

*SURFACE RIGHTS ACT*  
RSA 2000  
Chapter S-24  
(hereinafter “the Act”)

Before:

SURFACE RIGHTS BOARD  
(hereinafter “the Board”).

IN THE MATTER OF certain lands subject to a surface lease (the L.S. 14-6 well site and roadway lease) in Plan 9922030, Block 1, Lot 7 (NW ¼-6-38-27-W4M), in the Province of Alberta (hereinafter referred to as “the said land”).  
Excepting thereout all Mines and Minerals.

B E T W E E N:

SHININGBANK ENERGY LTD.,

Operator,

- and -

W. DONALD NICKS  
and  
TRUDY L. NICKS,

Lessor.

DECISION

Upon application by the Lessor for review of the rate of compensation payable in respect of a surface lease in the said land; and upon the Board being satisfied that conditions precedent to the application had been met; the Board held a hearing on the application on March 14, 2007, at Red Deer, Alberta.

PRESIDING BOARD:

- John E. Logan, Presiding Chair
- E. Gordon Chapman
- David McDonald

APPEARANCES:

- For the Operator:
  - Messrs. Brent Davidson, President; Travis Whitlock, Landman; and Steve Ferguson; all of Maverick Land Consultants (87) Inc., Land Agent.
- For the Lessor:
  - Mr. W. Donald Nicks, also representing Trudy L. Nicks, Landowners;
  - Mr. Michael D. Keyes B.A., LL.B. of Warren Sinclair LLP, Legal Counsel; and
  - Mr. Brian S. Gettel, B.Comm., AACI of Gettel Appraisals Ltd.

EXHIBITS FOR IDENTIFICATION:

- Exhibit A: Copy of the surface lease as filed with the application.
- Exhibit B: Application for review.

**EXHIBITS FILED:**

- Exhibit 1: One (1) coil bound book containing twenty seven (27) tabs comprising the Lessor's Counsel's submission.
- Exhibit 2: A six (6) page document containing a written submission on behalf of Donald and Trudy Nicks (the Landowners).
- Exhibit 3: A fifteen (15) page Commercial Real Estate Purchase Contract pending on the subject land.
- Exhibit 4: A ninety-seven (97) page document containing information presented to Shiningbank – by the solicitor for the Nicks.
- Exhibit 5: A fifty (50) page document containing documents pertaining to the 14-6-39-27-W4M.
- Exhibit 6: An eighty four (84) page document titled "Documents Pertaining to Rental Renewals on Subject Wellsite".
- Exhibit 7: A one hundred and seventy-eight (178) page document containing seventeen (17) comparables for compensation paid in the area.
- Exhibit 8: A three (3) page document containing a cover page and two maps of the area showing the location of the comparables.

Exhibit numbers 4 to 8, inclusive, were filed for the Operator. Exhibit numbers 1 to 3, inclusive, were filed for the Lessor.

**PRELIMINARY MATTERS:**

The Board raised a preliminary issue and asked what the proper acreage for the subject site was. Both parties agreed that this matter deals with 2.95 acres on the subject property.

**BACKGROUND:**

This matter concerns a review of compensation for a surface lease of 2.95 acres on the subject property with an original date of July 26, 1983. The effective date of review is July 26, 2003. There is industrial and commercial development occurring in the immediate area of the subject and this has had the effect of increasing the land value considerably. Current annual compensation is \$2,800.00 per year, the Operator has offered \$3,100.00 per year and the Lessor is requesting \$4,425.00 per year.

**ISSUES:**

What is the appropriate amount of compensation payable under the surface lease review for File No. SL 2005.0072?

Does a substantial increase in property value affect compensation under "Loss of Use" in a surface lease review?

**RELEVANT LEGISLATION:**

*Surface Rights Act RSA 2000, Chapter S-24*

***Review of rate of compensation***

**27(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;*

3.....

- (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).
- (2) For the purposes of this section,
- (a) the term of a compensation order shall be computed from the date the original right of entry order to which it relates was made, and
  - (b) the term of a surface lease shall be computed from the effective date of the lease.
- (3) This section applies to compensation orders and surface leases
- (a) that provide for the payment of compensation on an annual or other periodic basis, or
  - (b) that do not provide for the payment of compensation on an annual or other periodic basis but relate to major power transmission line structures as defined or designated in the regulations.
- (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.
- (6) If either party indicates pursuant to a notice under subsection (4) that that party wishes to have the rate of compensation reviewed or fixed, the parties shall enter into negotiations in good faith for this purpose.
- (7) When the parties agree on a rate of compensation
- (a) under a surface lease, the parties shall amend the lease in accordance with their agreement or enter into a new lease, and
  - (b) under a compensation order, the parties shall notify the Board in writing of the rate agreed on and the Board shall vary the compensation order accordingly.

4.....

*(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.*

*(9) An application pursuant to subsection (8) shall set out*

- (a) the name and address of the operator,*
- (b) the name and address of the lessor or respondent, as the case may be,*
- (c) the rate of compensation under the surface lease or compensation order, and*
- (d) the amount the applicant believes to be a reasonable and fair rate of compensation,*

*and the application shall be accompanied with a copy of the surface lease, if applicable, and any other documents or material the applicant considers to be relevant to the application.*

*(10) On receipt of an application pursuant to subsection (9), the Board shall fix a date for the hearing of the application and notify the parties of the date so fixed.*

*(11) The Board shall hear the application and, as soon as it is convenient afterwards, shall make an order fixing, confirming or varying the rate of compensation payable commencing on the anniversary date of the surface lease or compensation order, as the case may be, next following the date notice was given under subsection (4).*

*(12) An order under subsection (11) may be appealed as though it were a compensation order under section 23.*

*(13) With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.*

*(14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.*

*(15) If the operator fails to give a notice required by subsection (4) or (14), the lessor or respondent, as the case may be, may within a reasonable time after the failure, give a notice to the operator stating that the lessor or respondent wishes to have the rate of compensation reviewed or fixed and in that case*

- (a) subsections (6) to (13) apply,*
- (b) the Board may, notwithstanding subsection (11), make its order as to the rate of compensation effective from the same date it would have been effective if the operator had given notice as required by subsection (4) or (14), and*
- (c) the Board may make any order regarding the payment of interest that it considers appropriate.*

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#### ***Determining compensation***

***25(1) The Board, in determining the amount of compensation payable, may consider***

5.....

(c) *the loss of use by the owner or occupant of the area granted to the operator,*

(d) *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,*

*1983 cS-27.1 s25*

**SUMMARY OF THE LESSOR'S POSITION:**

The Lessor's counsel presented Exhibit 1, a coil bound document containing 27 tabs. These are summarized below.

1. Surface Lease dated July 26, 1983.
2. Letter from Westridge Petroleum Corp. to Roderick R. Ellenwood, dated March 3, 1993.
3. Letter from Westridge Petroleum Corp. to Don Nicks, dated August 24, 1993.
4. Letter from Westridge Petroleum Corp. to W. Donald and Trudy L. Nicks, dated June 23, 1997.
5. Letter from Don and Trudy Nicks to Westridge Petroleum Corp., dated July 18, 1997.
6. Letter from Westridge Petroleum Corp. to W. Donald and Trudy L. Nicks, dated July 27, 2000.
7. Letter from Don Nicks to Shiningbank Energy Ltd., dated January 20, 2004.
8. Letter from Sisson Warren Sinclair to Shiningbank Energy Ltd., dated June 22, 2004.
9. Letter from Sisson Warren Sinclair to Shiningbank Energy Ltd., dated October 14, 2004.
10. Letter from Maverick Land Consultants (87) Inc. to Sisson Warren Sinclair, dated March 1, 2005.
11. Letter from Sisson Warren Sinclair to Maverick Land Consultants (87) Inc., dated March 17, 2005.
12. Letter from Sisson Warren Sinclair to Shiningbank Energy Ltd., dated June 9, 2005.
13. Letter from Sisson Warren Sinclair to Shiningbank Energy Ltd., dated August 15, 2005.
14. Letter from Sisson Warren Sinclair to the Alberta Surface Rights Board, dated October 13, 2005.
15. Letter from the Alberta Surface Rights Board to Sisson Warren Sinclair dated October 24, 2005.
16. Letter from Sisson Warren Sinclair to the Alberta Surface Rights Board, dated October 13, 2005.
17. Letter from Shiningbank Energy Ltd. to W. Donald Nicks and Trudy L. Nicks, c/o Sisson Warren Sinclair, dated November 3, 2005.
18. Letter from Sisson Warren Sinclair to Shiningbank Energy Ltd., dated November 15, 2005.
19. Letter from the Alberta Surface Rights Board to Sisson Warren Sinclair, dated November 24, 2005.
20. Letter from the Alberta Surface Rights Board to Shiningbank Energy Ltd., dated December 5, 2005.

6.....

21. Letter from the Alberta Surface Rights Board to Sisson Warren Sinclair, dated January 4, 2006.
22. Fax from the Alberta Surface Rights Board, dated March 8, 2007, containing a copy of a letter with attachments, from Shiningbank Energy Ltd. to the Alberta Surface Rights Board, dated February 7, 2006.
23. Appraisal prepared by Brian Gettel, dated August, 2006.
24. Letter from Gettel Appraisals Ltd. to Sisson Warren Sinclair, dated March 8, 2007.
25. Letter from Gettel Appraisals Ltd. to Sisson Warren Sinclair, dated March 9, 2007.
26. Copy of Board Decision No. 99/0080 involving Rywood Resources Ltd. v. Winfield Power Company Ltd. et al., dated July 12, 1999.
27. Excerpts from the *Surface Rights Act*, RSA 2000, Chapter S-24.

Counsel for the Lessor submitted Exhibit 2, a written submission on behalf of Donald and Trudy Nicks outlining the history, import and relevance of each of the tabs in Exhibit 1.

Exhibit 3, presented by the Lessor, is an accepted Commercial Real Estate Purchase Contract for the subject property for five million, seven hundred and nineteen thousand, seven hundred and forty dollars (\$5,719,740.00) to support the increased land value for the subject.

Counsel for Mr. Nicks submitted that the value of the subject property has increased substantially recently because of encroaching industrial and commercial development in the immediate vicinity of the subject property. He acknowledged that the Board may only consider Section 25(1)(c) and (d), loss of use and adverse effect, but argued that the increase in value of the subject results in an increased loss of use.

**SUMMARY OF THE OPERATOR’S POSITION:**

The Operator submitted that, although there is much industrial and commercial activity in the immediate area, the subject property is still zoned as agricultural and is currently being used for agricultural production.

The Operator further submitted that an increase in value of the subject is irrelevant and the Board may only consider Section 25(1)(c) and (d), loss of use and adverse effect, when determining compensation.

The Operator also provided the Board with Exhibit 7 containing 17 comparable leases in the area to support the \$3,100.00 offered to the Landowners as fair and reasonable. These comparables are summarized below.

	Location	Operator	Type of Taking	Date	Acres	Market Value of Land	Nuisance & Inconvenience	Adverse Effect	Loss of Use	Loss of Use (per acre)	Annual Compensation
1	102/14-1-37-28 W4M	Shiningbank	New Surface Lease	Dec 2006	6.100	\$ 18,900	\$ 1,570	\$ 2,080	\$ 1,720	\$ 282	\$ 3,800
2	102/8-18-37-27 W4M	Shiningbank	Amendment	Feb 2007	4.530						\$ 5,000
3	102/16-27-38-28 W4M	Shiningbank	New Surface Lease	Jan 2006	5.300	\$ 15,750	\$ 2,150	\$ 2,025	\$ 1,575	\$ 297	\$ 3,600
4	102/13-34-36-27 W4M	Shiningbank	Amendment	March 2006	6.960						\$ 5,000
5	102/7-32-36-27 W4M	Shiningbank	New Surface Lease	July, 2006	2.710	\$ 6,775	\$ 1,900	\$ 1,987	\$ 813	\$ 300	\$ 2,800
6	103/13-21-36-27 W4M	Shiningbank	Surface Lease	Nov 1989	4.010	\$ 10,295					\$ 2,700
7	102/6-23-36-28 W4M	Shiningbank	New Surface Lease	Jan 2006	4.050	\$ 12,150	\$ 2,000	\$ 2,285	\$ 1,215	\$ 300	\$ 3,500
8	102/10-29-36-27 W4M	Shiningbank	New Surface Lease	April 2006	2.373	\$ 5,933	\$ 1,781	\$ 1,868	\$ 712	\$ 300	\$ 2,600
									Average		\$ 3,625
1	7-24-39-27 W4M	Solara		Feb 2007	4.06						\$ 4,200
2	11-29-39-27 W4M	Vermillion			3.94						\$ 4,000
3	14-27-37-27 W4M	CNRL		Oct 1995	4.64						\$ 2,500
4	16-27-37-27 W4M	CNRL		Nov 1995							\$ 2,500
5	6-23-38-28 W4M	Daylight Energy		Sept 1995							\$ 4,000
6	13-15-38-28 W4M	Daylight Energy		Oct 2005	2.80						\$ 2,470
7	6-15-38-28 W4M	Daylight Energy		Oct 2005	3.85						\$ 2,759
8	4-17-38-28 W4M	Tempest		Aug 2005	5.11						\$ 3,500
9	102/6-35-38-28 W4M	Progress		Aug 2005	7.03						\$ 5,550
				Average	4.50				Average		\$ 3,561
				Std Deviation	1.42				Std Deviation		\$ 948

7.....

FINDINGS OF FACT:

1. The subject property is currently zoned for agricultural use.
2. The subject property is currently being used for agricultural production.
3. There is an accepted offer to purchase the subject property for five million, seven hundred and nineteen thousand, seven hundred and forty dollars (\$5,719,740.00).
4. There is substantial industrial and commercial development in the immediate area of the subject property.
5. The subject property is ripe for commercial or industrial development.
6. There is currently no commercial or industrial development on the subject property.

DECISION:

It is the decision of the Board to order annual compensation for the subject property increased from \$2,800.00 per year to \$4,425.00 per year, effective July 26, 2003.

REASONS FOR THE DECISION:

Section 27 of the *Surface Rights Act* describes the requirements for a review of compensation. Section 27(1)(d) further states:

*“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).*

The matters referred to in Section 25(1)(c) and (d) are described in the *Act* as follows:

***Determining compensation***

**25(1)** *The Board, in determining the amount of compensation payable, may consider,*

- (c) *the loss of use by the owner or occupant of the area granted to the operator,*
- (d) *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,*

1983 cS-27.1 s25

“Loss of use” has typically been considered by the Board as “loss of agricultural production”. As the subject property is still zoned as agricultural land and is still being used for agricultural purposes, the Board has decided to deal with loss of use in this case as loss of agricultural production.

Counsel for the Landowners presented *Rywood Resources Ltd. v. Winfield Power Company Ltd. et al.* (Surface Rights Board Decision No. 99/0080) as support for their position that as development of the subject property is imminent and, as the highest and best use of the subject property is as subdivided commercial or industrial development, the Landowners should be compensated on a “return on investment” basis.

The Board notes that in the *Rywood v. Winfield (supra)*, the Operator failed to register the encumbrance on the title of the land. When Winfield Power Company Ltd. purchased the land, they were unaware that a well was in place. This was due to the negligence of the operator. There was also development occurring on the property. In that case, it was only proper to consider “loss of use” as “loss of return on investment”.

The Board was persuaded that the subject property will be developed in the near future. The period covered for this review is from July 26, 2003 to approximately July 26, 2008, and the Board was further persuaded that if any development was to take place during this period, it would happen during the last few months of this period. If applications for rezoning or subdivision were in place at this point in time, the Board would have looked more favorably on this argument. It would be more appropriate to make this argument at the next surface lease rental review.

Having considered this argument, the Board then considered the position of the Operator.

The Operator submitted that the Board may only consider loss of use and adverse effect when reviewing compensation and the Board agreed with this position.

The Operator maintained that the last offer of \$3,100.00 per year was fair and reasonable and presented 17 comparable agreements to support that position. The Board considered those comparables and noted the following:

1. The range of compensation paid under those 17 comparables was from \$2,470.00 to \$5,550.00.
2. The mean of compensation paid under those 17 comparables was \$3,561.00.
3. The standard deviation of those 17 comparables was \$948.00
4. The requested compensation of \$4,425.00 per year was well within that range and was within one standard deviation of the mean.

Based on the comparable leases provided by the Operator, the Board determined that the requested annual compensation of \$4,425.00 is fair and reasonable.

DETERMINATION OF COMPENSATION:

The Board has determined that the annual compensation for the subject well will be \$4,425.00 per year effective July 26, 2003 payable to the Lessor.

An Order will issue varying the rate of compensation payable under the Surface Lease from \$2,800.00 to \$4,425.00 per annum, effective July 26, 2003, and payable on that date in each year thereafter unless and until varied by a further review.

INTEREST:

Under Section 27(15)(c), the Board may make an order regarding the payment of interest that it considers appropriate. The Board considers the Bank of Canada rate on the due date of the rental payment to be appropriate interest on the balance of annual compensation due. The interest rates are as follows:

- July 26, 2003 - 3.25%
- July 26, 2004 - 2.25%
- July 26, 2005 - 2.75%
- July 26, 2006 - 4.50%

COSTS:

Legal Counsel for the Landowners submitted that costs incurred were as follows:

1. Legal costs: .....\$ 9,273.00 (incl. GST and disbursements)
2. Mr. Gettel’s appraisal costs: ...\$ 6,360.00 (incl. GST and disbursements)

**Total costs: .....\$ 15,633.00**



The Operator objected to these costs on the following basis:

Mr. Gettel’s costs should not be paid as the appraisal was inappropriate for the matter at hand. Mr. Gettel’s appraisal was based on land value and did not take into account Section 27 of the *Surface Rights Act*. The Operator further submitted that a large amount of Mr. Keyes’s costs was involved in “bringing himself up to speed”. Mr. Sisson had been handling this file until late August, when he was appointed to the Bench. At this point, Mr. Keyes took over the file. The Operator felt that a large portion of Mr. Keyes’s costs was a duplication of work done by Mr. Sisson.

Mr. Keyes responded that it took very little time to get up to speed on the file and that the majority of his time was spent dealing with the Operator and/or the Landowners. He also indicated that Mr. Gettel’s appraisal report was integral to their case and was a legitimate expense.

It is the decision of the Board to order costs as follows:

- 1. Legal costs: .....\$ 9,273.00 (incl. GST and disbursements)
- 2. Mr. Gettel’s appraisal costs: ...\$ 6,360.00 (incl. GST and disbursements)

**Total costs: .....\$ 15,633.00**

payable by the Operator to the Lessor.

Dated at the City of Edmonton in the Province of Alberta this 4th day of July, 2007.

SURFACE RIGHTS BOARD

MEMBER