

**File No. 1870**  
**Board Order 1870-1**

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**March 6, 2017**

**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

THE NORTHWEST 1/4 OF SECTION 9, TOWNSHIP 86  
RANGE 18, WEST OF THE 6<sup>TH</sup> MERIDIAN, PEACE RIVER DISTRICT  
(the "Lands")

BETWEEN

KEITH DIETZ

APPLICANT

AND

CANADIAN NATURAL RESOURCES LIMITED

RESPONDENT

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**BOARD ORDER**

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Heard: November 7 and 8, in Fort St. John  
Appearances: Keith Dietz, for the Applicant  
Dwayne Werle, for the Respondent

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## **INTRODUCTION AND ISSUE**

[1] The Applicant, Keith Dietz, is the owner together with Susanne Lorain Dietz of the Lands legally described as: THE NORTHWEST ¼ OF SECTION 9 TOWNSHIP 86 RANGE 18 WEST OF THE 6<sup>th</sup> MERIDIAN PEACE RIVER DISTRICT (the “Lands”). On April 29, 1991 a surface lease was entered into between Eleanor Rose Blanchette and Margaret Jean Blanchette and Amerada Hess Canada Ltd. (“Amerada”) granting Amerada the use of 4.35 acres of the Lands to operate and maintain a well site and an access road (the “Lease”). Subsequently the Land was sold to the Applicant and Ms. Dietz and an assignment of the Lease was made dated March 1, 2005. Canadian Natural Resources Ltd. (“CNRL”) is now exercising the rights of the lessee, Amerada. The original amount of the rent under the Lease was \$2,500 a year. The rent increased over the years. The last rent review occurred in October 2009. The rent was increased to \$4,400 a year from \$4,000 a year.

[2] Mr. Dietz seeks an increase to the annual rent payable under the Lease in accordance with the provisions for rent review set out in the *Petroleum and Natural Gas Act* R.S.B.C. 1996 c. 361. The effective date of this review is October 18, 2014.

[3] The purpose of a rental payment is to address the immediate and ongoing impact to the landowner and to the land of an operator’s activity on private land (*Dalgliesh v Worldwide Energy Company Ltd.*, (1970) 75W.W.R. 516 (Sask. D.C.)). The rental payment is to compensate for actual or reasonably probable loss or damage caused by an operator’s continuing use of land.

[4] The onus is on the Applicant, Mr. Dietz, to establish his ongoing prospective loss and to establish that an increase to the rental payment is warranted to compensate for ongoing losses (*Progress Energy Canada Ltd v Salustro*, 2014 BCSC 960). The Board

must base its findings with respect to the loss on the evidence before it. The burden of providing evidence to substantiate loss rests with the Applicant.

[5] Mr. Dietz is seeking to increase his annual rent to \$5,800 from the current annual rent of \$4,400, an increase of \$1,400. He claims that an increase is due on several grounds including increased production and returns on his farm, the general increase in the value of farm land, increased cost of production due to the location of the wellsite and general nuisance and disturbance. CNRL submits that the evidence does not support an increase. CNRL submits that the current rent of \$4,400 represents fair compensation when considering both loss of use and any nuisance or disturbance.

[6] The issue, therefore, is to determine whether the evidence substantiates that the annual rent should be increased to reflect the actual and ongoing loss to the Applicant arising from CNRL's continued use and occupation of the Lands.

## **FACTS**

[7] The Lands are agricultural land used for growing wheat, canola, and fescue. The surface lease area is 4.35 acres, including an access road. Currently on site, there is a teardrop pad with two small buildings and a water injection well. The well site is not located on a home quarter and no additional land is severed. CNRL visits the site approximately once a week. Mr. Dietz rotates the crops on a four-year cycle, two years of fescue, one year of canola and one year of wheat.

## **LEGAL FRAMEWORK**

[8] Section 154 of the *Petroleum and Natural Gas 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 nuisance and disturbance from the right of entry;
- f) the effect, if any, of other rights of entry with respect to the land;
- g) money previously paid for entry, occupation and use;
- h) the terms of any surface lease or agreement submitted;
- i) previous orders of the Board;
- j) other factors the Board considers applicable;
- k) other factors or criteria established by regulation.

[9] 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.

[10] Section 154(2) of the *Petroleum and Natural Gas Act* further provides, 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.

## **EVIDENCE**

[11] I heard evidence from Mr. Dietz with respect to the use of the Lands and the impact of the Lease on the use of the Lands. I heard evidence from Ms. Kira Gerow, Reclamation Coordinator, CNRL respecting loss of use, crop rotation and market value of the crops harvested and from Mr. Dwayne Werle, District Landman, CNRL about the Lease and CNRL's operations.

[12] Mr. Dietz provided a Book of Documents (Exhibit 1) and CNRL provided a Book of Documents (Exhibit 2), both of which contained lists of comparable leases. Exhibit 2 also contained an Annual Compensation Review Report prepared by Ms. Gerow, a professional agrologist and certified crop adviser, setting out Ms. Gerow's estimates for loss of profit, and nuisance and disturbance. Ms. Gerow also gave evidence at the

hearing. Ms. Gerow's estimate of loss does not exceed the current rent. I consider the evidence as it relates to the factors set out in the *Petroleum and Natural Gas Act*.

### **Value of the Land and Change in the Value of the Land**

[13] Mr. Dietz provided some evidence about the increase in land values in the area. He said that 1/4 sections which previously had sold for \$20,000 now sell for \$370,000 and that the price of land has gone up. The evidence was very general in nature with no supporting documentation respecting the increasing value of land as a whole. Nor was the evidence specific to the value of the parcel of land in question. The evidence does not assist me in determining the value of the specific parcel in question and the change in value of these Lands over time or as a result of the Lease.

### **Loss of Right or Profit**

[14] Mr. Dietz testified as to his farming practise. He has farmed over twenty years and has adopted practices to increase farm production. He uses GMO plants and seeds and uses larger and bigger equipment to improve efficiency. He rotates his crops on a four-year cycle, the first two years are fescue, the third year is canola and the fourth year is wheat. As a result of the layout and shape of the leased property, he has additional headlands (extra corners around the lease area) resulting in greater compaction of the ground and additional time for the extra headlands when using his equipment. This increases his costs due to extra time, machinery wear and fuel costs. He estimated his costs to be \$150 per acre.

[15] Mr. Dietz also testified that his overall farm income has been increasing at a rate of about 16% a year since 2010 but provided no income records to support his statement. He also did not provide any specifics of how the sale of the products of the Land related to his overall income. He did indicate initially that his loss was approximately \$173 an acre for crop loss (a total of \$752.55 for the 4.35 acres). In his closing submission, Mr. Dietz provided two breakdowns of his crop loss.

[16] The first approach relied upon his 16% increase each year. He estimated is crop loss per acre in 2014 to be \$477 and then increased that by 16% resulting in a loss of \$561 (2015), \$650 (2016) and \$754 (2017) for an average crop loss of \$610 per acre or \$2,647 annual crop loss.

[17] The second approach was based upon actual loss on the Lands. In 2013, it was fescue at 900 lb. per acre times \$ .90 for \$810. In 2014, it was the second year of fescue at 600 lb. per acre times \$ .90 for \$540. In 2015, it was canola at 54 bushels per acre times \$10.00 for \$540. In 2016, it was wheat at 70 bushels per acre times \$7.00 for \$490. Total loss over four years was \$2,380 or an average of \$595 per year, which multiplied by 4.35 acres equates to total annual loss of \$2,588.

[18] However, one must consider input costs as well. In his oral evidence, Mr. Dietz indicated the following input costs: \$110 per acre for wheat, \$170 per acre for canola and \$75 an acre for fescue. Accounting for input costs decreases the actual loss as follows: fescue Year 1 \$735 an acre, fescue Year 2 \$465 an acre, canola Year 3 \$370 an acre, and wheat Year 4 \$380 an acre for a total loss of \$1,950 or average annual loss of \$487.50 an acre, which multiplied by 4.35 acres equates to total annual loss of \$2,120.

[19] In her evidence, Ms. Gerow, for CNRL, reviewed the document she had prepared entitled Annual Compensation Review for 12-09-086-18 W6M, August 2016 (found at Tab 1, Exhibit 2). Ms. Gerow used representative industry data as Mr. Dietz had not provided production records to CNRL. Ms. Gerow used data from the Agricultural Financial Service Corporation (a publication for the Province of Alberta). She stated that this data was more readily available and that the data for British Columbia was limited. She calculated the weighted average yields for the three crops for 2012 to 2015 – fescue, 500 lb. per acre (for a good year); canola 29.25 bushels an acre and wheat 48 bushels an acre. She also calculated the average market price, certified fescue \$.70 per lb, canola \$11.38 a bushel and wheat \$6.35 a bushel. Her input costs calculations were, fescue \$75 an acre for seedling and \$50 an acre for established, \$185 an acre for

canola and \$130 an acre for wheat. Ms. Gerow initially calculated the average loss over four years to be \$222.19 per acre for a total loss of \$966.54 a year. After further questioning and analysis, she made adjustments based upon Mr. Dietz's evidence and recalculated the average loss to be \$332 per acre or \$1,445 for the total loss per year.

[20] In addition to the crop loss, there was evidence of the cost and expense related to the extra headlands which Mr. Dietz estimated to be \$150 an acre for a total of \$652.50 resulting in a total loss of \$1,405 (using the \$175 an acre estimate) or \$2,872 (using the actual loss figures). Ms. Gerow's calculations, which were more detailed and based upon the evidence given by Mr. Dietz regarding his farming practice, added an additional cost of \$477.50 due to the headlands resulting in a total loss of \$1,922.50.

[21] I accept Mr. Dietz's estimate of loss (with the inclusion of input costs) of \$2,120 plus Ms. Gerow's more detailed assessment of headland costs of \$477.50 resulting a total loss of \$2,597 for loss of profit.

### **Nuisance and Disturbance**

[22] Little direct evidence was presented respecting nuisance and disturbance. CNRL said that the well site was accessed by CNRL approximately once a week. Mr. Dietz suggested it was more than that. The well is a water-injection well not an oil or gas producing well. The lease site is not located on the home quarter. Mr. Werle suggested that an amount of \$1,500 was sufficient for any nuisance and disturbance. Mr. Dietz suggested \$2,500 but did not provide any evidence to support a specific amount.

[23] There was some evidence related to water pooling on the property to the east of the well site but the evidence suggested that this was related to the slope of the land and not to the well site in particular. There is a culvert on the road.

### **Other Leases**

[24] Both parties presented evidence respecting other leases. While the Board may consider other leases, it has found that often other leases are of limited or no assistance

in a rent review application unless they are capable of substantiating a clear pattern of dealings. The rent negotiated to compensate for ongoing prospective losses in one case does not establish another landowner's probable ongoing loss or create an entitlement by another landowner of the same amount. Compensations for factors such as nuisance and disturbance will be dependent on the particular circumstances of each case, and unless the evidence establishes that the circumstances giving rise to one particular element of compensation are the same or very similar, the compensation agreed in one case does not substantiate loss in another case.

[25] Mr. Dietz provided a table of nine comparable leases (Tab 17, Exhibit 1). He suggested that the lease of 16-16-86-18 was the most relevant. CNRL provided a list of fourteen comparable leases (Tab K, Exhibit 2) including 16-16-86-18. The lease of 16-16-86-18 has a rental of \$4,900 for 4.67 acres and was last reviewed in 2009. CNRL advises it is an active oil well site with the pump jack close to the house. The nuisance and disturbance payment is \$3,000. Another lease of 6-9-86-18 of 7.36 acres is of an active water injection well site which has a nuisance and disturbance payment of \$2,000 according to CNRL with a total rental of \$4,900 (it is farmed for hay). Mr. Dietz also provided some leases which only provided total rental payment without a breakdown for loss of use and for nuisance and disturbance (leases, 10-36-88-19, 1-33-85-18 and 5-8-88-17) and as such are of limited value. Given the list of comparable leases a nuisance and disturbance payment between \$1,500 and \$2,000 appears appropriate.

### **Change in the Value of Land and Money**

[26] Section 154(2) of the *Petroleum and Natural Gas Act* requires the Board to consider any changes in the value of land or money since the rent was last negotiated, in this case October 2009. No evidence of the change in the value of money was presented by either party. The evidence relating to the change in the value of land was of general nature about land increasing in value but no specific evidence of the change in the value of the Lands that are the subject of the application since October 2009.

The evidence was anecdotal at best.



### **ANALYSIS AND CONCLUSION**

[27] The above analysis suggests that considering Mr. Dietz's farming practise of the Lands, in particular the four-year rotation and the use of GMO products and his success at fescue production, and taking into account the input costs and headland costs, that a payment in the range of \$2,600 is sufficient to cover his actual losses. Further, there is a nuisance and disturbance factor related to regular access to the well site but the well site is not located near the home quarter and Mr. Dietz did not indicate any extensive disturbance. In addition, the comparable leases speak to a range of \$1,500 to \$2,000 for this type of intangible award. Accordingly, \$1,800 would appear to be sufficient resulting in a lease payment of \$4,400, the current lease amount.

[28] The evidence does not support increasing the rent above the current rent of \$4,400. The current rent sufficiently compensates Mr. Dietz for the tangible losses and provides additional compensation for intangible losses, likely incurred but not quantified.

[29] I find the annual rent of \$4,400 continues to be appropriate as of the rent review period commencing October 18, 2014.

### **ORDER**

[30] Canadian Natural Resources shall continue to pay annual rent of \$4,400.00 to Mr. and Mrs. Dietz for the rent period commencing October 18, 2014.

Dated: March 6, 2017

FOR THE BOARD



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Howard Kushner, Panel Chair