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: 11-2015
File No: 02-2015

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) — **Evelyn Francis Jorgensen**

— AND —

Respondent (Operator) — **Tundra Oil and Gas Partnership**

Occupant — **Carlyle Glenn Jorgensen**

CONCERNING:

Lsd 8 in Section 6-9-29 WPM in the Province of Manitoba (the "well site", including its associated access road).

PURPOSE OF HEARING:

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

VARIATION OF COMPENSATION

BACKGROUND:

On December 19, 2014, the Applicant applied to the Board requesting a variation of the compensation payable under the surface lease pertaining to the well site.

The Board via letter dated February 5, 2015, informed both parties that due to weather conditions and snow cover, a viewing of the site was not practical at that time, and that a hearing of the matter 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 to 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 intended 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 site 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 well site took place on May 11, 2015, as planned with both parties attending. The Applicant attended, along with her son, Carlyle Jorgensen, who is the occupant of the well site and who planned to represent the Applicant at the Hearing.

At the beginning of the hearing, the parties confirmed that the only issue being heard was the determination of the amount of annual compensation payable under the surface lease pertaining to the well site.

ISSUES:

1. **Determination of whether the current annual rent amount on the well site should be varied, and if so, by how much?**

2. **The amount of Costs, if any, to be awarded?**

3. **Is a party entitled to interest on any moneys owed to it?**

APPEARANCES:

APPLICANT: Evelyn Francis Jorgensen *(represented at the hearing by her son Carlyle Jorgensen)*
Witnesses: Diane Elliott - Lessor of Tundra surface leases (sworn)
Aurel Poirier - Lessor of Tundra surface leases (sworn)

Occupant: Carlyle Glenn Jorgensen (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)

Note: *Three (3) applications were being heard at the hearing, all pertaining to variation of compensation payable under surface leases for which the Respondent was the Lessee. Some of the evidence filed at the hearing, pertained to all three applications. The following is a list of all evidence filed:*

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 (9991 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 amount of annual compensation for the well site, effective December 29, 2014, shall be $4,200.**
3. **The Applicant is entitled to costs associated with the hearing in accordance with the provisions of Subsection 26 (3) of the Act, and the Respondent shall pay the Occupant costs in the amount of $1,300.**
3. **The Respondent shall pay to the Applicant interest at a rate of 3.0% per annum on any unpaid portion of the amount of the above ordered compensation, from December 29, 2014, to the date of payment.**

   The Respondent shall pay to the Occupant interest at a rate of 3.0% per annum on any unpaid portion of the above ordered costs unpaid following 30 days of the issuance date of this Order.

REASONS FOR DECISION

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

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

a) The original Surface Lease was between Evelyn Francis Jorgensen and Kiwi Resources Ltd. The Lease was dated December 22, 2005, with annual rent set at $2,258. *(Exhibit #8, Tab 9)*

b) The well site is not directly in the center of the Lsd but skewed approximately 70 metres east and 68 metres north.

c) The well site has dimensions of 100 metres per side giving it an area of 1.00 ha (2.47 ac).

d) The well site has an access road 15 metres in width.

e) The access road is L-shaped, starting at the road allowance at the northeast corner of the southeast quarter of the section, running 130 metres west along the north boundary of the quarter section, then running 79 metres south connecting with the north boundary of the well site.

f) The area of the access road is 0.313 ha (0.77 ac).

g) The total leased area is **1.313 ha (3.24 ac).** *(Exhibit #1, Tab 4)*

h) The access road is minimally built-up with a gravel cover which enables farm machinery to pass over it.

i) The land is rolling cropland, and the well site is situated north of a low area, and has a dugout to the northwest.

j) It was pointed out that the Applicant in working around the leased area also travels onto a portion of the neighboring property on the north side of the access road.

k) It was also noted that there were three (3) additional well sites with associated access roads on the quarter section.

l) On October 14, 2014, the Applicant requested the Respondent review the annual compensation under the Surface Lease. (*Exhibit #1, Tab 1*)

m) The Applicant applied to the Board on December 19, 2014, for a variation of the amount of compensation payable under the Surface Lease for the well site. (*Exhibit #1, Tab 2*)

Position of the Applicant regarding amount of compensation:

The Occupant presented the case on behalf of the Applicant (his mother). The supporting arguments previously used at the hearing by the Occupant for his two (2) sites were also used for this well site. The key points presented in support of higher compensation were:

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 Occupant 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.

3. "Comparable lease" evidence filed by the Occupant (*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 Occupant, for which the Respondent was the Lessee, had annual rentals in 2013 of $3,000 for crop land. The position of the Occupant 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 Occupant 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. 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, not 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 Occupant'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 Occupant 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 Occupant centered around determining the cost of the "**adverse effect**" caused to his normal farming operation due to the presence of the Respondent's well site on the land he farms.

The Occupant 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 lease area.

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 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 the Court.

The Occupant'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 Occupant developed and presented a substantial amount of empirical data for two (2) of the sites (13-19-8-29WPM and 8-6-9-29WPM) under review.

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 Occupant attempted to calculate the additional costs associated with "tangible" adverse effects.

To determine those tangible effects, the Occupant 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 site with which to contend, for each of the (11 to 12) annual farming operations he carries out on the SE1/4 6-9-29WPM.

To place a cost factor on each farming operation, the Occupant calculated the extra time to conduct each operation and the cost per hour associated with each operation. First the Occupant determined the extra travel distance by using a sketch 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.

This is the same methodology used by the Occupant for his 13-19-8-29WPM well site as described in detail in Board Order No. 10-2015. [***For greater detail of the methodology refer to Board Order No. 10-2015***]

The following is a comparison of the additional costs or "tangible adverse effect" calculated by the Occupant for each farming operation during the year for the two (2) different sites:

13-19-8-29WPM site:	8-6 well site + *(N parcel on neighbor's land):*
1. $206.83 for pressed spray burn off	$199.89 + $18.44 = $218.33

2.	$145.27 for heavy harrow	$165.99 + $25.50 = $191.49
3.	$367.58 for cultivation	$318.37 + $30.90 = $347.27
4.	$1,124.38 for seeding	$865.39 + $160.14 = $1,025.53
5.	$118.42 for annual herbicide spraying	$344.69 + $42.66 = $387.35
6.	$146.74 for swathing	$151.44 + $36.87 = $188.31
7.	$587.42 for harvesting	$465.40 + $63.85 = $529.25
8.	$145.27 for heavy harrow	$165.99 + $25.20 = $191.19
9.	$206.83 for post harvest spraying burn off	$199.89 + $18.44 = $218.33
10.	$367.58 for cultivation/fertilizer application	$367.58 + $30.90 = $398.48
11.	$206.83 for heavy harrow	$165.99 + $25.50 = $191.49
12.	$270.44 for yield loss due to compaction (26% on 2.64 ac)	(29% on 2.64 ac) $301.56
		Subsoil pass $146.25 / 3= $48.75
$4,130*	"Tangible" Adverse Effect Costs	$4,231

As indicated, the Occupant has also included additional costs related to a small parcel of land adjoining the access road for the 8-6 site located on the NE1/4 6-9-29WPM. The Occupant also farms this small parcel. The added cost for farming this parcel is $479 which he included in the $4,231 total.
The Occupant used the same "net revenue per acre" value he had calculated for the 13-19 site. The $394/ac net revenue was based on a rotation of three (3) crops (Canola, Wheat and Rye) each having their respective revenue value and input costs.
As noted by the Board in Order No. 10-2015, the Operator had an error in his total input costs for Rye which resulted in inflated average net revenue by $20 per acre. The average net revenue cost used by the Occupant was $394/ac. The corrected average net revenue cost is $374/ac.

The Occupant's calculated "Loss of Use" cost is:

= Avg. net rev./ac X size of total lease area = $394/ac X 3.24 ac

= $1,276

The Board corrected amount is $374 X 3.24 = $1,212

In addition, the Occupant includes $2,200 as an additional cost for "Intangible" Adverse Effects. He noted the cost of "intangible" adverse effects of having the well site 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 Annual Compensation requested by the Applicant for the well site is the sum of:

$1,276 for Loss of Use cost

$4,231 for Tangible adverse effect costs

$2,200 for Intangible adverse effect costs

$7,707 Total Compensation

Position of the Respondent regarding amount of compensation:

The Respondent's position was the Board should continue to determine compensation using the "global" (comparable leases) approach 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 of offers (*under Tabs 15 -17*) 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 (1) 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 stated that it is the landowner who initiates a request for a review of compensation. He also stated that it typically takes the Respondent approximately 30 days 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 land, and accommodate the farming over of leased land, where possible. When asked as to what he thought appropriate annual rentals might be for the well site, he suggested $3,400 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 Board involvement. 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:

- the Jorgensen family is the only party with whom the Respondent is unable to come to agreement with, and also the only party in recent years that has 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 and 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 (2) 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 Occupant (Applicant). This is evidenced by both parties having to resort to the use of lawyers in dealings that are normally resolved between parties. Such involvement results in extra time and expense to the parties. The Occupant'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 Occupant.

- applying the compensation range ($3,200 to $3,600) used in Board Order No. 07-2014, this well site might warrant the higher $3,600 compensation amount due to it being a small battery.

- 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 Occupant 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 and #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 and 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 site results in a 2012 annual rate of 3.24 ac X $1,000/ac = $3,240.

2. Increase in Land Values

The increase in land value information submitted by the Occupant 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 Occupant 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 an annual rental for the well site of (3.24ac X $850/ac) = **$2,754.**

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

   The Occupant's submission relating to increases in other farming related costs indicates that for the 28 yr period between 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 site results in a 2012 annual rental rate of (3.24 ac X $2,508/ac) = **$8,126.**

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

   In Board Order No. 10-2015, the Board described in detail how the "empirical approach" to determining compensation had evolved in Manitoba, along with the well known "Lemay Bros." case in Alberta (*refer to that Order or Exhibit #7 for greater detail*).

   Similar to Board Order No. 10-2015, the Board has found the large amount of detailed information presented by the Occupant pertaining to the additional cost of "adverse effect" caused by farming around the 8-6 well site to be informative and useful. The Board recognizes the amount of time and effort the Occupant 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 the best estimates of the Occupant. The Lemay Bros. case before the Alberta Court of Queen's Bench was subjected to the rigorous scrutiny of expert witnesses presented by the operator. Unlike the Alberta Surface Rights Board, the Court did not fully accept the position put forward by the Lemay Bros.

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

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

   - the $4,231 ($1,306/ac) amount seems unrealistically large. Considering the net revenue the Occupant states is being generated by the 3.24 acres ($1,277 or $394/ac), it is difficult to accept that to farm around the site would cost an additional 3.31 X the value for loss of use (or net revenue). In comparison, the Lemay Bros. model resulted in an additional cost of $560/ac which was only 60% more than the value for loss of use ($350/ac) in that case. Using the same proportion for this well site results in a value of (1.6 X $1,277) **$2,043** or **$631/ac.**
   - the "comparable lease" evidence filed by both parties would also indicate that this amount for this one component is excessive. The Occupant's "tangible adverse effect" amount of $4,232 is ($4,232/$3,200) 32% greater than the "total" compensation amount in comparable leases.
   - the Occupant'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 movement of the operator's vehicles and equipment 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 Occupant's grown crop on the site had created a fire hazard for which the Occupant did not want to be found liable.

- there were models available in 2006 (Lemay Bros.) to do assessments of added costs of farming around installations on farm land. There was no mention made by the Occupant 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.
- the model used by the Occupant has not undergone a rigorous review and evaluation by experts.
- the Occupant's calculated "headlands" cost reduced by the model's 50% factor is $46.60. However, for each of the operations, the Occupant charges $60 for "headlands", the same amount he used for the 13-19 site.
- 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 a charge included.
- the Occupant has included $478.70 as extra costs related to farming the very small parcel of land on his neighbor's land located immediately north of the access road. Farming this difficult piece of property is a choice the Occupant has made, and it is questionable whether the extra costs should all be charged against the well site.
- why should the Occupant 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.
- whether all twelve (12) of the yearly operations he has listed and included in his calculation of costs, will actually occur in every given year.
- that the Occupant 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 much more time consuming and costly. The number of farming operations he contends are done each year may not be done by most farmers (e.g. the three (3) heavy harrowing operations, special subsoil cultivator).
- the description of how he plans to operate around the entire leased area is significantly different than how he has normally operated around well sites on his land, and it raises the question whether the Applicant will employ the described changes when they would appear to be excessive and possibly not necessary.

However for this well site, the Board does recognize that the longer access road, along with its L-shape, creates a more difficult lease to farm around. This would qualify it for a larger "tangible adverse effect" cost than the two (2) sites under Board Order No. 10-2015 which were awarded $1,700. The Board is also cognizant that the other well sites and access roads on the quarter section result in some cumulative effect.

In analyzing the various components affecting the determination of compensation, the resulting information would suggest that a dollar per acre rate basis is a 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. The location of the well site and access road, and the nature of the access road (built-up, trail) greatly determine "tangible adverse effect".

On the other hand, "intangible adverse effects" is one (1) factor that is more appropriate to be set on a per site basis.

Based on all the evidence, including comparison with the Lemay Bros. model and results, the Board considers a value for "tangible adverse effect" of around $2,000 reasonable for this site.

Due to the existence of meaningful empirical evidence at this Hearing, the Board did not place its customary emphasis on the "comparable leases" 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.

The Board accepts the Occupant's methodology for calculating "Loss of Use", but as noted, his rate for "net revenue" of $394/ac is reduced to $379/ac to account for the error. This results in the "Loss of Use" cost component being ($374/ac X 3.24 ac) = $1,212.

Intangible Adverse Effects may include such items as nuisance and inconvenience (need for owner's extra surveillance of property, dealing with the operator's employees and contractors, additional noise and 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 and pest control).

As stated by counsel for the Respondent at the Hearing, and evidenced by the Occupant during his presentation at the Hearing and in the evidence filed (*Exhibit #2, Tab 1*), the Board notes there is a "fractured" relationship between the parties. It would appear by the evidence the Occupant may never be completely satisfied with what he expects from the Respondent, and that the Respondent may have become disillusioned with ever being able to satisfy the demands of the Occupant. This in itself is evidence of an "intangible adverse effect" on the Occupant and Applicant, caused by the well site being on their farm land.

Also in considering "intangible adverse effects", the Board recognizes this site is officially classified as a battery site, as evidenced by Battery Operating Permit No. 97. *(Exhibit 5, Tab 9)* A battery site normally involves more equipment, resulting in more traffic and related issues. The Respondent also indicated that this site should probably be awarded more because of it being a small battery site.

Considering all the factors affecting this matter, the Board considers an amount of $1,000 for "intangible adverse effects" for this site to be reasonable.

Similar to Board Order No. 10-2015, the Board considers the three (3) compensation component areas used in that Order to be a reasonable description of all the applicable matters under Subsection 26 (1) of the Act. Therefore, the Board has used values for those three (3) components to determine the total amount of compensation as follows:

$1,212	Loss of Use	(3.24 ac @ $374/ac)
$2,000	Tangible Adverse Effect	($2,000/3.24 ac = $617/ac)
$1,000	Intangible Adverse Effect	
$4,212		

In accordance with Section 32 of the Act, and being cognizant that the Surface Lease on this site will not be eligible for rent reviews for another three (3) years from the effective date of this Order, 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 for the Surface Lease pertaining to this well site, annual compensation in the amount of $4,200 is fair and reasonable.

Note: Converting the $4,200 amount to $/acre results in a value of $1,296/acre. The shape and location of the lease area, the built-up nature of the access road, and the site being licensed as a "battery site"; justify the higher per acre rate of compensation, when compared to the other two (2) well sites (9-19 and 13-19) heard at this Hearing.

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 $3,600 for the well 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 $4,200) $3,780 amount. Therefore, the Board is required to award costs of and incidental to the proceedings pertaining to the application for the well site.

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 (1) 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. The Board 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.

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 application and notice
$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 applications by Carlyle Jorgensen on sites 9-19-8-29WPM and 13-19-8-29WPM. The Total Costs shall be split equally, at* ***$1,300 per application.***
The costs for the 8-6 site are to be paid to the ***Occupant****, who was the party that prepared and presented the case for the Applicant, and represented the Applicant at the Hearing.*

5. Is a party entitled to interest on monies owed to it?

In accordance with Subsection 33(1) of the Act, the effective date of the variation in compensation is December 19, 2014, the date of the application.

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 19, 2014.

In addition, interest at the same rate will be payable by the Respondent to the Occupant 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