

*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 (“surface lease”) in the North West Quarter of Section 7, Township 63, Range 5, West of the 4th Meridian, in the Province of Alberta, as described in Certificate of Title No. 052 019 592 +1 (“the Land”).  
Excepting thereout all Mines and Minerals.

B E T W E E N:

DEVON ARL CORPORATION,

Operator,

- and -

ANDREW JOHN LEROUX  
and  
MARYANNE LEROUX,

Lessor,

DECISION

Upon application by the Lessor for review of the rate of compensation payable in respect of a surface lease in the 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 3, 2008, at Smoky Lake, Alberta.

PRESIDING BOARD:

- N. Allen Maydonik, Q.C., Presiding Chair
- David M. Broda
- Edward V. Zenko

APPEARANCES:

For the Operator:

- Heidi L. Meldrum, with Parlee McLaws LLP, Legal Counsel;
- Kevin Ryan, District Superintendent, with Devon Canada Corporation;
- Shane Nordin, Senior Land Agent, with Devon Canada Corporation; and
- Robert J. Telford, B. Sc., AACI, P. App., P. Land, Land Consultant and Appraiser, McNally Land Services Ltd.

For the Lessor:

- Andrew John Leroux, Landowner;
- MaryAnne Leroux, Landowner; and
- Vic Findlater, with Todd Drake Williams Findlater LLP, Legal Counsel.

**BACKGROUND:**

This matter concerns compensation for an Alberta Surface Lease dated August 28, 2001. The lease originally involved 2.92 acres but was later amended and increased to encompass 8.19 acres. It contains a multiwell padsite and an access road. It is located on land owned by Andrew John Leroux and MaryAnne Leroux (the "Landowners") adjacent to the hamlet of La Corey north of Bonnyville.

The Landowners applied for a review of compensation on the surface lease as provided for in Section 27(8) of the *Act*. Satisfied that all conditions had been met, the Board held a hearing on March 3, 2008, in Smoky Lake, Alberta.

N. Allen Maydonik Q.C. sat as a Member of the Board at the Hearing. He was unavailable to complete the Board's deliberations and decision writing process. Therefore the Board completed this Decision with two Members in accordance with section 10 of the *Act*.

**ISSUE TO BE DECIDED:**

What is the appropriate amount of compensation payable for this multiwell padsite?

**RELEVANT LEGISLATION:***Surface Rights Act RSA 2000, Chapter S-24****Review of rate of compensation***

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**27(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.*

...

***Determining compensation***

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

- (a) *the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,*
- (b) *the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,*
- (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,*
- (e) *the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and*
- (f) *any other factors that the Board considers proper under the circumstances.*

PRELIMINARY MATTERS:

There were no preliminary matters.

BOARD FILINGS:

Exhibit A: Copy of the surface lease as filed with the application.

Exhibit B: Application for review.

EXHIBITS FILED:

Exhibit 1: A Cirlox bound document titled "Submissions of Landowner"

Exhibit 2: A copy of a satellite photograph of the Land

Exhibit 3: A one page overview of the assets and activity on the site

Exhibit 4: A Cirlox bound document titled "Estimate of Annual Compensation"

Exhibit 5: A Cirlox bound document titled "Negotiated Agreements"

Exhibit number 1 was filed for the Lessor. Exhibit numbers 2 to 5, inclusive, were filed for the Operator.

SUMMARY OF THE LANDOWNERS' POSITION:

The Landowners are requesting annual compensation of \$10,000 per year. They presented the following information, evidence, and arguments in support of this level of compensation.

- The Landowners had drainage problems in the area of the lease site prior to 2001. They had already dug a drainage ditch (four or five years prior to the construction of the lease site) to provide drainage to the east (Exhibit 1, Tab K). The construction of the padsite caused water to back up in the area again. Planted trees along the boundary of the lease have died as a result of the flooding. The Landowners presented aerial photos of the lease site area to show that it was dry in the year 2000, prior to the construction of the lease site. They provided photos in Exhibit 1, Tab M, showing water flooding in the area north of the surface lease.
- Andrew John Leroux ("Leroux") testified that he has leased two acres of land to ATCO in 2006 and in 2008. In exchange he gets about \$15,000 worth of used power poles and cross arms every year (Exhibit 1, Tab G). ATCO also hires him to plough snow. The result is that he nets over \$7,500 per acre (in kind) for this two acre parcel of land. Leroux argued that this arrangement is an indicator of market lease rates.
- Leroux testified that he bought the land with the intention of subdividing it. He stated that he is a contractor, not a farmer. Leroux testified that he has already subdivided and sold residential lots on the SW-18-63-5-W4M (the quarter just north of the Land). Exhibit 1, Tab H, indicates that the Landowners sold at least 14 lots in that subdivision project during 2006 and 2007. The Landowners provided evidence in Exhibit 1, Tab I, that two of the lots that he had sold for \$20,000 had resold for \$45,000 on July 1, 2006. The Landowners presented this as evidence that the real estate market was very active because of the oil activity in the area.
- The Land has already had three lots subdivided. Leroux provided evidence in Exhibit 1, Tab N, that he had plans in place to subdivide the Land as early as the late 80's or early 90's when this particular plan was drawn.
- Exhibit 1, Tab O, contains an appraisal of a planned 7+ acre parcel adjacent to the subject surface lease. Atlas Appraisal Services Inc. estimated that the parcel has a market value of \$340,000 to \$450,000.
- Exhibit 1, Tab P, contains a copy of an Offer To Purchase dated February 5, 2008, in which a third party offers \$38,000 per acre for this seven acre parcel (more or less) of the NW-7-63-5-W4M. The Landowners offer this as evidence that there is a "boom" in the area and that the offer by the Operator is not fair and reasonable.

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

The Operator presented three witnesses and four Exhibits in support of its position that \$6,050 per year is fair and reasonable compensation for the subject surface lease. This offer is based on \$250 per acre for loss of use, \$2,000 adverse effect for the first well, and \$500 per well for adverse effect on each of the additional four wells.

Exhibit 2 is a copy of an aerial photograph (with superimposed contour lines) showing the Land, the multiwell padsite, and the above ground structures. The Board notes that this Exhibit was useful in providing the Board with an appreciation of the area.

Exhibit 3 indicated truck traffic as follows.

- Operator visits a minimum of once per day.
- Emulsion is hauled by tri-axle truck once every two to five days.
- Sand is hauled out about once every three months.
- Pressure truck visits one to two times per month.
- Flush-by visits one to two times per month.
- Service rig visits three to four times per year.
- Other miscellaneous traffic as required.
- Vegetation control occurs one or two times per summer.

The Operator provided testimony that the lease location has five wells, three storage tanks, an MCC building, a header building, a casing gas compressor, and the associated piping. Two of the five wells are now producing, two have the potential to be started up, and one is shut in and will not be activated.

The Operator stated that it pumps water off of the site when it gets permission from the Landowners. In 2007, the Landowners requested that the Operator not pump water off of the site. Under cross examination by Operator’s Counsel, Leroux acknowledged that there had been a water problem prior to the construction of the lease location. The Operator presented evidence that there is a one-metre difference in elevation between the north end of the lease and the south end (higher). This elevation difference is responsible for the water that pools north of the lease.

The Operator presented testimony that leases with multiple wells typically have more traffic than leases with single wells. That is why the Operator is proposing an additional \$500 for the additional wellheads.

Exhibit 4 was filed by the Operator and is titled “ESTIMATE OF ANNUAL COMPENSATION for a Surface Lease” prepared by Robert J. Telford (“Telford”) of McNally Land Services Ltd. Telford expressed the opinion that there is a pattern of dealings which supports a \$6,050 annual award of compensation. Telford based this opinion on 42 comparables in and around the Land. Of these, eight leases had multiwell padsites from the time of initial drilling. Thirty-four had additional wells (i.e. padsites) added later. Telford testified that he selected these 42 sites because of their comparability to the subject site. The sites involve three different operators, and are similar to the subject land because of proximity to the subject land, land use, as well as impact on the landowner and adjoining lands. Telford testified that these comparables provide for compensation as follows.

Description	Adverse Effect	Loss of Use	Adverse Effect for Additional Wellheads
Mean	\$1,800	\$245	\$452
Median	\$1,845	\$250	\$500
Mode	\$1,700	\$250	\$500
Minimum	\$1,000	\$185	\$200
Maximum	\$2,360	\$301	\$500
Count (# of padsites)	34	34	42

**FINDINGS OF FACT:**

- Andrew John Leroux and MaryAnne Leroux hold title to the NW-7-63-5-W4M (the Land).
- The Devon 13-7 padsite contains five wells and encompasses 8.19 acres of the Land.
- The effective date of review is August 28, 2006.

- The Land is located within the hamlet of La Corey and contains approximately 144 acres.
- The Operator is offering annual compensation of \$6,050. This offer is based on loss of use at \$250 per acre, adverse effect of \$2,000 for the first well, and additional adverse effect of \$500 per additional well.
- The Landowners are asking for \$10,000 per year in compensation.
- The Landowners have a history of developing land in La Corey. They had previously subdivided and sold 14 lots on the SW-18-63-5-W4M (the quarter immediately north of the Land).
- The Landowners had plans of subdividing the Land as early as the late 80’s or early 90’s when they had the drawing in Exhibit 1, Tab N, prepared. The drawing is titled “TENTATIVE PLAN SHOWING PROPOSED SUBDIVISION.”

DECISION:

The Board fixes compensation as follows:

Loss of Use: 8.19 acres @ \$250.00 per acre.....	\$ 2,047.50
Adverse Effect: .....	\$ 6,000.00
Total: .....	\$ 8,050.00 (rounded)

REASONS FOR THE DECISION:

**Why the Board did not accept the Landowners’ Position**

The Landowners requested a global amount of \$10,000. The Board does not accept this figure for the following reasons.

- The Board is not persuaded that one lease with ATCO is a good indicator of fair and reasonable compensation. Furthermore, payment for this lease is “in kind.” This requires that a value be placed on the poles and cross bars. The Landowners value them at a retail price. The Board is of the opinion that a wholesale price for the poles and crossbars would more accurately reflect the true consideration in these transactions. The Board is not persuaded by the Landowners’ valuation.
- The Board received very little empirical evidence to support the choice of the \$10,000 figure. Without some basis for arriving at the figure, the Board cannot place much weight on it.

**Why the Board did not accept the Operator’s Position**

The comparables that the Operator supplied involved agricultural land away from any development. The Land is adjacent to the hamlet of La Corey. John Leroux stated that “I bought the land to subdivide.” The Landowners have a history of developing land. They developed the SW-18 immediately north of the hamlet of La Corey and they had subdivision drawings made up for the Land approximately 15 years ago. The Board is persuaded that the potential for at least some subdivision is not entirely remote. The Board is persuaded that Landowners have the location, the expertise, and the experience to begin such a project. The Board is not concerning itself with whether or not the proposed plans will be successful. The Board is persuaded that this is, and always has been, the intentions of the Landowners. The Board is persuaded that the lease site will be an ongoing obstacle to the Landowners’ plans. The Landowners will have to contend with and work around the lease as they pursue their development plans. In summary, the Board is persuaded that although the Land is currently being used for agricultural purposes, it does have development potential which the comparables do not. The Land is not comparable to the agricultural comparables presented by the Operator. It would not be fair and reasonable to compensate the Landowners on the same basis.

**The Award of Compensation**

Section 27(8) of the Act provides for a Board hearing in cases where operators and landowners cannot agree on an annual rate of compensation. In such cases, the Board is guided by s.25(1) of the Act.

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Section 25(1)(c) and (d) read as follows:

*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,*

This discussion will consider compensation under these two headings.

- **Loss of Use:** The Landowners' request was based on a global amount of \$10,000 with no breakdown provided. In the absence of an alternative number from the Landowners, the Board fixes this component of compensation at \$250 per acre. It is the opinion of the Board that this is fair and reasonable compensation for the upcoming five-year period.
- **Adverse Effect:** Section 25(1)(d) of the *Act* suggests that the Board, in compensating landowners, may consider the adverse effect of the area granted on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by the operations of the operator. The Board is persuaded that the Landowners will experience nuisance and inconvenience over and above that experienced by the landowners presented to the Board as comparables. The Board is persuaded that there are cogent reasons for departing from the proposed pattern of dealings of the Operator.

The Board is persuaded that the presence/operations of the Operator's lease will complicate the efforts of the Landowners to drain water from the Land.

The Board is persuaded that the presence of the lease site will continue to complicate the efforts of the Landowners to subdivide and develop the Land. This is an adverse effect for which compensation is warranted.

In the absence of more empirical evidence, the Board fixes compensation for adverse effect, noise, nuisance, and inconvenience at \$6,000.

An Order will issue varying the rate of compensation payable under the surface lease from \$6,000 to \$8,050 per annum, effective August 28, 2006, 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:

August 28, 2006 – 4.50%  
 August 28, 2007 – 4.75%  
 August 28, 2008 – 3.25%

#### COSTS:

The Board understands that the Operator and the Landowners/Counsel have agreed on Landowners' Counsel's invoice for legal services. The Board will not involve itself in this matter.

The Leroux submitted costs of \$2,028.85. In its submission of March 12, 2008, the Operator questions three items. The Board will list the contested items and comment briefly.

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1. HP colour and black cartridges for printer (\$49.95)---The Landowners could have done their printing commercially and charged by the page, plus mileage. It appears that the Landowners tried to keep costs down by using someone's printer. The Board has no intention of penalizing them for so doing. The Board awards \$49.95 for "printing."
2. Land Appraisal (\$577.50)---In considering costs, it is the Board's opinion that the fundamental principle in fixing costs is that a party should be reimbursed for any reasonable costs reasonably incurred in and incidental to the proceedings before the Board, and necessary to the determination of fair compensation payable for that which gave rise to the proceedings. The Board has not been persuaded that the costs associated with this land appraisal were necessary to the determination of fair compensation because land value is not a factor in the determination of annual payments on a surface lease.
3. Time spent in preparation---The Board does not consider the total submission of the Landowners to be excessive.

The Board fixes costs at \$1,451.35 payable jointly to the Landowners.

Dated at the City of Edmonton in the Province of Alberta this 16th day of October, 2008.

SURFACE RIGHTS BOARD

MEMBER