File No. 1797
Board Order No. 1797-1

January 8, 2014

SURFACE RIGHTS BOARD

IN THE MATTER OF THE PETROLEUM AND NATURAL GAS ACT, R.S.B.C., C. 361 AS AMENDED

AND IN THE MATTER OF
SECTION 33 TOWNSHIP 113 PEACE RIVER DISTRICT EXCEPT THE SOUTH ½ AND PLAN PGP43992
(The "Lands")

BETWEEN:

Terrance Henry Iverson and
Donna Marie Iverson

(APPLICANTS)

AND:

Canadian Natural Resources Limited

(RESPONDENT)

BOARD ORDER

Heard: October 16 and 17, 2013 at Victoria
Appearances: Donna Iverson, Barrister and Solicitor, for the Applicants
Heidi Meldrum, Barrister and Solicitor, for the Respondent

INTRODUCTION

[1] Mr. and Mrs. Iverson seek review of rent payable under three leases with Canadian Natural Resources Limited (CNRL). The Iversons seek annual rent in the range of $1,100 to $1,200/acre whereas CNRL's offers for the three sites range from $867 to $897/acre. Additionally, the Iversons seek rent for a borrow pit associated with one of the well sites and for severance associated with another site, which CNRL opposes.

[2] The parties disagree on the effective date of any renewed rent. CNRL relies on the Form 2 delivered September 13, 2012 and section 165(7) of the *Petroleum and Natural Gas Act* (the *Act*) to argue that any renewal is effective on the anniversary date of each lease immediately preceding September 13, 2012. The Iversons argue that CNRL effectively received notice to negotiate well in advance of the Form 2 being delivered. Relying on the Board's decision in *Wilderness Ranch Ltd. v. Progress Energy Ltd.*, SRB Order 1786-90-1, February 27, 2013, they submit the effective date of any renewed rent should be the anniversary date immediately preceding the date of such effective notice to negotiate.

ISSUES

[3] The issues for this arbitration are to determine the amount of annual rent payable for each site going forward and the effective date of any renewed rent. Specific issues with respect to individual leases include: whether compensation for the borrow pit at B-14-A should be included in the rent review, and whether there is severance associated with C-5-A.

[4] The parties' positions with respect to renewed rent and the effective dates of renewal for each lease are summarized below:

Lease	Start date	Last Renewed	Iverson Renewal Date	CNRL Renewal Date	Current Rent	Iverson Proposed Rent	CNRL Proposed Rent
B-14-A	Jan. 2/96	Jan. 2/06	Jan. 2/11	Jan. 2/12	$5,700	$8,998	$6,620
C-4-A	Dec. 19/98	Dec.19/03	Dec. 19/07	Dec. 19/11	$4,100	$6,492	$4,800
C-5-A	Sept. 29/05*	n/a	Sept. 29/10	Sept. 29/11	$3,300	$5,950	$3,900

*The lease is actually dated July 8, 2005, but both parties referred to a start date of September 29, 2005 and based proposed renewal dates on a September 29th anniversary.

[5] The parties' positions with respect to the compensable areas for which rent is payable for each lease are as follows:

Lease	Lease Area	Severance Iversons	Severance CNRL	Iverson Total Compensable Area	CNRL Total Compensable Area
B-14-A	6.58 acres	1.6 acres*	.8 acres	8.18 acres	7.38 acres
C-4-A	5.41 acres	none	none	5.41 acres	5.41 acres
C-5-A	4.5 acres	1.0 acre	none	5.5 acres	4.5 acres

*Includes .8 acres for borrow pit.

FACTS

[6] Mr. and Mrs. Iverson own the Lands described as Section 33 Township 113 Peace River District except the South ½ and Plan PGP43992 (the Lands). The Lands are located in the Buick area, approximately 50 miles north of Fort St. John. The Iversons do not live on the Lands and have not farmed the Lands since 1985. The Lands are currently farmed by Bruce Roberts. Mr. Roberts principally uses the Lands to grow forage for his cattle.

[7] There are three leases on the Lands subject to this rent review application known as B-14-A, C-4-A, and C-5-A.

B-14-A

[8] The lease for well site B-14-A was initially signed January 2, 1996 and is for a 6.58 acre area comprised of a well site (4.18 acres) and an access road (2.4 acres). The rent for this site was last renewed as of January 2, 2006 at $5,700.

[9] There is a borrow pit associated with this well site of approximately .8 of an acre that is not covered by the lease, but for which the Iversons also seek a rental payment. Mr. Iverson signed a consent for the borrow pit, but requested that it be re-configured so it would not fall on cultivated land. CNRL did not honour this request. The Iversons received an installation payment for the borrow pit, but have never been paid rent for the area occupied by the borrow pit. When Mr. Iverson inquired about rent for the borrow pit, he was advised by Dwayne Werle, of CNRL, that "we do not pay annual rental on borrow pits".

[10] There is an area south of the access road between the road and a ditch of approximately .8 of an acre that both parties agree is severed by this lease.

[11] The B-14-A well is suspended. The well site contains a well head and a couple of risers. CNRL typically accesses this well site twice a year for yearly inspection and weed control.

C-4-A

[12] The lease for well site C-4-A was initially signed December 19, 1998 and is for a 5.41 acre area comprised of a well site (4.18 acres) and an access road (1.23 acres). The rent for this site was last renewed effective December 19, 2003 at $4,100.

[13] C-4-A is located to the south and east of B-14-A. The access road is accessed off of the access road for B-14-A at the south west corner of the B-14-A well site, and crosses the drainage ditch in which a 12-inch culvert has been placed. The well site contains a well head, a riser and a fence, which has partially fallen over. Other than the very small fenced area, the lease area, including most of the access road has been farmed over.

[14] The culvert plugs up with ice in the winter, and is too small to handle heavy spring run off and rain with the result that an area of the field south of B-14-A and west of C-4-A is prone to flooding. Sometimes this area cannot be seeded at the same time as other parts of the field because it is too wet. The flooding has caused some erosion and the water has cut ruts in the field.

[15] Mr. Iverson asked CNRL to fix the drainage problem in 2002, and again in 2004 and 2005, without satisfaction. Mr. Roberts has also complained about the culvert, although neither he nor Mr. Iverson made any complaints to CNRL about the culvert and drainage problem in the last year. Mr. Roberts sets bales out in the draw in an effort at controlling the erosion.

[16] Mr. Roberts experiences problems with weeds, including foxtail, on the lease area.

[17] The C-4-A well is suspended. CNRL typically accesses the well once a year for weed control.

C-5-A

[18] The lease for well site C-5-A was initially effective September 28, 2005 and is for a 4.5 acre area comprised of a well site (3.41 acres), an access road (0.2 acres), and a borrow pit (0.89 acres) located on the east side of the well site. The well site contains a well head, a methanol tank, and a riser. The well is operational and is accessed daily with a pick up truck.

Communications Between the Parties Respecting Rent Review

[19] The Iversons served CNRL with a Form 2 – Notice to Negotiate respecting all three leases on September 12, 2013. The evidence discloses that prior to the Notice to Negotiate being served, the parties had engaged in other communications respecting the renewal of these leases.

[20] By letter dated December 3, 2007 CNRL advised the Iversons they were entitled to a review of the C-4-A lease. CNRL further advised it was not aware of any factors warranting a change to annual rent, and that the current annual rent would, therefore, remain unchanged for a further five-year period. CNRL advised the lease would be eligible for further review on December 19, 2013. By hand-written note on the bottom of this letter, faxed back to the attention of Carolyn Richards at CNRL on January 22, 2008, Mr. Iverson requested a rent review for this lease.

[21] Mr. Iverson discussed annual rent with Ryan Deloouw of CNRL, and on February 12, 2008, Mr. DeLoouw faxed a proposal to Mr. Iverson. By letter dated April 29, 2008 to Mr. Deloouw, transmitted by fax on April 30, 2008, Mr. Iverson presented a proposal for revised annual rent.

[22] The evidence discloses no further communications between the parties on the subject of rent renewal for C-4-A until the summer of 2011. By letter dated August 24, 2011, CNRL agreed to increase the annual rent for C-4-A to $4,600 effective December 19, 2008.

[23] By letter dated August 24, 2011, CNRL agreed to increase the annual rent for B-14-A to $6,100 effective January 2, 2011.

[24] By letter dated August 24, 2011, CNRL agreed to increase the annual rent for C-5-A to $3,300 effective September 29, 2011.

[25] Upon receipt of the August 24, 2011 letters from CNRL, Mr. Iverson had several conversations with Ashley Scriba and Dwayne Werle, both of CNRL, but no agreement was reached. On July 6, 2012, Mrs. Iverson wrote to Ms. Scriba with a proposal. The Form 2 - Notice to Negotiate was sent in September 2012, and these applications were filed in December 2012.

[26] By letters dated March 22, 2013, CNRL agreed to increase the annual rent for C-4-A to $4,800 effective December 19, 2011; for B-14-A to $6,620 effective January 2, 2011; and for C-5-A to $3,900 effective September 29, 2011.

ANALYSIS

What is the effective date of any renewed rent?

[27] CNRL submits that in accordance with section 165(7) of the *Act*, any renewed rent is effective on the anniversary date immediately preceding the Notice to Negotiate, namely, for B-14-A: January 2, 2012; for C-4-A: December 19, 2011; and for C-5-A: September 29, 2011. The Iversons argue that CNRL was aware of the Iverson's desire to renew rents before the Form 2 was served, and that CNRL had engaged in rent renewal negotiations before the Form 2 was served.

[28] With respect to C-4-A, the Iversons argue the handwritten request for review faxed to CNRL on January 21, 2008 provided effective Notice to Negotiate, and that the renewal date should be the anniversary preceding, or December 19, 2007. With respect to B-14-A and C-5-A, the Iversons argue the renewal dates should be the anniversaries preceding CNRL's letters of August 24, 2011, or January 2, 2011 for B-14-A, and September 28, 2010 for C-5-A.

[29] In support of the submission that a formal Notice to Negotiate is not necessary if notice can be deemed to effectively have been given, the Iversons rely on the Board's decision in *Wilderness Ranch, supra*. In that case, the landowner applied to the Board for a rent review following a protracted period of negotiation between the parties, but did not send the operator a Notice to Negotiate in Form 2. The operator argued that as the Notice to Negotiate in the required form had not been served in accordance with section 165(2) of the *Act*, the Board could not proceed to hear the application. The Board found that while use of the prescribed form to initiate the rent review process was preferable, it was not necessary. The Board found notice must be in writing and clearly indicate an intention to negotiate an amendment to the rental provisions in the lease. The Board reviewed the history of communications between the parties and determined that notice had effectively been given through email and that any renewed rent would be effective on the anniversary preceding the date determined to have provided effective notice.

[30] CNRL argues that the circumstances in *Wilderness Ranch* are distinguishable because the prescribed form of notice had never been given, whereas in this case, a Form 2 -Notice to Negotiate was delivered. CNRL argues its delivery dictates the renewal date of any revised rent in accordance with section 165(7) of the *Act*. The Iversons argue that the parties were engaged in negotiation long before the prescribed notice was provided and that they ought not to be prejudiced for failure to use the prescribed form, when the intent to renegotiate was clear from the circumstances and the parties were actively engaged in negotiations. Further, they argue their eventual use of the prescribed form following protracted negotiations should likewise not prejudicially serve to restart the rent review process and change the effective date in the circumstances.

[31] The *Act* entitles either party to a surface lease or Board Order to request a rent review following the fourth anniversary of the effective date of a lease or Board order, or the effective date of the most recent amendment to the rental provisions of a surface lease or Board order. In accordance with section 165(2) of the *Act*, the right holder or landowner may serve notice on the other party in the form prescribed by the Board's rules. The Board has prescribed the Form 2 – Notice to Negotiate for this purpose. Section 165(7) of the *Act* provides that any renewed rent is retroactive to the anniversary date of the lease or Board Order immediately preceding the notice.

[32] Because a rent review does not occur automatically, the purpose of the notice is to initiate the review. Initiation of the review then triggers the effective date of any

renewal, and sets the earliest date by which application may be made to the Board if renewed rent is not agreed. It also serves to set the earliest next available date for either party to request a rent review. Unless one or other of the parties gives notice to the other party that rent should be reviewed, the current rental provisions remain in place unless the rent is renegotiated following the fourth anniversary of the date the rent was last negotiated or renegotiated.

[33] I agree with the decision in *Wilderness* that use of the prescribed form to initiate the rent review process is preferable, but not necessary. It is preferable because it serves to clearly initiate the process and provide the trigger for determining the effective date of any renewal and the entitlement date for the next rent review. If the prescribed form is used, there can be no doubt in the mind of the other party that the rent review process has been engaged. However, if the written communications between the parties effectively serve the purpose of the notice, namely to clearly initiate the review process and engage the other party, use of the prescribed form should not be necessary. (See also: *London v. Encana Corporation*, SRB Order 1747-1, December 19, 2013).

[34] In this case, with respect to C-4-A, CNRL wrote to Mr. Iverson on December 3, 2007 advising he was "entitled" to have the C-4-A lease reviewed, but that CNRL was not aware of circumstances warranting a change to the rent. The legislation in force at the time was similar to the current legislation in that it did not create any "entitlement" to review but required that a rent review be initiated by one of the parties by written notice. The legislation did not prescribe a five-year window of entitlement as suggested by the letter. Mr. Iverson wrote on the bottom of the letter: "This is a request for you to enter into a rent review on this well" and faxed it back to CNRL on January 22, 2008. Mr. Deloouw provided a proposal in writing for revised rent on February 8, 2008 and Mr. Iverson, in turn, provided a written proposal on April 28, 2008. The correspondence references telephone communications between the parties. It is clear that CNRL received Mr. Iverson's hand-written note as a request to engage in rent review negotiations and that the parties did in fact engage in rent review negotiations. For whatever reason that is not evident from the evidence, the parties did not pursue the negotiations further until the summer of 2011. The correspondence leaves no doubt, however, of Mr. Iverson's intent to initiate the process in January 2008, and of CNRL's engagement in the process.

[35] I find that with respect to C-4-A notice to initiate the rent review process was effectively given as of January 22, 2008. In accordance with section 165(7) of the *Act*, therefore, the effective date of any renewed rent will be the anniversary preceding this notice, or December 19, 2007.

[36] With respect to B-14-A, CNRL sent the Iverson's a letter dated August 24, 2011 offering to amend the rental provisions in the lease. The Iversons engaged in discussions with CNRL personnel in response to this letter in an effort to agree on a renewed rent. I find this letter effectively provided notice to initiate the rent review process as required by section 165(2) of the *Act*. In accordance with section 165(7)

of the *Act*, therefore, the effective date of any renewed rent will be the anniversary preceding this notice, or January 2, 2011.

[37] Similarly, with respect to C-5-A, CNRL sent the Iversons a letter dated August 24, 2011 offering to amend the rental provisions in the lease. The Iversons engaged in discussions with CNRL personnel in response to this letter in an effort to agree on a renewed rent. I find this letter effectively provided notice to initiate the rent review process as required by section 165(2) of the *Act.* In accordance with section 165(7) of the *Act*, therefore, the effective date of any renewed rent will be the anniversary preceding this notice, or September 29, 2010.

Rent Review – Consideration of Relevant Factors

[38] Section 154 of the *Act* sets out the factors the Board may consider in determining the initial compensation or annual rent payable for the use and occupation of private land. Those factors are as follows:

(a) the compulsory aspect of the entry;
(b) the value of the applicable land;
(c) a person's loss of right or profit with respect to the land;
(d) temporary and permanent damage from the right of entry;
(e) compensation for severance;
(f) compensation for nuisance and disturbance from the right of entry;
(g) the effect, if any of other rights of entry with respect to the land;
(h) money previously paid for entry, occupation or use;
(i) the terms of any surface lease or agreement submitted to the Board or to which the Board has access;
(j) previous orders of the Board;
(k) other factors the Board considers applicable;
(l) other factors or criteria established by regulation.

[39] Not all of the above factors will be relevant in every case or in the determination of annual compensation as opposed to initial compensation for an entry. There are no factors or criteria established by regulation.

[40] Section 154(2) of the *Act* further provides that in determining an amount to be paid on a rent review application, the Board must consider any change in the value of money and of land since the date the surface lease was originally granted or last renewed.

[41] The purpose of a rental payment is to address the immediate and ongoing impact of an operator's activity on private land to the landowner and to the lands (*Dalgliesh v. Worldwide Energy Company Ltd* (1970) 75 W.W.R. 516 (Sask DC)). The rental payment is to compensate for actual or reasonably probable loss or damage caused by an operator's continuing use of the lands. In an application for rent review, any revised rent is payable for the period following the effective date,

not for past losses. In determining a revised annual rent with reference to actual loss and on consideration of the relevant factors, an analysis of probable future use of the land and probable future losses must be undertaken (*Canadian Natural Resources Ltd. v. Bennett, et al*, 2008 ABQB 19).

[42] Following consideration of the various factors, the Board must step back and consider whether the award in its totality gives proper compensation, as there may be cases where the sum of the parts exceeds, or where the sum of the parts falls short of proper compensation (*Scurry Rainbow Oil v. Lamoureux* [1985] B.C.J. No. 1430 (BCSC)).

[43] In this case, neither party supported their view of appropriate rent with reference to specific evidence of loss relating to the factors set out in section 154 of the *Act*. Both parties simply advanced a lump sum amount which, if divided by the number of acres in issue, could be expressed as a per acre amount. I will nevertheless consider the relevant factors for which I have evidence or argument.

Compulsory Aspect of the Entry

[44] The Iversons and their witnesses referenced the compulsory aspect of entry to private land for oil and gas purposes, and the relative imbalance of bargaining power when negotiating compensation for entry. In British Columbia, a surface landowner typically does not own the subsurface rights, and the holder of subsurface rights has the right to enter private land to develop that resource. A private landowner is not in the position of being able to choose whether to permit oil and gas development on their land or to choose who the operator of any oil and gas facility will be. An operator is liable, however, to pay compensation to the landowner for loss or damage caused by the right of entry, and except where a right of entry relates to a flow line, to pay rent to the landowner during the duration of the right of entry.

[45] While the compulsory aspect of an entry is typically acknowledged in an initial entry payment, the entry and occupation of private land for an oil and gas activity remains compulsory until terminated in accordance with legislative provisions. Where a right of entry has been exercised, a landowner does not have the power to terminate that relationship or to oppose the assignment of a right of entry to another operator. I accept that renewed rent may reflect this ongoing compulsory relationship.

Value of the Land and Change in the Value of Land

[46] The Iversons provided evidence of two bulk sales each involving several quarter sections in the area in 2012, indicating land value of approximately $1,160/acre.

[47] The Iversons provided evidence of BC Assessment's determination of the market value of the Lands from 2004 to 2012. BC Assessment's conclusion of

market value as of July 1, 2004 (for the 2005 assessment roll) was $73,334. This was not the assessed value of the Lands for the 2005 roll, as the Lands are classified as Farm requiring their assessment in accordance with prescribed rates and not on the basis of their market value. BC Assessment's determination of value as of July 1, 2012 (for the 2013 roll) was $193,562.77, indicating an increase in value of about 246% in eight years.

[48] Revised rent may reflect that land values have increased since these leases were last negotiated.

Loss of Profit

[49] Mr. Iverson's evidence was that he leases the land to Mr. Roberts to farm. He himself has not farmed the Lands since 1985. I have no evidence of Mr. Iverson's rental income from the Lands or evidence about how the leases might affect the rental income. Mr. Iverson's evidence was that Mr. Roberts does not pay much to farm the Lands, that he had not paid this year's rent, and that it is really more of a stewardship relationship to keep the Lands in cultivation.

[50] Mr. Iverson's evidence was that CNRL used to pay him $400/acre for crop loss when the Land was cultivated with fescue. Mr. Deloouw's letter of February 12, 2008 with respect to C-4-A offered crop loss of $300/acre, calculated as six bales per acre at $50/bale.

[51] Ms. Scriba, CNRL's surface landman for the Buick area, gave evidence that she generally paid $200/acre, calculated as four bales per acre at $50/bale. Her evidence was that the amounts paid by CNRL did not typically depend on whether land was cultivated with a crop or hay for pasture. She was not able to provide worksheets suggesting particular amounts for any of the factors listed in section 154 of the *Act*, including crop loss, either for these losses or any of the comparable leases referred to by CNRL.

[52] Mr. Roberts' evidence was that he generally is able to seed and harvest 220 to 230 acres. In 2013, only 200 acres could be cultivated because of flooding. His evidence was that he places up to 15 bales in the draw in an effort to control erosion and water damage. Presumably, these are bales that could otherwise be sold or used to feed livestock.

[53] I have no evidence of actual yields or crop prices with which to calculate loss of profit. In any event, this application is not an application from Mr. Roberts, as the occupier of the Lands, pursuant to section 163 of the *Act*, for his loss incurred as a result of CNRL's entry to the Lands. While there is no doubt the leases take areas of the Lands out of production, the evidence is insufficient to properly estimate the Iversons' actual or probable ongoing loss of profit as a result of CNRL's use and occupation of the Lands. Other than to acknowledge that there likely is some loss of

profit arising from CNRL's right of entry, it will be impossible to reflect that loss with any degree of precision in the rent.

Temporary and permanent damage

[54] There is evidence before me of damage to the Lands as a result of flooding, likely caused by the inadequate culvert at C-4-A. The Iversons are not advancing a claim for temporary or permanent damage as part of this rent review. I agree that compensation for temporary or permanent damage to the land should be paid as and when the damage occurs and is not generally incorporated into a rental payment.

Severance

[55] With respect to B-14-A, the parties agree there is approximately .8 of an acre severed along the access road between the road and the ditch. Additionally, the Iversons claim rent for the area occupied by the borrow pit. Both Mr. Iverson and Ms. Scriba referred in their evidence to there being some sort of agreement between the Iversons and CNRL with respect to the borrow pit, although of copy of that agreement was not provided. I was not provided with documentation respecting CNRL's authority to use the Lands for a borrow pit or with respect to the financial arrangements between the parties with respect to the borrow pit. In the absence of this agreement, I cannot determine the rights and obligations of either party with respect to the borrow pit and I make no findings in that regard. As the area occupied by the borrow pit is not included in the lease, however, rent for the borrow pit is not payable under the lease and any claim for rent is not properly part of this rent review.

[56] There is no severance associated with C-4-A.

[57] With respect to C-5-A, the location of the well and access road creates two rectangles of land between the western edge of the well site and the western boundary of the Lands. The Iversons argue these rectangular areas create a severance of approximately one acre; CNRL disagrees. The aerial photograph shows that neither of these rectangular areas is cultivated. To access the rectangular area on the north side of the access road, farm equipment would have to cross the access road. While the rectangular area on the south side of the access road could be accessed by the field, it appears to be too small for efficient and easy access by farm equipment. Mr. Roberts' evidence was that this lease cut off some land that he could not get into to farm. I find that both of these areas are not easily accessible by farm equipment, creating a severance of approximately one acre.

[58] Loss due to severance may be reflected in the rent by increasing the lease area to include the severed areas. Inclusion of the severed area associated with B-14-A brings the compensable area for this lease to 7.38 acres. Inclusion of the severed area for C-5-A brings the compensable area for this lease to 5.5 acres.

Nuisance and Disturbance

[59] As the Iversons do not live on the Lands, they are not impacted by traffic or noise from the wellsites. With respect to B-14-A and C-4-A, there is little in the way of activity at these sites in any event.

[60] Both Mr. Iverson's evidence and Mr. Roberts' evidence indicate that the presence of the well sites creates some nuisance with respect to the farming of the Lands. The position of B-14-A, while not severing land to the east, creates some difficulties with access.

[61] The placement of C-4-A, and in particular the culvert, has created drainage issues that in some years impact the timing of seeding, the nature of the crop that can be planted, and the cultivable area. In some years, additional time and expense is incurred because parts of the field impacted by water run off cannot be seeded when the rest of the field is seeded. Mr. Iverson has written to CNRL in the past expressing his concerns about the drainage, but CNRL has not taken any action to address his concerns. His evidence was that he eventually just "gave up". Mr. Roberts' evidence was that he had also contacted CNRL in the past about the culvert. He described farming these Lands as a "pain in the butt" because of difficulties moving farm equipment from one field to another and because of delay in seeding wet areas.

[62] Mr. Roberts also expressed issues with weed control and indicated he had difficulty getting CNRL to spray the foxtail at the right time. His evidence was that just foxtail and weeds grow in the farmed area of C-4-A.

[63] Mr. Iverson's evidence was that in 2009, he received overdue tax notices for the leased areas. He had to call Victoria and spend time sorting out the situation. Ms. Scriba's evidence was that as far as she is aware, CNRL's taxes are up to date with respect to these well sites. I accept that receipt of an overdue tax notice of a leased area is a nuisance and inconvenience that a landowner should not have to experience.

[64] The evidence indicates that Mr. and Mrs. Iverson certainly spend time dealing with CNRL, although it is not possible to estimate how much time on the evidence before me. They have experienced frustration in bringing concerns to CNRL's attention. While they do not live on the Lands, and while CNRL's activity on the Lands is minimal, the Iversons nevertheless experience nuisance and disturbance as a result of CNRL's rights of entry, and this nuisance and disturbance, although difficult to quantify, may be acknowledged in the rent paid. I find the nuisance and disturbance associated with C-4-A is greater than with respect to the other two sites as a result of inadequate weed and water control and that the rent for C-4-A may reflect that the nuisance and disturbance is greater.

Other leases

[65] Both parties relied principally on rates being paid for other leases to support their respective positions on the appropriate rent payable for these leases.

[66] The Iversons provided evidence of rent renewals in 2013 for six leases between a landowner and Baytex Energy Ltd. located approximately 12 miles to the west of the Lands. The per acre rates for the six leases range from $976 to $1,273, with an average of $1,112. The land covered by these leases is used for crop or pasture.

[67] June Volz gave evidence that she negotiated a rent renewal with CNRL in November 2011 with respect to land owned by her in the Milligan Creek area at $1,000/acre. Her land is used to grow hay for livestock. Mrs. Volz also negotiated rent at $1,000/acre for another landowner in the area. Some of this land is used for crop and some for grazing of livestock. Her evidence was that Milligan Creek is approximately the same distance from Fort St. John as Buick, but in a north easterly direction rather than a northwesterly direction. She described the Buick area as an older settled community in comparison to Milligan Creek, with smaller, more developed land holdings and more community amenities.

[68] John Ross gave evidence of having recently completed rent review negotiations with Devon with respect to leases on land owned by him in the Rose Prairie area, approximately 27 miles north of Fort St. John, about half way between Fort St. John and Buick. One of his leases was renewed at $1,200/acre and the other, containing a long access road, at approximately $1,100/acre.

[69] CNRL provided evidence of 24 leases in the Buick area that were renewed between 2011 and 2013. Nine of the leases are with respect to land owned by a single landowner, and the remaining 15 leases are with respect to land owned by another single landowner. Both of the landowners rent their land to other farmers. The land is mixed farmland, some cultivated and some pasture, with some bushland. The lease rates range from $653 to $1,149 per acre. The site leased at $653/acre is a nine-acre site with a very long access road. The site leased at $1,149 is for a very small area for a well extension. Removing these low and high leases with distinguishable factors, leaves a range of $679 to $943 per acre, with leases from four to eight acres ranging between $846/acre for a 6.33 acre well site to $922 for a 7.16 acre battery site, with an average of $886/acre.

[70] Ms. Scriba's evidence was that CNRL has about 165 leases in the Buick area. CNRL is the main operator in the Buick area, holding the vast majority of the leases. CNRL's offers in this case fall within the range of the lease rates being paid by CNRL. I was not provided with any evidence of the lease rates paid by other operators in the immediate area.

[71] Ms. Scriba's evidence was that in determining an amount to offer for renewed rent, she looked at "what other people are receiving in the area" and the "heads of compensation" as if she was going to "sign it up today". She starts with a "compensation worksheet", and in the case of a rent review, typically considers crop loss, nuisance and disturbance, and any severance. Her evidence was this calculation generally results in an amount lower than what other people are receiving, and that, consequently, she will make a global offer that is not broken down by specific factors or presented as a per acre amount. In presenting an offer, she provides the landowner with other CNRL leases from the area for comparison. She was not able to provide compensation worksheets for the Iverson sites and could not say what portion of CNRL's offers related to crop loss, nuisance and disturbance or other specific factors. She was similarly not able to provide any detail or background to the amounts agreed in the comparable leases provided. Her evidence was the use of the land typically makes little difference in the amount of compensation paid.

Determination of Appropriate Annual Rent

[72] It is not possible on the basis of the evidence before me to calculate the actual or anticipated losses incurred by Mr. and Mrs. Iverson as a result of the right of entry. The evidence does not permit an estimate of probable loss of profit, or an estimate of the value of either intangible, or tangible, ongoing nuisance and disturbance. While I accept that the landowners experience nuisance and disturbance that should be reflected in the rent, and likely incur other losses that should be reflected in the rent, the best I can do with the evidence before me is to determine an appropriate annual rent on the basis of the evidence of the amounts generally paid to others.

[73] While the legislation sets out various factors for the Board's consideration in determining an amount paid for initial entry or as annual rent, a review of the Board's decisions demonstrates how difficult it is for the Board to determine rent on an analysis of all of the factors set out in section 154 of the *Act.* The decisions demonstrate that it is difficult, if not impossible, for most landowners to substantiate actual loss with evidence. More often than not, the determination of annual rent is an exercise in estimation and comparison than a precise calculation. Given the difficulty associated with providing evidence to quantify actual loss, both landowners and operators in rent review arbitrations often take the approach of determining rent principally from an analysis of other leases. Indeed, both parties took this approach to the determination of rent in this case.

[74] A review of the Board's decisions demonstrates that in the absence of evidence to establish and quantify actual or probable loss, rent may be based on evidence of average rents generally. Where the evidence falls short of demonstrating actual loss to the landowner, the Board has been satisfied to fall back on average rents paid to other landowners or on the offer made in that particular case where it reflects or exceeds "going rates".

[75] This approach to the determination of rent is less concerned with actual loss and recognizes that the determination of rent is often somewhat arbitrary. It recognizes that, in the absence of special individual losses that can be substantiated with evidence, it may be more important to ensure some equity of treatment between landowners than to focus on precise loss, which is difficult to demonstrate or prove in most cases. While possibly over compensating landowners for their actual tangible losses, this approach acknowledges value for intangible losses incapable of calculation, including the ongoing compulsory aspect of the relationship between the parties.

[76] In determining rent based on other leases, CNRL argued it is not appropriate to rely on leases from outside the Buick area. The Iversons argued that it is inappropriate to rely solely on area rates set by a single operator holding the vast majority of leases in the area and inappropriate to rely on negotiations with only two landowners. While the rents offered by CNRL are within the range typically paid by them in the Buick area, they are low in relation to the comparables provided by the Iversons from neighbouring areas reflecting rent paid for land in similar circumstances. The evidence does not suggest any particular reason why the rents negotiated by Mrs. Volz or the landowner 12 miles to the west should be higher than average rents in the Buick area. If anything, Mrs. Volz's evidence comparing Buick to Milligan Creek might suggest that land in Milligan Creek could be less valuable than land in Buick given the lack of community services in Milligan, suggesting rents should also be lower. In both of these comparables, the land itself is put to the same use as the Iversons' Lands. The evidence does suggest that rents for land closer to Fort St. John may be higher, again likely attributable to higher land value, which might account for the rent negotiated by Mr. Ross being on the higher side of the general averages.

[77] CNRL's rents in the immediate area are also low in relation to the average rent arbitrated by the Board since 2010. Since 2010, the Board has rendered eight decisions on rent review arbitrations. Expressed as per acre value, the rents awarded range from $721/acre to $1,331/acre with an average of $1,027/acre.

[78] I find in the circumstances of this case, that rent should be set principally on a consideration of rents paid to other landowners and generally reflect average rents paid. The evidence does not support that the Iversons' actual or probable loss is as much as claimed by them. On the other hand, the offer made by CNRL is low in relation to average rates generally paid by other operators and arbitrated by the Board.

[79] I conclude that an appropriate rent to be paid by CNRL to the Iversons should reflect approximately $1,030/acre for both leased and severed areas. This amount acknowledges: the ongoing compulsory aspect of these entries; that the land value has significantly increased since the rents were last determined; that the Iversons incur loss that is not capable of calculation, including nuisance and disturbance; and reflects an average of going rates paid in similar circumstances and rates arbitrated

by the Board. Given the effective date for the C-4-A lease is several years earlier than for the other two leases, use of the same lease rate being a higher than average lease rate for the time recognizes the additional nuisance and disturbance associated with that site.

Conclusion

[80] I determine rent for each of the leases as follows:

Lease	Area including severance	Amount	Effective Date
B-14-A	7.38 acres	$7,600	January 2, 2011
C-4-A	5.41 acres	$5,570	December 19, 2007
C-5-A	5.5 acres	$5,665	September 29, 2010

ORDER

[81] CNRL shall pay annual rent to Donna and Terry Iverson in the amount of $7,600 for the lease described as B-14-A effective January 2, 2011.

[82] CNRL shall pay annual rent to Donna and Terry Iverson in the amount of $5,570 for the lease described as C-4-A effective December 19, 2007.

[83] CNRL shall pay annual rent to Donna and Terry Iverson in the amount of $5,665 for the lease described as C-5-A effective September 29, 2010.

[84] CNRL shall forthwith pay to Donna and Terry Iverson the difference in annual rent already paid and that ordered above for each lease as of the effective dates indicated above.

DATED: January 8, 2014

FOR THE BOARD

Cheryl Vickers, Chair