Court of Queen's Bench of Alberta

Citation: Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd., 2008 ABQB 19

Date: 20080109
Docket: 0606 00177
Registry: Lethbridge

In the Matter of the Surface Rights Act, R.S.A. 2000, chapter S-24; And in the Matter of an Application filed by Bennett & Bennett Holdings Ltd. and Circle B Holdings Ltd. under section 27 of the Surface Rights Act; And in the Matter of Decision Nos. 2006/0009, 2006,0010, 2006/0011, 2006/0012, 2006/0013, 2006/0014, and 2006/0015 of the Surface Rights Board; And in the Matter of the North Half and South West Quarter of Section 10 and the South West Quarter of Section 23; Township 9, Range 17, West of the Fourth Meridian

Between:

Canadian Natural Resources Ltd.

Appellant

- and -

Bennett & Bennett Holdings Ltd.
and Circle B Holdings Ltd.

Respondents

Memorandum of Judgment
of the
Honourable Mr. Justice J. H. Langston

Introduction

[1] Canadian Natural Resources Ltd. is the current lessee in eleven surface leases on lands owned by Bennett & Bennett Holdings Ltd., and Circle B Holdings Ltd., corporations engaged in the business of farming. For the matters before this Court, there is no need to differentiate

between the two farming corporations, and Bennett & Bennett Holdings Ltd., and Circle B Holdings Ltd., shall simply be referred to as "Bennett".

[2] Each of the surface leases requires Canadian Natural Resources Ltd. (referred to as "CNRL") to provide specified annual compensation to Bennett. The rate of compensation is reviewable every five years. In 2005, seven of the eleven surface leases came up for review. Through its agents, CNRL attempted to negotiate new compensation rates, but the parties were unsuccessful in reaching a consensus. The matter proceeded to a hearing before the Surface Rights Board (referred to as "the Board").

[3] After conducting a hearing, the Board issued a single set of written reasons for its decision on each of the seven surface leases. The Board increased the compensation payable on all seven surface leases, although not to the level sought by Bennett. CNRL, which had sought a reduction in the annual compensation for some of the surface leases, appealed.

[4] The *Surface Rights Act* states that either Bennett or CNRL may appeal the decision of the Board to the Court of Queen's Bench as a matter of right. Further, section 26(6) of the *Surface Rights Act* specifies that an appeal to the Court shall be in the form of a new hearing.

[5] While there are several issues that need to be addressed, the crux of the matter is the determination of the appropriate annual compensation for each of the surface leases.

Issues

[6] The issues in this matter are:

A) What is the appropriate standard of review to be applied to the decision of the Surface Rights Board?

B) How does the appropriate standard apply to this particular Board decision?

C) How should the new evidence introduced before this Court by Bennett be treated?

D) Should the Decision of the Board be Upheld in Relation to:
   I) Pattern of Dealings
   II) Adverse Effect and Loss of Use
   III) Owner vs. Occupant
   IV) Conclusion

A) What is the appropriate standard of review to be applied to the decision of the Surface Rights Board?

[7] In a recent decision, the Alberta Court of Appeal discussed the appropriate standard of review for appeals of compensation orders issued by the Surface Rights Board. While it was

argued that because the *Surface Rights Act* states that appeals to the Court of Queen's Bench are conducted as a hearing *de novo* the *Pushpanathan* pragmatic and functional analysis did not apply, the Court of Appeal disagreed. The Court stated the *Pushpanathan* analysis is required even when a statutory right of appeal from an administrative body exists by way of a hearing *de novo*: *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.*, 2007 ABCA 131, at para. 8, leave to appeal to the Supreme Court refused.

[8] The Court of Appeal then conducted the *Pushpanathan* analysis and determined that the appropriate standard of review, when the ultimate issue was the amount of compensation payable, was the 'reasonableness' standard.

[9] The Court of Appeal's analysis and conclusions with respect the *Pushpanathan* factors are just as applicable here as they were in *Imperial Oil Resources*, namely:

1) the applicable statutory provision is identical;
2) the Board was determining the appropriate level of compensation and thus is owed some deference;
3) the members of the Board are selected for their expertise in determining compensation, but the Board does not make policy decisions. It attempts to resolve compensation disputes between private parties; and,
4) the question concerns the principles of patterns of dealings and adverse effect, thus making the question one of mixed fact and law.

[10] I therefore conclude there is no reason to deviate from the Court of Appeal's conclusion that the decision of the Board with respect to the amount of annual compensation payable must be assessed against the 'reasonableness' standard.

[11] The Supreme Court of Canada set out the test under the reasonableness standard in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 55:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, *supra*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation, even if this explanation is not one that the reviewing court finds compelling (see *Southam*, *supra*, at para. 79).

B) How does the appropriate standard apply to this particular Board decision?

[12] The decision of the Board commences with a detailed summary of the evidence and argument put forward by Bennett and CNRL. According to the summation, Bennett argued that

the adverse effect award should range from $3,000 to $4,000, and that the loss of use per acre should range from $1,000 to $1,200. Bennett argued there were many characteristics of both the nature of the use by the operator and the leased property itself that could increase the award for adverse effect, and felt that many of those characteristics were applicable to the surface leases in question. With respect to loss of use, the summation describes how Bennett arrived at varying figures for irrigated land and dry corners.

[13] According to the summation of CNRL's evidence, an analysis was provided for each surface lease site. CNRL appears to have offered an analysis for loss of use depending on what it had been advised Bennett was producing on the land, but it also appears to have discussed a pattern of dealings approach where it thought such an approach was applicable. With respect to the pattern of dealings approach, the surface lease comparables were broken into three groups; third party dryland leases, third party irrigation leases, and CNRL leases.

[14] After summarizing the evidence and commenting that the Board had received "an abundance of diverse evidence from both parties", the decision continued as follows:

> It is the Operator's opinion that only two of the sites (the L.S. 6-10 site and the L.S. 11-10 site) should be compensated as irrigated sites. The Lessor's opinion that because only one site does not have water rights, they all should be considered as irrigated.
>
> It is the Board's opinion that if and when the Lessor installs an end gun, these dry corners may be classified as irrigated. The Lessor has the right to apply to the Board under Section 29, or Section 27 for a review of the annual compensation.
>
> In regard to land value or possible acreage sales, these items are not relevant to the amount of annual compensation. They would be a factor if it were an original taking being considered.
>
> The sites are all somewhat different, so they will be separated into categories as follows:
>
> Irrigated sites – L.S. 6-10 site and L.S. 11-10 site,
> Partially irrigated sites – L.S. 15D-10 site, L.S. 10A-10 site and L.S. 4-23 site,
> Dryland – L.S. 12B-10 site and L.S. 4A-10 site.
>
> The Board has always considered that when specialty crops are grown, there should be some expenses deducted from the gross production. Having considered the relevant evidence of both parties, the Board determines a fair and adequate rate of compensation payable by the Operator under the surface leases to be as follows:

Loss of Use	
Irrigated sites	$600.00 per acre
Partially irrigated sites	$450.00 per acre
Dryland	$350.00 per acre

Adverse Effect	
Irrigated sites	$4,000.00 annually
Dryland and Partially irrigated sites	$2,500.00 annually

[15] The Board then set out the payments for adverse effect, loss of use, and total compensation applicable to each surface lease.

[16] In its reasons, the Board did not comment on the pattern of dealings put forth by CNRL, nor make any comment on the pattern of dealings approach. The compensation awarded for adverse effect was greater than that put forward by CNRL, and lower than that advocated by Bennett, but the Board gave no reasons for this decision. Other than stating that the Board always deducted some expenses from the gross production revenues for specialty crops, there was no further explanation regarding the loss of use figures utilized by the Board.

[17] While the Board found it appropriate to classify the various surface leases in question according to whether the land was irrigated, partially irrigated or dryland, it did not say why it believed such a categorization was appropriate, nor refer to any other decision where a rationale had previously been given.

[18] I point out these absences in the Board's reasons because this is not the first time I have questioned the sufficiency of the reasons in a Surface Rights Board decision. CNRL also refers to the insufficiency of the reasons, and argues that as a result, the Board is not owed any deference.

[19] There is no dispute that the Surface Rights Board is a tribunal obligated to give reasons. What is sufficient? I find the words of Sexton J.A. in *VIA Rail Canada Inc. v. National Transportation Agency,* [2001] 2 F.C. 25 (Fed. CA), at para. 22, germane:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its finding of fact and the principal evidence upon

> which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors. (Footnotes omitted)

[20] While the Board did set out its conclusions with respect to the major issues before it, I find that the reasoning as to how the Board reached these conclusions is conspicuously absent, especially in light of the Board's acknowledgment of the "diversity in the evidence" before it.

[21] The lack of provision of reasons can only be seen by the parties as a complete disservice. Without reasons, the decision is virtually absent of any precedential value. The lack of reasons potentially leads to a continual rehearing of issues, with the potential for contrary decisions on the same issue.

[22] From the perspective of the Court, there are also problems. The inadequacy makes it difficult, perhaps at times impossible, to effectively scrutinize the decision and determine the line of analysis leading to the conclusion. The problem is heightened where the tribunal is one which is supposedly entitled to deference because of its expertise. It is acknowledged that the members of the Surface Rights Board are chosen because of their expertise in assessing appropriate compensation. Yet how does the Board expect the Court to give deference to this expertise when the Board fails to rationalize its conclusions?

[23] Here, the problem is indeed exacerbated because this Board decision is owed deference given that the issue falls squarely within the Board's expertise. However, in *Fenske v. Alberta (Minister of Environment)*, 2002 ABCA 135, the Alberta Court of Appeal determined that the insufficiency of reasons does not automatically render the tribunal's conclusion unreasonable. At paras. 24 and 25, Costigan J.A. stated:

> A failure to provide reasons may impact upon the assessment of the expertise factor in some cases because the Court may be unable to ascertain the level of expertise of the decision maker in the absence of reasons.
>
> However, although the expertise factor has been described by Iacobucci J. in *Canada (Director of Investigation & Research) v. Southam Inc*., [1997] 1 S.C.R. 748 (S.C.C.), at 773, as:
>
> > . . . the most important of the factors that a court must consider in settling on a standard of review . . .
>
> it is, nonetheless, only one of four factors that must be assessed and balanced. It does not trump the other three, nor does the absence of reasons weigh against a high degree of deference where the expertise of the decision maker can be ascertained by other means.

[24] I find that even with the absence of sufficient reasons, the decision of the Board must still be assessed according to the reasonableness standard.

C) How should the new evidence introduced before this Court by Bennett be treated?

[25] At this hearing, both CNRL and Bennett introduced new evidence. CNRL objected to the introduction of the new evidence put forward by Bennett.

[26] Although before this Court all parties had legal counsel, none did before the Board. Darcy Edwards, land agent with Edwards Land Group Lethbridge, presented CNRL's case, and Daryl Bennett, owner and/or employee of Bennett, presented the case on behalf of the landowners.

[27] In this Court, Mr. Edwards gave evidence on behalf of CNRL. His evidence appeared to be substantially the same as that before the Board, although he did provide further details for the factual basis upon how he reached his conclusions concerning appropriate annual compensation. He also introduced a summary of additional surface leases, which were not in evidence before the Board. There was never any provision of copies of the additional leases to Bennett, and a summary of the new leases was not provided to counsel for Bennett until Mr. Edwards' testimony was already in progress. CNRL also called 4 additional witnesses who did not appear before the Board.

[28] At the hearing before the Board, only Daryl Bennett gave evidence on behalf of the landowners. Before this Court, he was also the only witness. However, he attempted to introduce new evidence in the form of additional surface leases, surface lease negotiations and other agreements such as concluded damage claims. CNRL objected to the admission of this new evidence.

[29] Mr. Bennett testified that in addition to farming and other related activities, he is also a founding director of the Alberta Land Advisor's Association. According to Mr. Bennett, the purpose of the Association is to give landowners equal representation when negotiating with oil companies and to inform the landowners of their rights. Any person who represents landowners can join the Association. Mr. Bennett also testified that he is personally engaged in assisting landowners in their negotiations, both on new takings and rent reviews. As he is not a land agent, he does not collect a fee for negotiating new agreements, although he testified that he has participated in many free of charge. Mr. Bennett has advertised as 'Althing Consulting Services'. One of the advertisements produced to the Court contained the slogan, "Maximizing the Landowners Rights & Compensation".

[30] In the course of the trial, I ruled that pending matters or compensation issues that were awaiting review by the Board were not to be introduced into evidence. New surface leases and rent reviews were admitted only if Mr. Bennett had been personally engaged in the negotiations leading up to the agreement, and only if he was able to produce signature pages for both parties.

CNRL objected to the introduction of this evidence, and I ruled that I would consider CNRL's objections in the course of my reasons.

[31] The first question that must be answered is what of Bennett's evidence was truly 'new'. While CNRL argued against the introduction of all agreements, I find that this argument cannot stand because Bennett introduced some of the same evidence before the Board. I have determined this from my review of the Board's summary of Bennett's evidence, in which the following statements occur:

> We will also provide actual comparatives for the Taber area for dry pivot corners, which greatly exceed the rates at which we are paid...
>
> An examination of comparative leases in the area (EXHIBIT #6) show a range of $1750 - $2500 for adverse effect...
>
> One of the comparables in EXHIBIT #4 is the Torrie's in Grassy Lake who just signed a lease for $800/acre loss of use and $2136 adverse effect...
>
> EXHIBITS #11 and 12, show comparative loss of use rates of $1300 and $783/acre respectively...

[32] It is therefore obvious that Bennett introduced third party agreements before the Board.

[33] Section 8(3)(b) of the *Surface Rights Act* states that in conducting a hearing or inquiry, the Board is not bound by the rules of law concerning evidence, and section 8(3)(a) states that the Board may proceed in accordance with its own rules of procedure and practice.

[34] Legg D.C.J. considered the issue of which rules of evidence should apply in Court in *BP Exploration Canada Ltd. v. Hagerman*, [1978] A.J. No. 573. After determining that the Board was explicitly exempt from the Supreme Court Rules, and had the power to make its own, Legg D.C.J. went on to state at para. 12;

> The question then arises as to whether the situation changes when the matter is appealed under section 24 of the Act to the District Court. There is no guidance given in section 24 as to whether the Supreme Court Rules apply to such appeals. I find that the Rules do not apply and that the Court must adopt the rules of practice and procedure of the Board and indeed, waive all rules of evidence. If it were otherwise it is conceivable that much of the material and evidence considered by the Board would not be available to the District Court judge who would have to determine the matter without the benefit of all the material placed before the Board. Since it is the Board's order which is under appeal surely the District Court judge should not be placed in an entirely different position from that of the Board which heard the matter in the first instance.

[35] I find that the same rationale is applicable here.

[36] As a separate point, CNRL argued against the admission of some of the agreements Bennett sought to introduce on the basis that they were concluded after the Board hearing. Since they could not be introduced into evidence before the Board, CNRL argues that they should not be admitted here.

[37] The exclusion of the evidence on such a basis would be contrary to the conclusions reached by the Alberta Court of Appeal in *Ranger Oil Ltd. v. Ferguson*, [1997] 3 W.W.R. 487, and *Palley v. Sulpetro of Canada Ltd*., (1983), 44 A.R. 57. Particularly in *Ranger Oil,* Justice Hunt noted that there are circumstances where section 25 of the *Surface Rights Act*, which states what the Board is to consider in determining compensation, is worded permissively and provides a wide scope for the evidence that may be taken into account. There is no reason to deviate from that general approach in this case.

[38] This is especially so given that before this Court, Mr. Edwards, on behalf of CNRL, also introduced a surface lease concluded after the Board hearing.

[39] Even though the rules of evidence may not apply to hearings before this Court, there are some parameters that must be met for evidence to be admissible. This new evidence falls within those parameters. Mr. Bennett testified as to his personal involvement in the negotiations leading to each of the agreements in question. When asked, he was able to answer various questions about the circumstances of the leases, including the ability to describe the land location and land usage in comparison to that owned by the Bennetts. His evidence was also limited to those agreements where he was able to produce the signature pages for both parties.

[40] Given the general approach to evidence in hearings of this nature, Mr. Bennett's personal involvement with this contested evidence, Mr. Bennett's personal knowledge of the circumstances surrounding the agreements, and the production of copies of the agreements, including the signature pages, I find the contested evidence falls within acceptable parameters and is admissible.

D) Should the decision of the Board be upheld?

[41] The *Surface Rights Act* gives general guidance with respect to the factors in determining the amount of compensation payable. Section 27(1)(d) states that on an appeal such as this, the Court may consider the loss of use by the owner or occupant of the area granted to the operator, and the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator.

[42] Two general approaches have developed in attempting to quantify these factors. The first approach attempts to determine whether a standard compensation rate is being paid for land of certain types and specified uses in a generally-defined area. If a party believes that a standard compensation rate exists, they may argue that a pattern has been established for the land in question, and it should be determinative in setting the annual compensation for the next five years. This approach is referred to as a "pattern of dealings".

[43] The second approach attempts to calculate the actual loss of use and adverse effect that arises as a consequence of the rights granted to the operator.

I) Pattern of Dealings

[44] The starting point for the concept that a pattern of dealings could be accepted as evidence of appropriate compensation was *Livingston v. Siebens Oil & Gas*, [1978] 3 W.W.R. 484, Alberta Supreme Court, Appellate Division, where the Court stated that evidence of a pattern of dealings could be cogent and carry great weight. Since *Livingston*, many Courts have been faced with the determination of whether a pattern has been sufficiently established.

[45] In this Court, CNRL attempted to establish the existence of an applicable pattern of dealings through Darcy Edwards of Edwards Land Services. Mr. Edwards testified that he had been involved in land work for over 30 years, over the course of which he had involvement with around 25,000 surface leases, right of way agreements, damage claims and rental reviews. He had appeared before the Board 15 times. As previously stated, he attempted to negotiate the renewal of the surface leases in question with Bennett and was then CNRL's advocate at the Board hearing.

[46] Mr. Edwards testified that his standard procedure for payment of compensation for surface rights was to provide payment according to a pattern, which he defined as 'consistent compensation paid on multiple comparable agreements". In order to determine whether a site was sufficiently similar to others so as to be entitled to the same compensation, Mr. Edwards testified that he would examine the following factors:

a) the area in which the site was located
b) whether the site was to be in a corner, on the border, or elsewhere within the parcel
c) the size of the site
d) the configuration of the site
e) the presence or absence of an access road
f) the types of crops grown on the parcel
g) the crop rotation
h) the expected rate of return
i) the type of well that was being placed on the parcel

[47] In order to determine whether there was a pattern of dealings in which the Bennett surface leases could be included, Mr. Edwards testified that with respect to the irrigated parcels, he looked for comparables in the immediate Taber area. He found that there were not a great number of sites that had been drilled there within the past few years, so he turned to his own records and searched different companies that he had worked for. From this, he found surface leases for irrigated parcels which he thought were comparable. CNRL was not a party to these leases.

[48] Mr. Edwards took these comparables, summarized them, and provided this as evidence before the Board. For each site, his chart displayed the township-range location, total acreage, and total rental amount. In addition, the chart also included a total rental breakdown as between the payment for adverse effect and the per acre payment for loss of use. The date of the lease was also included.

[49] Before this Court, Mr. Edwards expanded on the information contained in the chart. He now included the locale and section number, allowing for identification of the site location within a smaller area. The expanded chart also stated the type of crops grown and whether or not an access road was included. Lastly, the chart stated the Bennett surface lease or leases to which the comparable was most similar. Mr. Edwards testified that he was able to confirm that these sites were comparable as he had viewed both the sites listed in the chart, and all the Bennett sites.

[50] For the Board hearing, Mr. Edwards also prepared a similar list of dryland parcels, again comprising surface leases entered by various oil companies, not including CNRL. Unlike the irrigated parcels, Mr. Edwards did not physically view these lands.

[51] Mr. Edwards testified that he considered the dryland parcels to fit within a pattern because all sites were unirrigated; some were corner locations, while others were located in the interior of the parcel; some had access roads while some didn't, and the crops grown were similar to a lot of the crops that the Bennetts were producing.

[52] Mr. Edwards summarized the same evidence for these dryland comparables as he had for the irrigation comparables. He presented this to the Board, and to the Court. Unlike the irrigation comparables, no further details of these dryland comparables were provided to this Court.

[53] The last list of comparables provided to the Board by Mr. Edwards was a list of CNRL surface leases. Both irrigated and dryland parcels were included but not differentiated within the list. For each site, the township-range location, total acreage of the site, and the total rental amount were listed. No further details of these comparables were provided to the Court.

[54] These three lists represent the comparables and the categories Mr. Edwards used to support the pattern of dealings he advocated before the Board. In this Court, in addition to

providing the three lists and the expanded version of the non-CNRL irrigation leases, as referred to above, Mr. Edwards also adduced a list of six CNRL surface leases for irrigated parcels. This list illustrates the locale and section-township-range identifier for each site. It also provides the total acreage and total rental, with a breakdown for adverse effect and per acre loss of use. The review date, types of crops grown, and the presence or absence of an access road, were also shown.

[55] Mr. Edwards stated that based on these comparables, he determined that there is a pattern of compensation for adverse effect and loss of use. The pattern is:

a) irrigated parcels partially or totally under pivot:
   -adverse effect: $2,000.00
   -loss of use: $350 - $400/acre. An exception is specialty crops, where the per acre payment can be as high as $600.
b) dryland parcels
   -adverse effect: $1,600.00
   -loss of use: $125 - $200/acre

[56] Mr. Edwards testified that based upon the characteristics of each Bennett site, it would be appropriate to set each site's annual compensation rate in accordance with this pattern.

Analysis

[57] In *Intensity Resources Ltd. v. Dobbish*, (1989), 66 Alta. L.R. (2d), 43 (A.B.Q.B.), Justice Chrumka considered whether the Board's award of annual compensation should be lowered on the basis of the operator's alleged pattern of dealings. Justice Chrumka stated that the amount of weight to be given to a surface lease agreement entered into evidence depended on its similarity with other agreements and whether or not a pattern had been established. He then listed several factors to consider when determining whether or not a pattern of dealings had been established. While the list was not exhaustive, Justice Chrumka was of the view that if each factor was sufficiently proven, an applicable pattern of dealings had been shown.

[58] I also find is necessary to discuss some of the critical factors to the formation of a pattern of dealings, as they are listed in varying cases, in order to determine whether the pattern advocated by Mr. Edwards is proven and is applicable in this case.

[59] Before the Board, Mr. Edwards provided only the township and range identifiers for each site used as part of his pattern. Given that there are 36 sections in each township, and a section is 640 acres, the lack of provision of the section number meant that the site could have been located somewhere within a parcel of over 23,000 acres. Before this Court, the section number was produced for only some of the leases that Mr. Edwards had put forward before the Board. He also provided section numbers for the additional six CNRL leases that he entered into evidence.

[60] With the information before the Court, it appears that the comparables put forward by Mr. Edwards are located in the adjoining districts of the County of Lethbridge, County of Warner, and Municipal District of Taber. The Bennett lands in issue are located in the Municipal District of Taber. Virtually all of Mr. Edwards' comparables lie to the west or southwest of the Bennett lands.

[61] No indication was given as to why leases in the Municipal District of Taber, County of Lethbridge or County of Warner, but not, for example, the County of Vulcan, another adjoining district, constitute a comparable area. No indication was given as to why areas to the west and southwest of the Bennett lands were similar for comparison purposes.

[62] In addition to not defining the area used for comparison purposes, there was also no information presented with respect to how many sites are located within the area over which the comparables are spread, nor even any indication of how many sites Mr. Edwards reviewed in order to locate the comparables. Mr. Edwards admitted in cross-examination that he had not reviewed all the sites within a circle utilizing the Bennett lands as a center point and the outer comparables as the radius. When asked if there could be leases within the area that provided compensation higher than the rates Mr. Edwards was suggesting, he responded that he did not know, because he had not looked at all the leases; yet the radius was defined using the lands in issue and the comparables which Mr. Edwards had produced.

[63] In *Intensity Resources*, Justice Chrumka referred to the 'area' factor as a geographical block in an area of Alberta. In *Laschuk v. Canadian Natural Resources Ltd*., 2003 ABQB 135, every compressor site within the defined subject area was canvassed in order to identify comparables.

[64] In *Ferguson v. Ranger Oil Ltd*., (1995), 168 A.R. 1, (A.B.Q.B.), the area of the disputed pattern was a total of seven adjoining sections of land encompassing approximately 4500 acres. The area contained the 14 sites in issue as well as 66 sites argued to be comparables. The expert propounding the pattern described the area as "Long Coulee Field", and stated that he had visited and observed all the well sites in it, which encompassed more than 100 leases in total. It was from the 100 that he had located the 66 comparables. The opposing party's witness agreed not only with the characterization of the 'area', but also agreed that the 66 comparables chosen would provide a sufficient sample from which it would be fair to determine if there truly was a pattern.

[65] Some of the comparables presented here may adjoin the Bennet lands, but others are at least 6 miles, and as much as 30 miles, away. They are spread across over 23,000 acres, and are located in different municipal districts and counties. There has been no identification of a 'geographical block', to use the words of Justice Chrumka.

[66] These points are not made to suggest that only an area defined by political districts, or a concentric circle around the subject leases, will qualify as an area in which a pattern can be

established. However, without giving any definition to the specific area in which the pattern is said to apply, the Court is hindered in its ability to consider whether the leases presented as comparables are truly indicative of a pattern in an area.

[67] Perhaps more importantly, the Court has absolutely no indication as to how many total sites may be within the area of comparables presented by Mr. Edwards. By Mr. Edwards' own testimony, we know there are other sites in the area, but we do not know whether they provide higher compensation or not. If they are higher or lower, we also do not know if they are comparable.

[68] Mr. Edwards advised that he had originally looked in the immediate Taber area for comparable irrigated sites, but that he did not find any because there hadn't been a great number of new sites drilled in the past few years. However, he did not explain why he could only use new agreements and not concluded rent reviews. Before this Court, rent reviews were introduced as comparables; Mr. Edwards testified that the source of the CNRL irrigation leases introduced as evidence before this Court but not the Board resulted from rent reviews which Edwards Land Group Lethbridge conducted in 2005 and 2006. Yet Mr. Edwards did not explain why he considered it appropriate to now introduce rent reviews rather than just new agreements.

[69] A second factor, not listed in *Intensity Resources* but considered by many other Courts, is the need for the agreements within the pattern of dealings to rest upon an unfettered negotiation process.

[70] After briefly touching on the political history of the landowner's mandatory right to compensation, McDermid J.A. in *Livingston* stated the following at para. 7:

> Keeping in mind this political background it is most important that when both parties have shown that they are satisfied by establishing a course of dealing in any area this is very relevant evidence to be considered by the Board. The Company may in an individual case pay more than it thinks is fair, for various reasons, and as the Board states little weight can be given to individual cases, but in an area where there is a course of dealings between oil companies and surface owners whereby a standard rate of compensation has been paid and accepted, this evidence should at the very least be given great weight by the Board.

[71] In *Lomond Grazing Association. v. Pancanadian Petroleum Ltd.*, (1985), 63 A.R. 120, (A.B.Q.B.), Justice MacLean quoted this and other excerpts from *Livingston*, then went on to state at para. 26:

> Having said "both parties have shown that they are satisfied" and that there is "a standard rate of compensation" and "such a number of deals" recognizes the principle of law that has been repeatedly applied by our Courts, and that is, that

> such evidence is admissible where it appears that the sale was freely and willingly made without coercion, compulsion or compromise.

[72] In *Lomond*, both the operator and the landowner put forward patterns of dealings for consideration. Assigning greater evidentiary weight to the comparables put forward by the landowner, Justice MacLean stated at para. 30;

> ... I am satisfied in this case two equal competing parties met on an equal open basis and freely and voluntarily entered into a settlement unaffected by the power of compulsion and expropriation and unaffected by any other extraneous factors determined only to reach settlement on the basis of an amount that represented a fair value for the rights that the operator wished to take from the owner.

[73] Also in *Dome Petroleum Ltd. v. Richards et al*, (1986), 34 L.C.R. 1 at 67, the freely negotiated agreement played a pivotal role:

> These cases indicate to me that there is a discernible trend in our courts to follow the *Livingston* decision and to extend its interpretation to give great weight to "area agreements" where it can be shown that they represent a true arm's length negotiation between owners and operators bargaining on an equal footing. ... To my mind I would hold that even one example of an "area agreement" freely negotiated should be regarded as highly relevant and cogent evidence for the reasons already advanced. It should certainly be accorded more weight than several negotiated leases between individual landowners and an operator or operators, especially if these were signed early in the oil development of a particular area.

[74] As indicated, Mr. Edwards differentiated his comparable leases according to whether CNRL or a third party was the signatory oil company. He did not, however, provide any information on the landowner who had signed the agreement, nor which third party oil companies were signatories to which agreement. The different numbers of oil companies and landowners represented within the comparables was not disclosed. In cross-examination, he further advised that all the surface leases for all the irrigated lands shown in Exhibits 3 and 4 had been negotiated between a landman and an unrepresented farmer. This is all the information provided to the Court regarding the parties to the comparable leases.

[75] While the non-identification of the parties may have been done for privacy reasons, it makes it very difficult for the Court, and presumably the Board, to determine how many parties are truly represented in the comparables put forward. There are methods of identifying the number of parties represented in the comparables and information regarding how the agreements were reached without divulging identities.

[76] Again referring to the pattern propounded in *Ferguson*, the expert stated that the leases reviewed were between 15 different oil companies and 20 different landowners. Of the approximately 100 negotiated leases in the area, he stated this was a 'good mix of companies and landowners', and that there was a 'clear, normal market pattern'.

[77] Given that neither the Board nor the Court were provided with information including a definitive area, the total number of leases within the area, or the number of oil companies and landowners represented by the comparables, it is impossible to make such conclusions in this case.

[78] Mr. Edwards himself realizes that the context in which the lease is executed is important. The report prepared by Edwards Land Group Lethbridge for well site LS 4A-10 states,

> Although the Board considers privately negotiated agreements as evidence, the Operator believes minimal weight should be used to determine increases, using this evidence. We must be cautious when looking at privately negotiated leases without knowledge of the settlements, was the negotiation driven by a mineral lapse or other commitments resulting in time constraints. These are only a few of the unknown factors that can alter negotiations.

[79] Despite this, no information on the parties nor the factors under which the leases were negotiated was provided.

[80] A third factor which I have considered is the rental amounts contained within Mr. Edwards' comparables. Mr. Edwards testified that the pattern indicated that payments for adverse effect ranged from $1,600 to $2,000, and for loss of use, from $125 to $600 per acre.

[81] As indicated above, the last list of comparables provided to the Board was a list of 29 CNRL surface leases including both irrigated and dryland parcels with total rental amounts. The list includes no breakdown of the total rental between loss of use and adverse effect.

[82] If one were to take Mr. Edwards' minimum payment for adverse effect, and minimum payment for loss of use per acre, and apply those values to the acreages for the 29 leases, the total rental amount for 13 of the leases is less than what it should be using the *minimum* values in the pattern given by Mr. Edwards.

[83] Therefore, 13 of the 29 comparables within this chart do not support the alleged pattern. If there is a pattern, then CNRL has not followed it in almost half of its dealings as presented to the Board.

[84] Mr. Edwards did not offer any explanation as to why these leases were proper comparables, even though almost half of them provide compensation at lower levels than the pattern.

[85] All the other comparable charts break down the loss of use and adverse effect payments. While there are some discrepancies, they are not as numerous as those previously described from the CNRL comparables chart. Where discrepancies do exist, however, Mr. Edwards did not explain them. Understanding the exceptions to the pattern is a key to understanding the pattern itself.

[86] The Board did not apply Mr. Edwards' pattern, and gave no reasons for this in its decision. Given that the Board did not provide any comment on the pattern of dealings argument, I find I must consider whether Mr. Edwards' evidence satisfies me that a pattern of dealings, inclusive of the Bennett lands, exists.

[87] As explained throughout this topic, I was provided with more detailed evidence on some of the comparables provided to the Board, and with six additional CNRL irrigation leases that had not been provided to the Board. Even with this additional evidence, however, I find that a pattern of dealings applicable to the Bennett lands has not been established.

[88] Although the reasons for this conclusion should be apparent from the discussion above, I will attempt to concisely summarize them here for ease of reference:

a) There was no definition, precise or general, of the area to which this pattern was said to apply.
b) There was no information with respect to how many sites, overall, are within the area.
c) There was no indication of how many sites were reviewed in order to ascertain the comparables, nor any indication of why other sites reviewed were not comparable.
d) There was no explanation of why this pattern was applicable to a certain area.
e) There was no information provided with respect to the number of parties, either operator or landowner, represented within the comparables.
f) There was no information with respect to the negotiation process.
g) With respect to the chart showing CNRL irrigation and dryland leases, almost half of the leases do not fit the compensation pattern.
h) There was no explanation of why leases that were presented as comparables but that did not fit the compensation pattern supported the pattern of dealings.
i) There was no explanation as to why initially only new agreements were considered appropriate comparables, but why later, rent reviews were also considered to be properly included.

[89] I have reached this finding independent of any deficiencies in the manner in which Bennett challenged Mr. Edwards' pattern. I find that Mr. Edwards' evidence, in and of itself, is insufficient to establish a pattern applicable to the surface leases on the Bennett lands.

II) Adverse Effect and Loss of Use

[90] As previously indicated, the second method of providing compensation for the effects enumerated in the *Surface Rights Act* is to calculate the actual loss of use and adverse effect. When the land in question is used as cultivated farmland, this approach involves three steps:

1. In order to determine the loss of the use of the leased area, the farming practices on the land are examined in detail. Attempts are then made to quantify, on a per acre basis, the revenues which the landowner has lost as a result of the inability to use the land due to the existence of the surface lease.
2. Recognizing that the site contains an obstruction which must now be farmed around, attempts are made to quantify the effect the obstruction has on the remaining land still used by the landowner. Before this Court, this has been referred to as the 'tangible portion' of adverse effect.
3. Factors such as noise emanating from a well site, or the unsightly view of a well jack from the living room window, are considered compensable factors under the *Surface Rights Act*. These and other characteristics are compensated as part of the 'intangible portion' of adverse effect.

[91] While these three steps may present a neat package for understanding the theory behind the determination of compensation for a lease of surface rights, they are not easily workable in practice. With respect to the first and second steps, there are countless numbers of variables which are part of each analysis. Every farming operation has a different operating practice, thus meaning different variables apply to each calculation. When one adds to this already complex mix the dubiety of ascertaining yield patterns as a result of Mother Nature and the uncertainty in predicting commodity prices on the global market, the true proximity of the advocated final figures to reality is impossible to determine. With respect to the third step, how does one put a value on the interruption of peaceable possession?

[92] In *Wainco Oil and Gas Ltd. v. Clausen*, June 24, 1987, Red Deer 8610 001733 (A.B.Q.B.) and *Wainco Oil and Gas. Ltd. v. Yates,* June 24, 1987, Red Deer 8610 001940 (A.B.Q.B.), Justice MacKenzie cautioned against becoming overly engrossed in only considering dollars and cents:

> It is true that the experts come up with precise final figures. But it is well to remember not to confuse organization of material, logical observation, and systemic calculation with precision. The opinion of the expert is valuable in assisting the finder of fact in arriving at a general figure. But it achieves no more.

[93] This is not to say that the reports which attempt to quantify the imposition of the surface lease are not useful. There is no option in the forced relationship of landowner/lessor and oil company/lessee other than to try and determine a fair rate of monetary compensation for the infringement.

[94] Before this Court, Tim Thompson, an agronomist, and Donald Hoover, an agrologist, testified on behalf of CNRL. Neither provided evidence to the Board.

[95] Mr. Thompson, an employee of Edwards Land Group Lethbridge, testified that after the Board hearing, he was asked to research the various crops which Bennett stated it grew and provide a report detailing the actual cost of crop loss per crop. To do this, he did not use any of the yield, price or cost figures that Bennett used to determine its loss of use figures. He did not speak to anyone with Bennett. Mr. Thompson used his own figures, those obtained from statistics for the Alberta or Southern Alberta region, and those obtained from his contact with organizations that deal only with specific crops, such as the Potato Growers Association or Rogers Sugar Factory.

[96] Mr. Thompson did not deduct any expenses from the gross values for dryland crops, but he did deduct variable costs from the gross values for all irrigation crops.

[97] Mr. Thompson's study was limited to the years 2000 to 2005. In cross-examination, he agreed that 2006 had been an exceptionally good year in terms of yields, but he refused to comment on profitability because gross receipts were not in. The following exchange then occurred:

> Q: Do you agree with me that the year 2006 is one of the years within the period of time that we're talking about here today for this rent review?
> A: I believe - my understanding of this rent review is that it was for the period up into 2005.
> Q: That's your understanding?
> A: Yes it is.

[98] This understanding is consistent with the approach taken by Mr. Thompson in his report. Mr. Thompson took his calculations of individual crop gross margin per acre for irrigated lands, and applied the margins to the Bennett crop rotation for a five-year period. This produced a per acre average gross margin, for a span of five years, for each quarter section of the Bennett lands involved in this appeal. However, the crop rotation used by Mr. Thompson was that used by Bennett in the last five-year period, not the five-year review period commencing in 2005.

[99] Generally speaking, Mr. Thompson's gross margins for irrigated crops were lower than those presented by Bennett at the Board. This is hardly surprising given that the variable costs used by Mr. Thompson were generally higher, and his yield figures and per unit crop prices were generally lower, than those utilized by Bennett.

[100] Mr. Thompson commented that he did not believe that the results Bennett reported were unachievable; but that he questioned the capability of achieving such results every year, over the course of the years.

[101] Mr. Thompson refused to comment on future trends. With respect to the price per unit crop values that he used for his analysis, he stated that every commodity was specific and

different. When asked if a trend could be ascertained, he responded, “they vary substantially, and I don’t know that there’s ever a pattern, if you will.”

[102] Taking the same approach, Mr. Thompson agreed that costs over the period of 2000 to 2005 had risen, but he refused to provide an opinion as to costs in the future.

[103] Mr. Hoover was accepted as an expert in agrology without the preliminary qualification process. In addition to being a professional agrologist holding a P. Ag. designation, he is also an accredited appraiser and a certified management consultant. After the Board hearing, he was asked to provide a computation of the annual compensation payable on the seven surface leases here in question. He knew that the annual compensation he was asked to compute would be payable over a five-year period, with this period commencing sometime in 2005 for each surface lease.

[104] Therefore, like Mr. Thompson, Mr. Hoover testified to provide information with respect to the loss of use component of the annual compensation. In addition, he provided an opinion with respect to the tangible portion of adverse effect. Mr. Hoover defined the intangible portion as the subjective impacts, such as nuisance, inconvenience and noise, and stated that he did not attempt to quantify that component.

[105] Mr. Hoover gathered information from third party sources and spoke with Mr. Darryl Bennett. Like Mr. Thompson, he also attended the sites and found that harvest and fall work had already been completed. His observation was that every corner with a well site was farmed as a dryland parcel. There were five such surface leases; the other two sites were located on irrigated land and encompassed access roads coming through the middle of the irrigated field.

[106] Mr. Hoover also calculated gross margins per acre for various crops. He deducted variable costs from all crops grown on both dryland and irrigation portions. Even though it was his opinion that Bennett raised crops on most of the well site, just as it would if the well site was not present, he performed his loss of use calculations on the basis that the entire well site was unused by the owner. This is appropriate given that at any time and without notice to the landowner, the operator has the right to use of the entire well site.

[107] To determine the annual compensation for each site, Mr. Hoover calculated loss of use based upon the crop that was actually grown or that which was anticipated. For two of the leases, he used the actual crop grown in 2006 and the anticipated crops for 2007, 2008, 2009 and 2010. For the remaining leases, he used the actual crops grown in 2005 and 2006, and the anticipated crops for 2007, 2008 and 2009. Mr. Hoover also differentiated between what would be grown on the irrigated portions as opposed to the dryland corners, as applicable, for each site.

[108] Mr. Hoover used yield information from Bennett and from the Agricultural Financial Services Corporation. For prices and costs, he used information from various sources, with the

information collected from the areas of Alberta, Saskatchewan and Manitoba. Mr. Hoover did not explain why he deemed it useful to use some of Bennett's information and not others.

[109] Mr. Hoover agreed that he was using prices from 2004 and 2005, and yield figures from before that, to try and determine the appropriate compensation for the future five years. He agreed that prices were higher in 2006 and that a farmer would not be wrong to be optimistic about an increase in prices. But based on the fact that his calculations are based on 2004 and 2005 figures, the optimism is not reflected in his calculations of the gross margins.

[110] As to the trend for costs, Mr. Hoover stated that while some have gone down many have gone up, and it was his opinion that generally speaking, costs would be increasing in the five-year period from 2005. His costs analysis, however, appears to be based on past statistics from Agricultural Financial Services Corporation.

[111] Mr. Hoover gave a detailed explanation on the process that he used to calculate adverse effect. A computer program called the obstruction mapper program was designed with the intent that it would calculate the costs of the extra coverage that is expended in working around the well site obstruction. It does this by determining the area that is missed or the area that is worked more than once, including how many times that area is worked. The number of operations performed on the field in a crop year, the equipment size, equipment costs on a per acre basis, and weed control costs are determined, and then fed into the program. This enables the program to then calculate the costs of the extra applications.

[112] Another variable fed into the program is field efficiency. In any field, there are obstructions that have to be worked around, or corners that have to be turned. These characteristics decrease the efficiency of the machinery, and the existence of a well site is no exception. Various coefficients can be fed into the program to compensate for this efficiency decrease. The coefficient is subjective; Mr. Hoover's report states there are no known studies that verify the coefficients that have been used.

[113] Other assumptions are also made for the utilization of the program. For example, the majority of one of the well sites was located on a dryland corner, with a very small portion in the irrigated section. Since it would be difficult to work the irrigated corner, it was assumed that corner was not worked at all. Assumptions are also made regarding farming patterns. With some sites it is possible to work the field in a north-south or east-west direction. Where this was possible, the obstruction mapper was used to analyze the costs of more than one farming pattern, and the costs associated with each pattern were then averaged to arrive at one tangible adverse effect figure. Although it was acknowledged that a farmer may wish to work a field diagonally, this pattern was not utilized in the program.

[114] Another assumption is the amount of loss for each instance of multiple coverage. Mr. Hoover testified that based upon a study conducted by a third party years ago, the loss for double coverage is assessed at 10%; for triple coverage, at 25%; and for quadruple coverage, at 50%.

Mr. Hoover indicated some dissatisfaction with using these numbers; he stated that he considered this information fairly stale-dated.

[115] The obstruction mapper program used by Mr. Hoover in this case is the third version of the program. Previous versions also included variables such as the speed of the equipment, the particular costs of the equipment, and the extra distance traveled, but this approach was abandoned, for there were too many variables. The current version of the program, therefore, just determines how many times the same piece of the field is worked, or what portion is missed.

[116] Mr. Hoover went through each well site, providing his observations of the characteristics of the site; his understanding of the farming plan; and his calculation of loss of use and tangible adverse effect. He also commented on whether or not he was of the opinion that the site could be seen from the homestead; and whether he noted any noise, smell, or spills at the time of his visit.

[117] CNRL's position before the Board with respect to loss of use and adverse effect was put forth solely by Mr. Edwards. It appears he determined a total loss of use calculation for each site utilizing the crop rotation plan provided by Bennett and price, yield and cost figures, some of which were provided by Bennett, but some of which were derived from sources unascertainable in the Board decision.

[118] Before this Court, Mr. Edwards did not discuss the calculations of actual loss of use or adverse effect that he introduced to the Board, and gave the opinion that the appropriate level of compensation for adverse effect was disclosed by the pattern of dealings. As already discussed, the existence of an applicable pattern of dealings has not been proven here.

Analysis

[119] When the issue of annual compensation comes up for review, the negotiation concerns the rent to be paid for the future five-year period, not the past five years. Therefore, when determining the rate of compensation by calculation of the actual loss of use and adverse effect, an analysis of probable future land use must be undertaken.

[120] The Alberta Court of Appeal, in *Jorsvick v. Pennzoil Petroleum Ltd.,* (1988), 88 A.R. 397, stated that the role of the Board was not just to see if there were any changes to the land use which would justify a change in the annual compensation, but that it was to assess compensation afresh:

> We emphasize that the function of the Board on each review is to look <u>forward</u>. The 'changed circumstances' test, therefore, is not appropriate. ...
> It follows that once either party triggers a review, the entire question of annual compensation is at large, and must again be fixed by the Board on the basis of the material then before it. What happened earlier is merely a factor to be considered. It is not correct to say that the applicant, to gain a change in the award, must show

> altered circumstances. It is correct to say that, to gain any new award, the applicant will only get the award he proves he is entitled to. The onus is on the applicant, whoever he may be. There is no presumption for or against the previous award.

[121] Mr. Thompson does not utilize Bennett's anticipated crop rotation plan in his calculations, but uses one from the past. He agreed that costs of inputs rose from 2000 to 2005, but would not comment on costs of inputs in the future. With respect to crop values, he stated each crop was different and he didn't know that there was ever a pattern.

[122] Mr. Hoover did use Bennett's anticipated crop rotation plan in his calculations. He was also confident enough to opine that a farmer could be reasonably optimistic that both crop values and input costs would rise over the next five-year period, but he did not use this opinion in his calculations. Both calculations of variable costs and gross revenues were based solely on past statistics.

[123] Neither Mr. Hoover nor Mr. Thompson appeared to consider how the statistics used may compare to the Bennett operation, especially in light of the testimony regarding how Bennett reduces its costs and sells to specific markets to achieve higher prices. For example, Darryl Bennett testified the operation pre prices fertilizer and fuel. The operation has over 12,000 gallons of bulk storage in order to allow it to make fuel purchases when it appears advantageous. Mr. Bennett also testified that the operation does not have debt levels like other farm operations, as it carries minimal levels of debt. For example, there are four quarter sections containing the well sites at issue in this appeal, and only one of them has a loan or loans attached to it. Mr. Bennett also testified that wheat was sold at flour mills for a higher-than-average price, and that specific varieties of seed are used because of their higher-than-average yield production.

[124] Again, I emphasize that the purpose of this critique is not to discount the usefulness of the Thompson and Hoover reports in their entirety, but to stress that they can only be considered as aids in assisting the Court at arriving at appropriate compensation. There are two main reasons for this. The first is that the reports are based on past events, not future forecasts. Secondly, the reports are largely a statistical analysis and do not reflect the specific workings of the Bennett operation.

[125] One methodology which I do consider to be in error is the deduction of expenses from all crops grown, in the case of Mr. Hoover, and from all crops grown on irrigation, in the case of Mr. Thompson. In calculating loss of use, the Board has consistently stated that costs are only to be deducted in the case of specialty crops grown on irrigation. In fact, in *Talisman Energy Inc. v. Paziuk*, 2003/0161, the Board rejected Mr. Hoover's evidence because he took the same approach taken in this case:

> The Board accepts Mr. Hoover's evidence of land value. He is an accredited appraiser and presented evidence of comparable land sales. The Board does not

> accept his evidence regarding loss of use. It has been the Board's practice to award the gross amount except in cases of specialty crops wherein input costs may exceed net profit.

[126] In its decision in this case, the Board also stated expenses should be deducted from gross production when specialty crops are grown, and did not refer to deductions from any other production. I see no reason to depart from this methodology.

[127] Given the frequency with which the term "adverse effect" is used, there is a surprising lack of comment on what it entails. The *Surface Rights Act* simply states that in determining the amount of compensation payable, the Board may consider, "the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator".

[128] The cases that I have found which may provide some assistance discuss 'adverse effect' in the following ways:

a) *Intensity Resources*, at para. 25:
With respect to the adverse effect on the remaining land, the board stated:
This includes any extra requirements of time and costs necessarily incurred in farming around the obstruction in the field; any likely incidental production losses outside the area granted due to compaction or pulverization of the soil, overlaps or misses, and combining losses; any effect on management decisions and practices; added strain and stress on all machinery from turning and manoeuvring; and the probable need for more attention to effective weed control around the area...

b) *Gaschnitz v. Westhill Resources Ltd.*, (1980), 13 Alta. L.R. (2d) 248 at 255:
Adverse effect is awarded to cover, inter alia, inconvenience to a farmer in having to farm around the well site in question, the extra turns required for his tractor and farm equipment and the general inconvenience which will result due to the location of the well site in the farmer efficiently and effectively carrying out his farming operations.

c) *Sifton Energy Inc. v. Perrott*, 2006/0005 (Surface Rights Board):
The Board considers [adverse effect] to include the inconvenience and added cost to normal field operations in the vicinity of the demised premises; extra operating time resulting from the field obstruction; extra care and attention required in all field operations

> in the vicinity of the obstruction; any yield losses which may result from overlaps and misses, extra turning and combining losses due to the obstruction; any problems likely to arise from unattended weed infestations encroaching off the demised premises into adjoining land.

d) *Imperial Oil Resources Ltd. v. 826167 Alberta Inc.*, 2005 ABQB 309, (affirmed by the Court of Appeal), at para. 5:
> Adverse effect refers to the impact on land adjacent to the lease and, for our purposes, would mean such things as extra time needed to cultivate or care for land which is obstructed by a well head, or for extra time needed to supervise or inspect lands because of the operator's right to enter thereon.

[129] In reviewing the statutory provision and these cases, it is my view that while there may be tangible and intangible components to adverse effect, they cannot be completely divorced from one another. For example, while there is a quantifiable equipment cost to working over the same piece of land two or more times, simultaneously, there is an added stress on the operator to ensure that he or she does not hit any of the structures on the well site. Simultaneous with the extra caution being taken with each extra pass, there is extra time being expended.

[130] As explained, Mr. Hoover uses a computer obstruction mapper program to quantify the tangible portion of adverse effect. It is interesting to note that when he performs the calculation, he completely disregards the simultaneous events of extra stress and extra time. These are significant factors to consider; first, the farmer has to decide how the land is going to be farmed with the obstruction now in place. Second, the revised farming pattern has to be executed. As varying sizes and types of equipment are used with each farming operation, both steps are performed more than once in a growing season.

[131] Much like the calculation for loss of use, the obstruction mapper program uses statistics to the point that the decision-maker is left questioning how applicable the final figures are to the particular parcel in issue. For example, Mr. Hoover indicated that if more than one farming pattern may apply to the parcel, the average of both patterns is taken. This likely does not accord with reality. Mr. Hoover also acknowledged that the program could not even quantify all potential farming patterns, for example, working a field diagonally. Mr. Hoover stated that the percentages he used for determining the loss from each extra pass were stale-dated, thus calling into question this data. He also testified that the coefficients used to calculate field efficiency were subjective and dependent upon the farming experience and knowledge of the program user.

[132] Mr. Hoover was very honest and forthright giving his evidence, but it is difficult to understand why he refuses to quantify the intangible portion of adverse effect on the basis of subjectivity when there are so many subjective components within his calculation of the tangible portion of adverse effect.

[133] Mr. Bennett suggested many factors which he thought would properly be compensated for if acknowledged to be items which fell within the 'adverse effect' category. For example, he referred to noise, dust, garbage or unpleasant odours from the site; the extra traffic from either oil company employees entering the site or the public using access roads for unauthorized access; the potential health risks from hydrogen sulfide; the increased time to move irrigation equipment in order to conduct farming operations; the increased potential for irrigation equipment to get stuck more often; increased risk of erosion and weed problems; the effect of access roads on runoff and drainage; difficulties in farming at night and worrying about hitting the structures; the loss of the ability to build near the site given the 100 meter setback requirement; the loss of the ability to use the land for other purposes, such as equipment storage or acreage subdivision; the cumulative effects of having more than one well to farm around; the increased time for record keeping, to make sure payment has been received or a review period hasn't been missed; the time to negotiate a renewal.

[134] While there must be actual proof of the existence of these factors before they are properly compensated for under adverse effect, I do find merit to what I perceive to be the overarching theme of Mr. Bennett's factors. The theme is that the adverse effect does not arise solely from the exclusion of the leased parcel from the landowner's operation, the existence of the physical structures, or, the presence of an access road. It also arises from the need to interact with the operator as a business associate. The problem for the landowner is that it did not voluntarily choose to have this business relationship, and the operator constitutes a business associate that does not have the same objectives for the use of the now mutually-held business asset, the land, as the landowner.

[135] Generally speaking, the landowners in question are engaged in agricultural operations. Like the operators, they are operating a business, but in effect, are forced to hand over the use of one of their major business assets, their land, for contrary use by a third party. It is difficult to conceive that any business owner would ever willingly engage in voluntarily relinquishing use of its business assets. Yet that is what the farmer, the rancher, must do.

[136] The *Surface Rights Act* authorizes compensation to be provided for "the adverse effect of the area granted to the operator on the remaining land of the owner or occupant *and* the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator". This section does not limit compensation to the adverse effects caused by the well site; it explicitly refers to adverse effect arising from the 'operations of the operator'.

[137] An example of compensation which readily falls into this category is provided by one of the comparables put forward by Mr. Edwards. He testified that in one of the comparables he provided, the well site was located in the middle of a parcel irrigated with wheel move. The oil company purchased the landowner an additional wheel move set. When the farmer came up to the well site with one set, he would just stop it there, and then he would continue irrigating from the other side of the well site using the second wheel move set.

[138] Mr. Edwards testified that the second set of wheel move was purchased to 'alleviate the inconvenience to the landowner'. I cannot see why the cost of the additional wheel move set, even if only a one-time event, would not be categorized as a type of adverse effect payment.

[139] I find that Bennett has proven that it suffers adverse effects arising from the operations of CNRL. Mr. Bennett testified as to the preparations conducted for the meeting with Mr. Edwards. He testified as to the numerous phone calls to CNRL and its agents with respect to the leases and their renewals. He also testified about various effects that the presence of CNRL has on management decisions and practices. For example, Bennett was considering methods of optimizing the use of 4 adjoining dry corners, which encompass approximately 10 acres in total. One method of maximizing use of the parcel required the addition of water. To get water to the parcel was not difficult, but it required the permission of CNRL, which had a pipeline connecting two wells in the area. There was a time lag after Bennett contacted CNRL to obtain permission. After hearing from CNRL, Bennett determined that the various conditions CNRL required to be met before it would provide permission were too onerous. Bennett then utilized an alternate method of supplying the parcel with water. They were required, however, to wait until the crop was removed before they could use the alternate method.

[140] There is no question that the requirement to obtain CNRL's permission to construct the water line required extra time and effort from the management of the Bennett operation. Bennett also suffered delay in having the project finalized. This is an example of how the operations of the operator, while not arising directly from the well site itself, have an adverse effect on the owner.

[141] Before this Court, Bennett has not proven the majority of the adverse types of effects which he listed potentially arise from the operations of the lessee. But I do find that he has proven an adverse effect not only on the Bennett lands not included in the leases, but also arising from the operations of CNRL in general.

III) Owner v. Occupant

[142] The evidence before both the Board and this Court is that in the years that sugar beets or potatoes are grown on the Bennett lands, Bennett does not raise the crop itself, but rents the land to a specialty farmer. CNRL argues that in these years, Bennett is only entitled to receive compensation in the amount of the lost rental revenue per acre.

[143] This argument appears not to have been expressly made before the Board, and as noted by Bennett, is not listed as a ground of appeal in the Notice of Appeal filed by CNRL. However, as the *Surface Rights Act* states this appeal is in the form of a new hearing, I find that I ought to consider the matter.

[144] Part of the rationale behind CNRL's argument is the wording of the *Surface Rights Act*, specifically section 25(1), which states that in determining the amount of compensation payable,

the Board may consider the loss of use by the "owner or occupant". Therefore, argues CNRL, once a party has suffered a loss, regardless of whether it is the owner or the occupant, then that party can make a claim for it.

[145] The first problem with this argument is that it ignores the fact that the rate of compensation must be set for a five-year period which is *in the future*. Therefore, the parties and the tribunal must determine an appropriate rate of compensation for factors enumerated in section 25(1) regardless of who may end up having actual possession and use of the portion of land that has not been leased pursuant to the *Surface Rights Act*.

[146] The second problem with CNRL's argument is that the leasing of the land to a third party does not absolve the landowner of the potential obligation to deal with the operator during the course of any third party lease. Section 27 provides the process by which a party can have a rate of compensation reviewed. The relevant subsections are as follows:

> (1) In this section,
>
> (a) "lessor" means a party to a surface lease who is entitled to receive compensation under that surface lease;
>
> (b) "operator" means an operator who is obligated to pay compensation under a surface lease to a lessor, or who is obligated to pay compensation under a compensation order to a respondent;
>
> (c) "parties" means,
>
> (i) with respect to the review or fixing of a rate of compensation under a surface lease, the operator and the lessor, and
>
> (ii) with respect to the review or fixing of a rate of compensation under a right of entry order, the operator and the respondent;
>
> (d) "rate of compensation" means the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d).
>
> (4) An operator shall give a notice to the lessor or respondent, as the case may be,
>
> (a) on or within 30 days after the 4th anniversary of the date the term of the surface lease commenced or the right of entry order was made, as the case may be, where the term of the surface lease commenced or the right of entry order was made on or after July 1, 1983, or
>
> (b) where the term of the surface lease commenced or the right of entry order was made before July 1, 1983, on or within 30 days after July 1, 1987.
>
> (5) A notice under subsection (4) shall state
>
> (a) that the operator wishes to have the rate of compensation reviewed,
>
> (b) that the lessor or respondent, as the case may be, has a right to have the rate of compensation reviewed, or

> (c) where no rate of compensation has been fixed, that the lessor or respondent, as the case may be, has a right to have a rate of annual compensation fixed,
>
> in respect of the compensation years of the term subsequent to the year in which notice is given.
>
> (8) If, by the end of the compensation year in which the notice is given, the parties cannot agree on a rate of compensation, the party desiring to have the rate of compensation reviewed or fixed may make an application to the Board for a hearing to determine the rate of compensation.

[147] None of the written surface leases in question include a tenant as a party to the lease, so the tenants in question do not fall within the definition of "lessor" in section 27. This means the tenants in question are not included as a 'party', for "parties" in a review of the compensation rate is defined as "the operator and the lessor".

[148] Based upon these definitions, CNRL is only obligated to give notice to Bennett, not a tenant, of the time for review, and, if no agreement on the rate of compensation is reached, the tenant has no right to make an application to the Board for a hearing.

[149] Section 39, which allows a claim to be brought for damage that is not included within the surface lease, is similarly worded; the Board has the authority to make an order "with respect to a dispute between the operator and an owner or occupant *who are parties to a surface lease*" (emphasis added).

[150] Therefore, even though it may not be the landowner that is experiencing the loss of use and adverse effect in connection with production because it is a tenant that is farming the land, the landowner may continue to experience a detriment because it carries the obligation to assert the tenant's rights to compensation through the process set out in the *Surface Rights Act.* This is the case here, where the tenant is not named as a party to the surface lease.

[151] Another factor to consider is whether the surface lease lands and compensation are included or excluded in the rental agreement the landowner has with the third party. There is, however, no evidence on this point.

[152] Even with these considerations, there is merit to CNRL's argument where, as here, the appropriate rate of compensation is being determined using the quantification of actual loss of use and adverse effect. Given that the compensation is being set for a future period, it is reasonable to look at the landowner's plans for the future.

[153] The limited evidence here is that the land has been rented out for potato and sugar beet production in the past and will continue to be rented out in the future. At present, the rental amounts appear to be around $225/acre for sugar beet production and $350/acre for potato

production. Bennett still appears to be responsible from some costs, such as water and property taxes.

IV) Conclusion

[154] In *Imperial Oil Resources*, the Court of Appeal stated at para. 14; "When fresh evidence is adduced, depending on its nature and weight, the evidentiary record is broadened and an appellate judge may be required to proceed more by way of a fresh hearing than a simple appeal." Given the breadth of new evidence introduced here in conjunction with the lack of reasons given by the Board, it has been necessary for the evidence to be thoroughly discussed and reviewed. However, the Board is still owed some deference due to the application of the standard of review of reasonableness. As CNRL is the appellant, it is CNRL that bears the burden of proving that the Board's decision was unreasonable.

[155] I have already concluded there were deficiencies in the alleged pattern of dealings approach. Thus, it was reasonable for the Board not to follow it. Therefore, the rate of compensation is to be set using the loss of use and adverse effect approach.

[156] I find that the adverse effect awards of $2,500 and $4,000 granted by the Board are reasonable. Although the existence of a pattern of dealings was not proven in this case, I have reviewed the leases entered by Mr. Edwards and Mr. Bennett, and I find that while these adverse effect awards may be on the high side, there has not been adequate evidence to disturb them. In particular, with respect to the two lease sites for which $4,000 adverse effect awards were given, the sites contain access roads which run through the irrigated portions of the fields. This significantly impacts on the Bennett operation; the access roads effectively cut the quarter section or ½ quarter section, traditionally farmed as one field, into two. There was substantial evidence before this Court about how the dissection consumes much more time for farming practices and complicates production.

[157] With respect to loss of use, the Board assessed the surface lease sites on whether they were irrigated, partially irrigated, or dryland, and set the loss of use rates at $600, $450 and $350 per acre respectively. No reasons were given for this categorization, and there is no tenable line of analysis to support such a finding on the evidence presented in this Court. Therefore, the categorization used by the Board cannot be sustained.

[158] In order to reach this conclusion, I have examined the loss of use figures provided by Mr. Thompson, Mr. Hoover, and Mr. Bennett for various crops. With respect to potatoes and sugar beets, with the evidence before me, it is more appropriate to use the rental figures paid by the third party tenant than the gross margins calculated by Bennett. However, Bennett receives intangible benefits from renting out the lands for production of these specialty crops. For example, nutrients used by the crops grown on the Bennett lands are returned to the soil; Bennett has less labour costs, including management time, in the years the lands are rented; equipment is

not used and thus does not depreciate as quickly. I have therefore used the rental figures only as general guidelines.

[159] I have also considered the crop rotation, either already commenced or anticipated, for each of the seven sites in question, and thus considered the loss of use figures calculated by Mr. Thompson and Mr. Bennett with respect to quarter sections and the loss of use figures calculated by Mr. Hoover with respect to individual lease sites. There is conflicting evidence with respect to the crop rotations applicable to each site for the five-year period in question. For example, on the L.S. 4-23 site, Mr. Hoover used a crop rotation pattern of canola; soft wheat; summer fallow; summer fallow; and canola. Mr. Bennett, however, testified that this corner is usually not summer fallow, but is cropped, and explained why this corner is different than the others which contain surface lease sites. Where there was conflicting evidence on the crop rotation pattern, I have preferred that of Mr. Bennett, because Mr. Hoover's understanding of the crop rotation pattern was largely based on hearsay from a third party.

[160] Generally speaking, the existence of irrigation availability increases the variety of crops that may be grown and their potential yields. This creates a natural distinction between irrigation and dryland. However, when comparing the loss of use calculations on the sites classified as irrigated versus partially irrigated by the Board, there is no such natural distinction. For those sites which the Board has classified as partially-irrigated, the more important feature is the crop rotation for the five-year period in question. There may not be only one crop rotation to consider, because the site could have an irrigated portion and a dryland portion which are farmed differently. However, a loss of use figure for the entire site can still be arrived at by performing a loss of use analysis on the basis of the two crop rotations, with the loss of use figures calculated therefrom then applied to the irrigation and dryland acreages within the site.

[161] In undertaking such an analysis for those sites classified as 'partially irrigated' by the Board, I conclude, on the crop rotations applicable for each 5-year period in question, that the loss of use figures for two of the three partially irrigated sites more closely resemble the loss of use figures calculated for irrigated sites than those calculated for dryland sites. Thus, a two-part distinction between irrigated sites and dryland sites is appropriate. More will be said about the reclassification of the 'partially irrigated' leases in due course.

[162] With respect to the loss of use award of $350 per acre for dryland sites, CNRL has not shown that the decision by the Board was unreasonable. In reaching this conclusion, the reasons why the reports and evidence by Mr. Hoover and Mr. Thompson are not sufficient to alter the award are summarized at paragraph 163 below. In addition, I have also considered the dryland lease comparables entered by Mr. Bennett and Mr. Edwards. The dryland comparables within the Municipal District of Taber provide for loss of use compensation for dryland of $325 to $450 per acre. This provides further rationalization for the decision of the Board.

[163] With respect to the irrigated sites, I find that a loss of use award of $500 per acre, not $600 as awarded by the Board, is appropriate. I have arrived at the $500 per acre figure based

upon various considerations. Those pertaining to the reports and evidence of Mr. Thompson and Mr. Hoover are as follows:

a) The reports by both Mr. Thompson and Mr. Hoover are more of a statistical analysis than a case study of the Bennett operation.
b) While Mr. Hoover was willing to opine on the future of commodity and input prices, like Mr. Thompson, no forecasts were reflected in his report. Given that the role of the tribunal is to look forward and Mr. Hoover felt he able to opine on future trends, a utilization of future forecasts would have been of assistance.
c) Mr. Hoover made deductions from gross revenue for all crops, and Mr. Thompson did the same for all crops grown on irrigation. The practice is to assess loss of use on the gross amount for all crops, regardless of where they are grown, except for specialty crops.
d) Mr. Thompson used past, and therefore inappropriate, crop rotation cycles. Mr. Hoover's crop rotation cycles were also not entirely correct.

[164] On the evidence before this Court, it is more appropriate to consider the third party rental revenue than the crop production revenue for the potatoes and sugar beets that are grown on the Bennett lands. There is no suggestion in the reasons of the Board that it took into account the third party rental revenue when it determined the loss of use award for irrigated and partially irrigated sites. In addition, when one examines the loss of use figures provided by the various witnesses in this Court, an award on irrigated sites of $500 per acre for loss of use more accurately reflects the input of the third party rental revenue into the calculations than the $600 figure arrived at by the Board.

[165] Further, I have examined the irrigation comparables introduced in this Court by Mr. Edwards and Mr. Bennett. Based upon these comparables, a figure for loss of use on irrigated sites of either $500 or $600 per acre would be within the range of appropriate compensation. However, there is no indication of whether any of the lands in the comparables are rented by the owner to a third party, and if so, what considerations, if any, were given to that arrangement in the determination of the loss of use figure. Therefore, based upon the evidence presented in this case, the $500 figure is applicable here.

[166] Based upon the preceding analysis, those surface leases classified as 'irrigated' by the Board shall remain in that category, but the loss of use will now be assessed at $500 instead of $600 per acre. The surface leases classified by the Board as 'dryland' will remain in that category, and loss of use will continue to be assessed at $350 per acre. Of the three leases classified as 'partially irrigated', L.S. 10A-10 and L.S. 15D-10 now fall into the 'irrigated' category, and loss of use shall be assessed at $500 per acre.

[167] L.S. 4-23 was classified by the Board as 'partially irrigated'. It is difficult to understand why this site was placed in this category. Before this Court, Mr. Bennett testified that this site is not usually summer fallow, but it was never disputed that it located entirely within a dryland

section. Further, the loss of analysis figures support a categorization of ‘dryland’ as opposed to ‘irrigated’. Therefore, this site will be classified as ‘dryland’.

[168] The appeal is therefore allowed to the extent that the Board decisions are varied in respect of the award for loss of use for five of the seven surface leases in question. The yearly compensation for each surface lease is therefore as follows:

L.S. 15D-10		
Adverse Effect		$2,500.00
Loss of Use	3.11 acres x $500.00 per acre	$1,555.00
Total		$4,055.00
L.S. 10A-10		
Adverse Effect		$2,500.00
Loss of Use	2.39 acres x $500.00 per acre	$1,195.00
Total		$3,695.00
L.S. 12B-10		
Adverse Effect		$2,500.00
Loss of Use	3.29 acres x $350.00 per acre	$1,151.50
Total		$3,652.00 (rounded)
L.S. 4A-10		
Adverse Effect		$2,500.00
Loss of Use	2.67 acres x $350.00 per acre	$ 934.50
Total		$3,435.00 (rounded)
L.S. 6-10		
Adverse Effect		$4,000.00

Loss of Use	3.92 acres x $500.00 per acre	$1,960.00
Total		$5,960.00

L.S. 11-10		
Adverse Effect		$4,000.00
Loss of Use	4.12 acres x $500.00 per acre	$2,060.00
Total		$6,060.00

L.S. 4-23		
Adverse Effect		$2,500.00
Loss of Use	2.69 acres x $350.00 per acre	$ 941.50
Total		$3,442.00 (rounded)

[169] The difference between the total yearly compensation calculated by the Board and this Court is nominal. However, this decision provides a methodology as to how to reach the calculation, a critical segment missing from the Board's decision.

[170] The parties have not had an opportunity to address the matter of costs. If they are unable to agree they may apply on Motion.

Heard on the 18th day of December to the 20th day of December, 2006.
Dated at the City of Lethbridge, Alberta this 8th day of January, 2008.

Langston J. H
J.C.Q.B.A.

Appearances:

Ronald C. Swist

Jeremy H. Hockin
Parlee McLaws LLP
for the Appellant
J. Darryl Carter, Q.C.
Darryl Carter & Company
for the Respondents