by Lemay Bros).
The resulting "headlands" cost charged to each operation is $127.85 X 50% = **$60.00**

Yield loss due to compaction caused by over/under application and overlaps was calculated as follows:

Normal yield - compaction yield = 61.63 bu/ac - 45.61 bu/ac = 16.02 bu/ac or 16.02/61.63 = 26% yield loss
Area of compaction around lease boundary = 2.64 ac
The Applicant used $394 as his average net revenue per acre *(see determination below)*
The resulting value for "yield loss due to compaction" = 26% X 2.64 ac X $394/ac = **$270.44**

For the 13-19 well site and access road, the additional costs or "tangible adverse effect" calculated by the Applicant for each farming operation during the year were:

1. $206.83 for pressed spray burn off
2. $145.27 for heavy harrow
3. $367.58 for cultivation
4. $1,124.38 for seeding (*for breakdown of details, refer to sample above*)
5. $355.25 for annual herbicide spraying *(2 to 3 applications per yr @ $142 per application)*
6. $146.74 for swathing
7. $587.42 for harvesting

8. $145.27 for heavy harrow
9. $206.83 for post harvest spraying burn off
10. $367.58 for cultivation/fertilizer application
11. $367.58 for heavy harrow *(*should probably be $145.27)*
12. $270.44 for yield loss due to compaction (26% on 2.64 ac)

$4,291.17 "Tangible" Adverse Effect Costs *[*would be $4,069 if $145.27 used]*

In addition, there is the "Loss of Use" cost which the Applicant calculates using a 3 crop rotation *(Canola, Wheat & Rye)* over 3 years:

Input costs:

P 11-52 fertilizer @ $635/tonne = $0.28/lb X $50 lbs/acre =$14/ac

N 28-0-0 Fertilizer @ $310/tonne = $0.14/lb X $285 lb/ac = $40/ac

Seed Canola @ $11.40/lb X 3.5 lb/ac = $40/ac

Seed Wheat @ $0.14/lb X 100 lb/ac = $14/ac

Seed Rye @ $0.13/lb X 110 lb/ac = $14/ac

Spray = $25/ac

Burn off spray = $12/ac

Canola:

Gross revenue/ac for Canola: avg yield of 44 bu/ac X avg price ($12.74 avg over 3 yrs) = $560.56/ac

Input costs for Canola: $14/ac + $40/ac + $40/ac seed + $25/ac +$12/ac = $130/ac

Net revenue/ac: Gross Rev - Input Costs = $560.56/ac - $130/ac = $430/ac

Wheat:

Gross revenue/ac for Wheat: avg yield of 50 bu/ac X avg price ($8.22 avg over 3 yrs) = $411.56/ac

Input costs for Wheat: $14/ac + $40/ac + $25/ac +$12/ac + $14/ac seed = $100/ac

Net revenue/ac: Gross Rev - Input Costs = $411.56/ac - $100/ac = $311/ac

Rye:

Gross revenue/ac for Rye: avg yield of 75 bu/ac X avg price ($6.67 avg over 3 yrs) = $500.25/ac

Input costs for Rye: $14/ac + $40/ac + $25/ac +$12/ac + $14/ac seed =* $60/ac *[*numbers add to $105/ac]*

Net revenue/ac: Gross Rev - Input Costs = $500.25/ac - $60/ac = $440/ac [*$395/ac if correct Input Costs used]

Average net revenue/yr with crop rotation:

= ($430 + $311 + *$440) = ($1,181)/ 3 yr = **$394/ac** *[*$379/ac if correct Rye input costs used]*

Loss of Use (for 13-19 site)

= Avg net rev./ac X size of total lease area = *$394/ac X 3.96 ac = $1,560.24 [*$1,500]

* Note: If correct Input costs for Rye are used, the average net revenue per year calculates to be $379/ac, which if used to calculate a value for "Loss of Use" results in ($379/ac X 3.96ac) = $1,500

In addition, the Applicant includes a further additional cost for "Intangible" Adverse Effects of $2,200. As part of his presentation, the Applicant noted the cost of "intangible" adverse effects of having well sites on his land included extra repair work to farming equipment caused by having to work (turn and/or backup) in tight corners created by the boundary of the lease.

The **Total Compensation requested by the Applicant** for the **13-19** well site is the sum of:

$1,560 for **Loss of Use** cost

$4,130 for **"Tangible" adverse effect costs**

$2,200 for **" Intangible" adverse effect costs**

$7,890 Total Compensation

Note for 9-19 site:

There was no evidence filed by the Applicant specifically regarding the 9-19 site. The Board assumes that because of the similarity of the site to the 13-19 site that the same evidence was intended to apply, including the "tangible" adverse effect model results above.

Position of the Respondent regarding amount of compensation:

The Respondent's position was that the Board should continue to determine compensation using the "global" (comparable leases) approach on which the Board has placed primary emphasis in recent years. The evidence submitted by the Respondent *(Exhibit #1)* consists of two (2) tables (*under Tab 14*), one (1) showing annual rentals for four (4) competitors on nine (9) leases and the other showing annual rentals on sixteen (16) leases for which the Respondent was the lessee.

The competitors' information showed that annual rents of $3,000 to $3,200 were the most common, on sites ranging from 3.31 to 3.98 acres, and averaged between $804 and $906 per acre. One (1) larger site (4.18 ac) had a rental at $3,400 ($813/ac). No information was provided as to the effective dates, land use, or access roads.

The Respondent's leases ranged from 3.45 to 4.19 acres with annual rentals of $3,200 ($696 to $928 per ac). The Respondent also showed four (4) battery sites ranging in size from 2.00 to 5.30 acres on which annual rentals ranged from $3,000 to $4,200 (rates ranged from $792/ac for the larger sites to $1,500/ac for the smallest site). Again, no information was provided as to the effective dates, land use, or access roads.

The Respondent also provided copies (*under Tabs 15 -17*) of offers made in January, 2015 to the two (2) witnesses of the Applicant. The offers indicated that these landowners had reviewed the new rentals offered to them and had agreed to and accepted (signed) those offers, all but one of which were for $3,200 annual rental. One (1) offer on a Diane Elliott lease was for $3,600 which was said to have a longer access road. Actual lease sizes and land use were not provided.

The Respondent's witness, Mr. Masson, stated that it is the landowner who initiates a request for a review of compensation, and that it typically takes the Respondent approximately thirty (30) days in which to review the compensation and make an offer. Under cross examination he confirmed that a visit to the site did not always occur, nor was there normally any discussion with the landowner. He stated the review is normally via internal discussion using the actual survey plan and surface lease. He also stated it was the policy of the Respondent to attempt to work with landowners regarding joint use of leased lands, and accommodate the farming over of leased land, where possible. When asked what he thought appropriate annual rentals might be for these two (2) sites, he indicated $3,200 for the 9-19 site and $3,400 for the 13-19 site (due to its slightly raised access road and the tank located on the lease). Under cross-examination he also confirmed he did not have a sound knowledge of the matters contained in Subsection 26(1) of the Act regarding the determination of compensation, and that the empirical approach was not used by the Respondent. He did not respond as to why the value of land was not reflected in their rental offers. He also confirmed that there are situations where the Respondent will review compensation requests when the request may be past the deadline stated in the surface lease.

The witness also stated that the Respondent had drilled approximately 200 wells in 2014, with no case of having to have the Board decide compensation. In addition, he stated that the Respondent had reviewed the annual rent on approximately 400 well sites in 2014, and it was only well sites on lands owned by the Applicants (i.e. Jorgensen family) that had not been successfully resolved with the landowners.

Counsel for the Respondent in his closing statement made the following observations and comments:

- that it was only the Jorgensen family with whom the Respondent is unable to come to agreement with, and who is the only party in recent years that have had cases before the Board
- in 2011, when he was counsel for another company (Enerplus Resources) on a compensation variance case before the Board, ironically it was he who argued that the Board should deviate from its practice since 1990, of using the "global" approach and move to the utilization of the "empirical" approach. The three (3) landowners in that case argued for continuation of the "global" approach. The Board, in its resulting Orders (#'s 4, 5 & 6/2011) stated "***The Board seriously considered the request to use an empirical method of calculating the amount of rent for surface rights, but have decided to follow the global approach for determining appropriate well site compensation.***"
- that in all recent review applications heard by the Board, the Board has continued to determine compensation primarily based on "comparable leases", the latest being Board Order 07-2014 (*Exhibit #9*) issued in October 2014. In that decision the Board ordered compensation in the amount of $3,200 for two (2) smaller size (3.45 ac & 3.54 ac) sites with non built-up access roads. The two (2) leases currently being heard were subject to review at the same time as that Board decision was made. Therefore the range of rates used at that time by the Board should also apply to the current two sites.
- that to provide some consistency and stability in its awards, the Board should not be increasing amounts every time it hears an application, but should set a range of compensation, in which typical sites would fall and so that the range could remain for a three (3) year period. This would put lease rentals and Board awards into a more stabilized three (3) year cycle, and provide both operators and landowners with a range of compensation to be used as guide lines in negotiations. Would eliminate what now has become a moving target each time the Board makes an award with an increase in rate. The Board needs to decide the frequency on which its range of compensation is subject to change.
- if an "empirical" approach is to be considered, typical sites should have similar adverse effects and warrant similar amounts of compensation
- the Applicant's stated three (3) year strategic plan in which he has elected to not farm across the lease site, is a personal decision of the Applicant which results in the highest possible "adverse effect" to his increased farming costs. Similarly, a number of the farming operations described by the Applicant employ equipment not commonly used by most farmers (service truck) and a "Bio-security unit".

- there is a "fractured" relationship between the Respondent and the Applicant. This is evidenced by both parties having to resort to the use of lawyers in dealings that are normally resolved between parties without the need for the involvement of legal counsel. Such involvement results in extra time and expense to the parties. The Applicant's requirement that the Respondent agree to paying him $100/hr for his time, before he was prepared to meet and discuss issues, is an example of the types of unreasonable demands often requested by the Applicant.
- normally the Respondent would be prepared to bend the rules regarding the deadline for requesting a review of compensation. With the Applicant knowing the deadline requirement, and not submitting his request for review until more than a month after the deadline, the Respondent took the position to enforce the deadline date condition in the surface leases for the well sites. Should the Board decide that the provisions of the Act prevail over the condition in the lease agreement (contract), it may be setting a dangerous precedent.
- the current annual rentals for these two (2) sites are not unfair when one considers the smaller size of the sites. However, applying the compensation range ($3,200 to $3,600) used in Board Order No. 07-2014, the 9-19 site is a typical site and the $3,200 amount should apply. The 13-19 site is slightly larger and has a small tank located on the site. An appropriate compensation amount for that site would be $3,400.
- suggested the Board should consider having costs awarded to an operator in cases where the compensation offered to the owner is similar to the resulting award to the Board. This might negate frivolous applications being made to the Board.

Analysis and Findings of the Board:

The Board in considering the issue of the amount of compensation to be paid, addressed each of the arguments put forward by the parties.

1. Use of "Global" approach in determining amount of compensation:

   - use of "comparable leases" was not intended to be a major consideration when the Act was implemented.
   - it was due to lack of sufficient reliable "empirical" data that the Board moved towards placing greater emphasis on "comparable leases", and why the Act was amended in 1996 to specifically include this provision.
   - if the "global" approach was to have compensation payments change in relationship with other general cost components in society, then utilizing the Bank of Canada - Inflation Calculator [http://www.bankofcanada.ca/rates/related/inflation-calculator/] based on monthly Consumer Price Index (CPI) data, might be a reasonable and reliable method of calculating compensation changes. The Board used this Inflation Calculator to analyze the result of starting in 1957 with a typical old well site with an average total lease size of 3.5 acres and annual rent of $100/ac adjusted by applying annual CPI increases. The results showed that in general, other than for the period 1998-2003, Board awarded annual compensation amounts were generally greater than the 1957 CPI adjusted rate. The 1957 annual rental of $350 ($100/ac) increased to $3,005 ($754.50/ac) in 2015, an increase of 758.6 %.

The Applicant referred to a 1984 Board order between Omega Hydrocarbons and Griffiths ($4,000 first yr and $2,000/yr). No such Order could be found by the Board. However, two (2) 1984 Orders (#25/84 & #26/84) were found for which the annual compensation for well sites on Griffith's land was set at $1,750 (or approximately $578/ac). The Board used the 1985 Newscope/Olhe Jorgensen lease (*Exhibit #6, Tab 12*) having a $2,000 annual rent for 3.03 acres or $660/ac, and adjusted the annual compensation by the CPI. The inflation adjusted rental value for the 1985 Newscope lease is $4,030 ($1,330/ac) in 2015.

If the 1990 Board awards of $2,200 for the large grouping of "older & smaller" leases (averaging 3.5 ac per site) in the Virden area were used as the starting point, the CPI adjusted annual rent for 2015 would be $3,564 or $1,018/ac.

The Board also did an analysis using the 2011 Board awards of $3,200 for the large grouping of "older & smaller" leases in the Virden area as a starting point. The result was a CPI adjusted annual rent for 2015 of $3,400 or $971/ac.

As noted, using CPI inflation adjusted rates for the major awards of the Board in 1990 and 2011 as a basis; an average rate of compensation of approximately **$1,000/ac** for 2015 is considered a reasonable compromise.

Applying this CPI inflation adjusted 2015 rate of $1,000 per acre to the well sites, provides the following result for 2015:

09-19: (3.91 ac) = $3,910

13-19: (3.96 ac) = $3,960

2. Increase in Land Values

The increase in land value information submitted by the Applicant indicates that land values have increased by an approximate amount of 4X from 1985 to 2012. Applying this same 4X increase to a 1985 3.03 ac surface lease with a $2,000 annual rent (*Exhibit #6, Tab 12*) results in a 2012 value of $8,000 or $2,640 per ac.

3. "Comparable Leases"

The "comparable leases" information provided by the Applicant and by the Respondent (both described previously), strongly support annual rentals around $3,200 or $850/ac. Applying the $850/ac rate, would result in rentals for the subject two (2) sites as follows:

09-19: ($850 X 3.91 ac) = $3,325
13- 19: ($850 X 3.96 ac) = $3,365

4. Comparing Increase in Annual Lease Rentals with other Farming related Cost Increases

The Applicant's submission relating to increases in other farming related costs indicates that for the 28 year period from 1985 to 2012, farm related costs increased approximately 3.8X.

Using a $2,000 annual rental value for a new lease in 1985 (*Exhibit #6, Tab 12)* and applying the 3.8X farm related costs factor, would result in a 2012 amount of $7,600 ($2,508/ac).

Applying that 2012 value ($2,508/ac) to the subject two (2) sites results in the following:

09-19: ($2,508 X 3.91 ac) = $9,806
13- 19: ($2,508 X 3.96 ac) = $9,932

5. Determining the cost of "Adverse Effect" utilizing an "Empirical Approach"

The Act, when first implemented in 1987, was drafted so that an "empirical" methodology would be used to determine compensation. Subsection 26(1) of the Act set out eight (8) specific matters which the Board was required to consider in determining compensation to be paid for surface rights. The early proceedings of the Board attempted to follow this approach, but were seriously hampered by the lack of sound empirical evidence for each matter. The Board then started to also consider the compensation being paid for "comparable" leases in the area. The then Clause (h) of Subsection 26(1) with the wording "and any other

relevant matter" enabled the Board to use this additional information. This approach had been used in Alberta, where it was commonly referred to as the "pattern of dealings "approach. As the Board continued to place greater emphasis on "comparable leases", the Act was amended in 1996 to specifically provide for the inclusion of "comparable lease agreements" under Subclause 26(1)(h)(ii) as a relevant matter for consideration by the Board. Over the years, the Board has placed significant consideration on "comparable lease agreements", as normally, little if any, definitive empirical information was filed as evidence.

In 2005, a rental review situation occurred in Alberta where the landowners (***hereinafter referred to as the "Lemay Bros."***) provided detailed empirical evidence in support of their claim for "adverse effect". The Alberta Surface Rights Board heard the case and accepted the empirical evidence submitted by the landowners as more cogent than the evidence (primarily "comparable leases") presented by the operator. The subsequent Board decision in 2006 resulted in an award for "adverse effect" for a 4.4 acre lease with access road of $3,600 whereas the operator had offered $1,770. For a second site, being a 3.56 acre site with no access road, the Board accepted the landowner's amount for "adverse effect" of $3,000 whereas the operator had offered $1,643. The operator successfully appealed the Board decision on the grounds that it had not been provided with reasonable time to prepare its case because the landowners had "blindsided" them at the hearing with their empirical evidence. The Alberta Court of Appeal, granted the appeal, and as required by the Alberta Surface Rights Act, the Alberta Court of Queen's Bench conducted a new hearing, at which both sides had equal opportunity to present their positions. The operator used expert witnesses in an attempt to degrade the empirical evidence submitted by the landowners. The end result was that the Court continued to accept the empirical evidence submitted by the landowners as being more cogent to that of the operator, and made only minor reductions in its final award. The 2009 Court decision separated the "adverse effect" matter into two (2) components, namely "tangible" (measureable) adverse effect and "intangible" adverse effect. The "tangible adverse effect" amount ordered by the court was $2,460 on the larger site and $1,448 for the smaller site. An amount of $1,000 per site was awarded for the "intangible" adverse effect component. The one (1) other component making up the award was $350/acre for "loss of use", an amount upon which the parties had previously agreed. This historical ruling by the Board and the Court resulted in an increase of 100% in the annual rent for the site with the access road ($2,500 increased to $5,000), and a 61% increase for the site with no access road ($2,300 increased to $3,700).

This Board has been referred to the above described Lemay Bros. case in the past. However, prior to this Hearing, no party had submitted a sufficient amount of empirical data on which the Board at that time was prepared to give meaningful consideration.

In this hearing, the Board has found the large amount of detailed information presented by the Applicant pertaining to the 13-19 site to be useful. The Board recognizes the amount of time and effort the Applicant expended in analyzing and preparing the information. The Board also recognizes that the Applicant has used much of the same methodology as the Lemay Bros. and is cognizant that much of the data inputs are only the best estimates of the Applicant. The Lemay Bros. case before the Alberta Court of appeal was subjected to the rigorous scrutiny of expert witnesses presented by the operator. Unlike the Alberta Surface Rights Board, the Court did not accept the complete position put forward by the Lemay Bros. Its award was 13% less for the site with no access road.

The Board notes that the Respondent, although knowing that a major part of the Applicant's position was based upon empirical evidence, chose not to have any expert witness to refute any part of that evidence.

This Board is reluctant to accept the Applicant's numbers in full regarding "tangible" adverse effect, for a number of reasons, including:

- the requested $4,130 ($1,042/ac) amount for just the "tangible" adverse effect seems unrealistically large. Considering the net revenue ($1,560 or $394/ac) the Applicant states would be generated by the 3.96 acre site, it is difficult to accept that farming around the site would cost an additional ($1,042/$394) **164%** of the value for loss of use. In comparison, the Lemay Bros model resulted in an additional cost of $560/ac for the site with an access road or ($560/$350) only 60% more than the value for loss of use, and for the site with no access road the corresponding amount was only ($407/$350) 16% more than the value of loss of use. The

Applicant's requested amount for "tangible" adverse effect per acre is 86% to 156% greater than the Lemay Bros award. If the same proportion as the Lemay Bros was applied for this site, the resulting amount would be (1.6 X $1,560) $2,496 or $630/ac.

- the "comparable lease" evidence filed by both parties would also indicate that this amount for this one (1) component is excessive. The Applicant's "tangible adverse effect" amount is 30% greater ($4,130/$3,200) than the "total" compensation amounts in comparable leases.
- the Applicant's rationale for planning to operate around the leased land, and not over a portion of it, as has been his practice to date. The reasoning which seemed to be presented at the Hearing was that he was becoming more and more concerned with the transportation of club root disease onto his lands, and did not want to be working or crossing leased land on which such disease may be present due to the operator's traffic on and off the site. Another possible reason was that he had previously cropped too close to a wellhead, and when the operator was performing a servicing operation on the well, the existence of the Applicant's grown crop on the site had created a potential fire hazard for which the Applicant did not want to be found liable.
- with the Respondent stating that the wells on the subject sites are planned to be abandoned, it is reasonable to assume that the well site abandonment operations will require farm equipment, which in all likelihood will be performed by the Applicant, which is common practice, and preferred by most, if not all, landowners. Should this situation arise, would the Applicant not then be working across a well site that he has previously elected not to farm due to biosecurity concerns?
- there were models available in 2006 (Lemay Bros) to do assessments of added costs of farming around installations on land. There was no mention made by the Applicant as to whether he had attempted to find a model to test his methodology and results. Had this been done, the Board would have been more susceptible in accepting the Applicant's empirical amounts and results.
- unlike the Lemay Bros case before the Court, the model used by the Applicant has not undergone a rigorous review and evaluation by experts.
- why is there a standard cost for "headlands" of $60 added to each of the various operations, when the first two (2) passes for that operation could be seen as the "headlands" for which there is already an included charge.
- why should the Applicant be charging each operation for his "biosecurity unit" when that unit would still be used even if there was no well site on the land.
- some small accounting errors are evident in the evidence, such as in the Cost Calculation summary for the 13-19 site, where $367.58 was charged for the 3rd heavy harrow operation when the first two (2) are charged at $145.27. Also in calculating Loss of Use, the total Cost of Inputs for the Rye crop appears to be $45/ac too small, which results in a $45/ac higher Loss of Use amount.
- whether all the yearly operations the Applicant has listed and included in his calculation of costs will actually occur in every given year
- that the Applicant has stated and emphasized that he and his family "Hold ourselves to a higher standard than other people." Therefore their method of farming may be more time consuming and costly. The number of farming operations he contends will be done each year may not be done by most farmers (e.g. 3 heavy harrowing operations)
- as the description of how he plans to now operate <u>around the entire leased area</u> is significantly different than how he has normally operated around well sites on his land, it raises the question as to whether the Applicant will in actual fact, employ the described changes when they would appear to be excessive and possibly not necessary

Based on all the evidence, including a comparison with the Lemay Bros model and results, and the offsetting weight given to "comparable leases", the Board considers a value for "tangible adverse effect" of approximately $1,700 to be reasonable for this site.

In analyzing the various components affecting the determination of compensation, the resulting information would suggest that a dollar per acre rate basis is a much better method to determine compensation. The current methodology simply based on land use (crop vs pasture) used by some operators to determine compensation often results in larger leases being paid less per acre than smaller leases, when land use is the same. Properly assessing "loss of use" and "tangible adverse effects" on a per acre basis would result in a more realistic and equitable compensation regime. On the other hand, "intangible adverse effects" is one (1) factor that is more appropriate to be set on a per site basis.

As stated by counsel for the Respondent at the hearing, and evidenced by the Applicant during his presentation at the hearing and in the evidence filed (*Exhibit #2, Tab 1*), the Board would agree that a "fractured" relationship exists between the parties. It would appear by the evidence that the Applicant may never be completely satisfied with what he expects from the Respondent, and that the Respondent has become disillusioned with ever being able to satisfy the demands of the Applicant.

Due to the existence of meaningful empirical evidence at this hearing, the Board did not place its customary emphasis on the "comparable lease" evidence filed by both parties. The Board considered the empirical evidence as being more cogent than the "comparable lease" evidence, similar to the same conclusion reached by both the Alberta Board and Court in the Lemay Bros case.

As noted in the "Loss of Use" calculations provided by the Applicant, there appears to be an error. Applying the same revenue values as determined by the Applicant, and the corrected "total input costs" for Rye, the Board has determined a value of $379/ac to be a more appropriate value than the $394/ac number used by the Applicant. Applying this value to the 13-19 site having an area of 3.96 acres, the "Loss of Use" cost component is calculated as ($379/ac X 3.96 ac) = $1,500

Intangible Adverse Effects may include such items as nuisance & inconvenience (includes need for owner's extra surveillance of property; dealing with the operator's employees and contractors; additional noise, dust and safety concerns caused by extra traffic; garbage on and off site) and the time spent developing strategies to mitigate impacts posed by operator's operations and facilities (e.g. weed & pest control).

The Board considers the Applicant's requested cost of $2,200 for "Intangible" Adverse Effect to be highly excessive, and with no rationale.

The Board has determined an amount of $800 for "Intangible Adverse Effect" to be more reasonable.

The Board also considers the three (3) compensation component areas used in Lemay Bros and by the Applicant to be a reasonable compilation of all the applicable matters under Subsection 26 (1) of the Act. Therefore, the Board has used cost values for those three (3) components to determine the amount of compensation as follows:

$1,500	Loss of Use (3.96 ac @ $374/ac)
$1,700	Tangible Adverse Effect (=$429/ac)
$800	Intangible Adverse Effect
$4,000	

Note: Converting this amount to $/acre results in a value of $1,010/acre. With reference to the Global Approach described in clause 1 above, this value per acre corresponds reasonably with the CPI inflation adjusted amounts for the major Board awards for the Virden group of leases made in both 1990 and 2011.

The 9-19 site is similar to the 13-19 site, other than being 0.05 acres smaller and having a tank situated on the site. Since no specific evidence was filed pertaining to the 9-19 site, the Board has decided that the smaller lease size offsets the cost of any additional adverse effect due to the tank, and therefore the 9-19 site is considered to be the same as the 13-19 site in regards to compensation.

In accordance with Section 32 of the Act, and being cognizant that the leases on these sites will not be eligible for rent reviews for another three (3) years, and after considering all the evidence, and its own knowledge and experience of farm and agricultural practices, and using the compensation components described above, the Board has decided that annual compensation in the amount of $4,000 for each of the well sites is fair and reasonable.

3. **Are costs to be awarded?**

Subsections 26(4) and (5) of the Act provide for how a declined offer prior to a hearing may determine whether costs will be awarded. If the offer is less than 90% of the compensation awarded by the Board, the Board is required to increase the compensation awarded to the landowners by "such legal, appraisal and other expenses that are incurred by the owner or occupant, as the case may be, for the purposes of preparing and presenting a claim for compensation and that the board considers just and reasonable." The practice of the Board is to permit the Respondent to provide the Board with a sealed copy of its last offer to the Applicant prior to the commencement of the hearing. The amount of the sealed offer determines whether costs are required to be ordered by the Board.

The Board arrived at the above noted decision on compensation following a meeting on June 1, 2015. Before opening the sealed offers provided by the Respondent, the Board decided that since each well site had been filed as a separate application, that determination of costs would be considered individually for each well site. The sealed offers provided by the Respondent were then opened revealing an offer of $3,200 for the Lsd 9-19 site and $3,400 for the Lsd 13-19 site.

Applying the 90% rule as provided under the above Subsections of the Act, the Board determined that the offers are less than the required (90% X $4,000) $3,600 amount, and therefore the Board is required to award costs of and incidental to the proceedings pertaining to the applications for the well sites.

4. **Amount of Costs to be awarded?**

Subsection 26(3) of the Act states as follows:

> *"Costs in discretion of board*
> *26(3) Subject to subsections (4) and (5), the costs of and incidental to any proceeding of the board shall be in the discretion of the board."*

Board Order 06-2014 regarding "Costs For Hearing", pertained to the same two (2) parties. In that Order the Board indicated that it had drafted revised Cost Guidelines to cover a standard one application proceeding (hearing). As this proceeding related to three (3) separate applications, the Board has used its discretion to determine costs for the proceeding. Similar to that Order, the Board does not simply multiply the cost guidelines that would be used for a one (1) application (site) proceeding. It recognizes that much of the work done and time spent, along with the associated expenses would be similar to a single site proceeding.

The Board has taken into account the complexity, amount and value (usefulness/applicability) of the evidence prepared and presented by the Applicant at the Hearing, and the Applicant's use of time and manner of presentation at the Hearing.

Recognizing the Applicant is not a lawyer, the Board found that although the Applicant had prepared much meaningful information, his attitude and manner of presentation at the Hearing was less than ideal. The Hearing could possibly have been completed in one (1) full day, instead of one and a half days, if the Applicant had been less theatrical and more focused on a clear presentation of relevant information.

The Board, using its drafted "Cost Guidelines" and discretion, has concluded that costs in the amount of $3,900 are just and reasonable, determined as follows:

$500	Preparation, filing and serving of applications and notices
$1,400	Preparation for hearing (including any legal advice)
$1,200	Participation at hearing (presentation and defense of position, cross-examination of other party)
$800	Disbursements *(modeled after those in Board Order 06-2014)*
$3,900	**Total Costs**

Note: *These Costs pertain to the entire proceeding (Hearing), including the application by Evelyn Jorgensen on site 8-6-9-29WPM. The Total Costs shall be split equally, at $1,300 per application.*

5. Is the Applicant entitled to interest on any amounts owing?

In accordance with Subsection 33(1) of the Act, the effective date of the variation in compensation is December 29, 2014, the date of the two (2) applications.
The Board, as provided under Clause 25 (4)(d) of the Act, has decided interest should be payable on any outstanding amount payable, and has determined that the Applicant is entitled to interest at a rate of 3.0% per annum on any unpaid portion of the amounts of the above ordered compensation, from the effective date, December 29, 2014.

In addition, interest at the same rate will be payable by the Respondent to the Applicant on any amount of the Total Costs unpaid after 30 days from the issuance date of this Order.

Decision delivered this 7th day of July, 2015.

H. Clare Moster,
Presiding Member