

Advisory 2020-5

Annual compensation, rental reductions, negotiations; and what a landowner needs to know about rights and responsibilities.

Further to the Advisory issued by the Farmers' Advocate Office ["the FAO"] in March 2020, the FAO has observed that many operators are carrying out reviews of the annual compensation payments paid to landowners and operators are seeking reductions for various reasons. Landowners who are affected may have received a notice of a rental review based on operator economic hardship, change of use of the leased land, or an attempt to reduce the acreage of the leased area. It is essential for landowners to ensure that their rights are recognized, understood and protected as some actions may not be in compliance with the provisions of the *Surface Rights Act* (SRA) and the *Environmental Protection and Enhancement Act* (EPEA).

The Surface Rights Board recently ruled in Ember Resources Inc. v Bates, 2020 ABSRB 600 dated July 17, 2020 as follows:

DECISION:

(1) The requirements for initiating review of a rate of annual compensation for a surface lease have not been satisfied in accordance with the requirements of s. 27(14) of the *Act* and accordingly, the Operator's applications are dismissed.

REASONS:

[33] The Panel finds the Operator failed to comply with the requirements of s. 27(14) of the *Act*. The Notice provided by the operator to the lessor several months after the prescribed time cannot be found to comply with the requirements of s. 27(14) of the *Act*, as the Board does not have the authority to extend a statutory time period without the express statutory authorization to do so. Failure to comply with s. 27(14) of the *Act* is fatal to the Operator's applications because compliance is mandatory to trigger the process in ss. 27(6) through 27(13) and the Board's authority to review the rate of compensation. Section 27(15) is a remedy strictly available to the Lessor where the Operator has failed to give notice. For these reasons, the Board dismisses the Operator's applications to review the rate of compensation.

The full SRB Decision is available on the CanLII website at:

<https://www.canlii.org/en/ab/absrb/doc/2020/2020absrb600/2020absrb600.html>

Why is this SRB decision significant for landowners?

It is important for landowners to know that **energy companies cannot unilaterally reduce annual wellsite compensation payments.** No change to surface lease payments may be made without first undertaking required notification as provided for in Section 27(4) and (5) of the *Surface Rights Act* [SRA] and undertaking good faith negotiations to attempt to reach agreement with landowners, and, failing agreement, obtaining an order "fixing, confirming or varying the rate of compensation payable" from the Surface Rights Board ["the SRB"].

The Compensation Review Process:

1. **Notice by Operator:** Section 27(4) and (5) of the *Surface Rights Act* ["the Act"] mandates that operators **shall** provide notice to landowners "on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or right of entry order was made" that:
 - a. the operator wishes to have the rate of compensation reviewed, or
 - b. that the lessor or respondent has the right to have the rate of compensation reviewed, and,
 - c. where no rate of compensation has been fixed, the lessor or operator has the right to have the rate of compensation fixed by application to the SRB.
2. **Good Faith Negotiations:** If, pursuant to a delivered s.27 notice, either party indicates that it wishes to have the rate of compensation reviewed or fixed, **the parties shall enter into negotiations in good faith for this purpose.** If, by the end of the compensation year (year 5 of the lease), the parties cannot agree on a rate of compensation, **either** party can make an application to the SRB for a hearing to set the new rate of annual compensation for the landowner's Loss of Use and Adverse Effect caused by the well site and any access road.

What are good faith negotiations?

Good faith has not, to the knowledge of the FAO, been defined in a decision of the SRB, but can be understood to include due diligence around the effort made and information given. Some reasonable effort is required on the part of both parties. However, a landowner is not required to convince an operator of his position, nor is a landowner required to provide research to support his position in negotiations (although evidence in SRB applications is a very important element in being successful):

In the view of the FAO, the information sent to landowners by the various Operators does not meet the statutory requirement of good faith negotiations as it does not correctly explain or outline the s.27 process set out in the Act. Landowners do not need to "appeal to the Surface Rights Board" if they do not agree with the amount being offered to them by the operator. The operator or the landowner may apply to the SRB under s.27(8) of the Act to have the compensation fixed by the SRB. It is important for landowners to be aware of their rights and options.

3. What happens if no s.27(8) application is made to the SRB?

It appears that the previous annual amounts payable would continue for the next five year term. The Alberta Court of Queen's Bench has provided some direction as to what happens to payments in the case if no section 27(4) notice is given or, arguably, no order made under section 27(8) of the Act:

Justice Sirrs in Shepstone v. Surface Rights Board (Alberta), 2000 ABQB 1003 noted:

"[13] It seems logical that if nothing is done within the proverbial reasonable time and the operator did not give the notice required pursuant to s. 27(4) then the rental established for the prior 5-year time period of the lease would prevail for the next 5-year period of the lease (barring of course a mid-term amending agreement being reached by the parties)."

4. How do I respond to a s.27(8) Application for review of my annual compensation?

Section 27(9) of the Act sets out what should be included in the application you receive. The SRB website has specific information as to what steps you must take in response to the application. You should seek independent legal or other professional advice as to your rights, remedies, how to argue your position and your ability to recover costs for your time and representatives, and your liability for costs.

5. Can I cash the cheque sent to me by the Operator?

Yes. Cashing a cheque for a reduced amount does not necessarily imply acceptance of the amount, the same applies if the operator completes a direct deposit transaction in your bank account. However, you should take steps to advise the operator in writing if you do not wish to accept its offer and that you wish to:

- a. negotiate a higher, or different annual compensation amount by way of s27 application to the SRB, or
- b. maintain the status quo as you feel that the current annual compensation fairly reflects your loss of use and adverse effect, and demand payment of the balance as explained below.

The FAO recommends that landowners contact the operator directly to assert their right to good faith negotiations and required notification. We strongly recommend that contact be made in writing if at all possible.

Be prepared to discuss the evidence that will support your case to negotiate the rental amount.

Adverse Effect reflects the alterations made to a landowner's business practices as well as the time, stress, and inconvenience experienced by a landowner as a result of the presence of an energy surface disturbance.

Loss of Use is provided to compensate a landowner for the inability to use and benefit from a portion of their land being leased by the energy company on an ongoing basis.

- Location of the surface lease and access road – corner, midfield, home quarter, connecting to another lease
- Use of the land – annual crop, hay, pasture
- Crop Rotation
- Typical crop yields and loss of production
- Potential compaction on access roads and surface lease from operator access due to “zero till” farming operations
- Good farming practices – weed control, club root protocol, noxious weeds
- Additional costs for seed and weed control making turns around the wellsite
- Size of equipment and difficulty to farm in confined spaces
- Specific examples of nuisance and inconvenience and how it impacts the remainder of the farming operation
- Review your original agreements that might have specific reference to the use of the land or any provisions for farming portions of the surface lease
- Discuss the “Default Clause” of the surface lease agreement
- Understand what makes your land or production unique

Section 27 Review the Rate of Compensation

If your negotiations are not successful, either party (lessor or operator) can make a *Surface Rights Act* Section 27 application for Review of Rate of Compensation. The Surface Rights Board is a quasi-judicial tribunal that assists landowners/occupants and operators to resolve disputes about compensation and a Section 27 proceeding would be a formal hearing in front of the tribunal. At this time, the operator has not made an application to the SRB to Review the Rate of Compensation; they have just unilaterally reduced the payment.

****As a landowner, you do not need to make a Section 27 application to Review the Rate of Compensation if you are satisfied with the original amount dated in the Surface Lease. A landowner can make a Surface Rights Act Section 36 Recovery of Compensation application to recover the reduced rental paid by the operator. The energy company will be served with a demand letter for payment and will have to justify the unilateral rental reduction to the Surface Rights Board.**

Check your surface lease anniversary date.

It is important to read the complete package of information sent to you by the operator. A landowner will need to understand the significance of the original lease date from the surface lease agreement. That date never changes and determines the 5 year period for the compensation review process. The FAO has noted that one company is actually sending out the notices with an attached "Schedule A" imposing a unilateral rental reduction. A landowner would not be able to file a Section 36 Recovery of Compensation application until the anniversary date has passed. The FAO would recommend that landowners engage with the operator and start good faith negotiations.

If the operator is not willing to rectify the default of the Surface Lease and pay the agreed upon compensation the FAO will be able to assist with providing a "model argument" to support your case.

You should seek legal advice relating to a determination of whether or not the operator is in default of the performance of its payment covenants or obligations under your Lease Agreement or Right of Entry Order. The default may include the failure to pay annual rental compensation of the negotiated and agreed upon rental amount, which amount continues to be payable until amended by both parties or amended by order of the SRB. Neither party to the Lease Agreement or Right of Entry Order has the ability to unilaterally change the amount of payment due.

If you feel that it is appropriate, after receiving specific legal or other professional advice, you may consider modifying the attached FAO template letter to meet your specific circumstances as a 30-day notice to the operator to remedy the default.

The FAO has developed template letters to assist landowners asserting their rights when energy companies do not pay the full compensation owed. Copies are available on the FAO website at www.farmersadvocate.gov.ab.ca or by calling 310-FARM (3276).

Summary of Key Issues

- Energy companies cannot unilaterally reduce annual wellsite compensation payments.
- A landowner or operator has the right to a 5 year review of the rate of compensation.
- A landowner has recourse to obtain compensation for unpaid or reduced rentals through the Surface Rights Board (SRB) under section 36 of the *Surface Rights Act* at any time during the 5 year term.
- The Surface Rights Act [SRA] identifies the operators' responsibilities for notification and negotiation of annual compensation on the five-year anniversary of the surface lease agreement.
- An operator must provide notice to the landowners on or within 30 days after the 4th anniversary of the date of the term of the surface lease. For example, if your surface lease was signed on August 1, 2010 the operator would have to provide notice on September 1st of 2019 to meet the 5 year anniversary date of August 2020.
- Failure to comply with the requirements of notification shows the SRB has ruled it has no jurisdiction to hear the cases and the attempts to reduce the annual compensation are outside of the SRA as per *Ember Resources Inc. v Bates*, 2020 ABSRB 600.
- A landowner and operator **may** enter into voluntary negotiations in midterm of the 5 year anniversary date, however it is not required.
- An operator must negotiate in good faith with a landowner. The FAO recommends the landowner keep a log of contact attempts and communication with the operator and the representative they speak with. It is preferred to have all communication in writing.
- Cashing a cheque for a reduced amount of annual compensation does not necessarily imply acceptance of the amount.
- The amount provided for annual rental is based on a landowner's **Adverse Effect and Loss of Use**, not the state of industry.
- Operators are responsible for paying the annual rental on a surface lease until a Reclamation Certificate is issued under section 144 of the *Environmental Protection and Enhancement Act* (EPEA). An operator cannot impose a partial reclamation on a designated area of the surface lease or access road.

For more information, contact the FAO through the AG Info Centre at 310-FARM (3276) or by email at farmers.advocate@gov.ab.ca

For more information on the *SRA* Section 36 Recovery of Compensation or Section 27 Review the Rate of Compensation, you can reach the **Surface Rights Board at 780-427-2444** or by email at srbxcb@gov.ab.ca or visit their website at <https://surfacerights.alberta.ca/>

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