

Advisory 2020-4

Farmers' Advocate Office provides landowners' clarity on various Energy Companies proposed "Annual Compensation Review".

The Farmers' Advocate Office [“the FAO”] has learned that several operators are carrying out a review of the annual compensation payments that is paid to landowners and they are seeking reductions for various reasons. Landowners who are affected would have received a notice of a rental review or have been presented with a unilateral reduction of compensation. It is essential for landowners to ensure that their rights are recognized, understood and protected as some actions may contradict the *Surface Rights Act* (SRA). The FAO is aware of compensation reviews and unilateral compensation reductions by:

- **Ember Resources Inc.**
- **AlphaBow Energy Ltd.**
- **Lynx Energy ULC**

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 good faith negotiations 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.

3. 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):

The SRB ruled in Bearspaw Petroleum Ltd v Lucas, 2016 ABSRB 602 as follows:

“Based on a review of the submissions, the parties exchanged proposals and when they could not agree, the Lessor proceeded to have his application filed with the Board. The Operator is critical of the Lessor not having provided any research to support his position. The Panel is not aware of any requirement for a landowner to divulge such information during negotiations. The Panel will not speculate on whether a tactical decision was made that it was in the Lessor’s best interest to proceed with his application. Nevertheless, based on the information provided to the Panel, to assert that by applying to the Board, the conduct was frivolous and vexatious is unfounded.”

The SRB ruled in Husky Oil Operations Limited v. Sampson’s Thunderbird Ranch Ltd, 2015 ABSRB 349 as follows:

“The Panel finds that while the parties are required to enter into good faith negotiations, as per section 27(6), the failure to do so (or failure to indicate the desire to do so) is not a prerequisite to the Board proceeding with a compensation rate review. Section 27(5) sets out the requirements that are to be included in the notice ([section 27\(4\)](#)). A lessor must be informed of the opportunity to have the rate reviewed. The Panel would suggest the Legislature would have used clearer language to support an interpretation that a condition precedent was required to initiate a Board review for compensation payable under a surface lease.

It is the Panels view that the intent of the Legislature in section 27(6) was not to create difficulties for parties to apply to the Board, but to encourage the parties to resolve their disputes privately and to do so in good faith.”

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.

4. 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)."

5. 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.

6. 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).

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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