File No. 1810
Board Order No. 1803/1810-2

August 25, 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

THE NORTH WEST ¼ OF SECTION 33 TOWNSHIP 78 RANGE 17 WEST OF THE 6TH MERIDIAN PEACE RIVER DISTRICT
(The "Lands")

BETWEEN:

Encana Corporation

(APPLICANT)

AND:

Perry Burl Piper and
Leslie Lancelot Dowd

(RESPONDENTS)

BOARD ORDER

Heard: May 27 – 29, 2014 in Dawson Creek
Appearances: Shawn Munro, Barrister and Solicitor, for Encana Corporation
Elvin Gowman, for Perry Burl Piper and Leslie Lancelot Dowd

INTRODUCTION

[1] Perry Burl Piper and Leslie Lancelot Dowd (the "Landowners") own land in the Peace River District, near Dawson Creek, namely Northwest 1/4 , Section 33, Township 78, Range 17, West of the 6th Meridian, Peace River District (the "Lands").

[2] Based on an existing surface lease, Encana Corporation ("Encana") operates a multi-well pad site on 7.09 acres of the Lands, consisting of 6.70 acres for the pad site and 0.39 acre for an access road ("Original Lease"). The lease was initially for one gas well but a lease amendment added two additional wells.

[3] Encana applied to construct and operate an well and to expand the well site to accommodate 27 additional wells, , and to construct and operate a pipeline right of way for three flow lines. On May 17, 2013, the Board issued a Right of Entry Order authorizing Encana access to the Lands for the purpose of drilling, completing and operating a 28 well padsite. This Order added 10.11 acres to the Original Lease area for permanent right of way and 2.62 acres for temporary workspace (the "expanded well site"). On June 14, 2013, the Board issued a Right of Entry Order authorizing Encana access to the Lands for the purpose of constructing and operating three flow lines, one to carry natural gas and the others to carry water (the "pipeline(s)"). The pipelines run to and from the expanded well site across the Lands. The Board granted access to 4.07 acres for a permanent pipeline right of way and 5.49 acres for temporary work space.

[4] The parties are unable to resolve the issue of the appropriate compensation for the entry and use of the Lands pursuant to section 162 of the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, ch. 361 (the "*Act*"). The Landowners also seek a review of the rent payable under the Original Lease pursuant to section 166 of the *Act.* The parties agreed the effective date of the rent review is August 15, 2012.

ISSUES

[5] The issues are: what is the appropriate compensation to be paid by Encana to the Landowners for the entry, use and occupation of the Lands for the expanded well site and pipelines and what is the appropriate annual rent under the Original Lease as of August 15, 2012?

BACKGROUND

[6] The Lands consist of 163 acres and are located in the Agricultural Land Reserve, approximately 22 kilometers northwest from the City of Dawson Creek. The southern portion is covered by trees with the remainder used for hay and forage production by a farmer. The Landowners do not reside on or farm the Lands.

[7] The Lands have a soil classification of class 4X that limits the agricultural use of the Lands to perennial crops such as forage or hay with some rotation with cereal crops. In August, 2008, the previous landowners entered into a lease with Trident Exploration Corporation, for the drilling and operation of a single well. Trident paid the landowners an initial payment of $14,000 for damages, nuisance and disturbance, signing consideration and annual consideration, and $4,400 per year thereafter. In February, 2011, an amendment was entered into to allow an additional two wells onto the well site with compensation of $14,621.50 in damages, nuisance and disturbance, signing consideration and annual payments of $5,500 per year with $500 per well for the additional two wells. Trident subsequently assigned the Original Lease to Encana.

[8] Ms. Wannamaker of Encana testified that multi-well pad sites require a larger pad area for the additional well head(s). These sites are visited about once a day once it is producing. There is no trucking required or storage tanks on site, therefore, the amount of access required is not significant. The life span of these sites is approximately 15 years.

PRELIMINARY ISSUES

[9] At the start of hearing, the Landowners requested the Board view the Lands. After discussions with the parties, it was agreed that I would visit the property with Mr. Piper and a representative of Encana at the end of the first day of the hearing. I visited the Lands and viewed Encana's operations, but did not walk on the lease area. No evidence was discussed during the site visit other than identifying the well site, access roads, and rights of way. Although viewing the site was of interest, the parties provided no submissions arising from or touching on the visit.

[10] During the course of the hearing, the Landowners attempted to tender an expert witness, Blaine Nicholson, a local realtor to provide an expert opinion on real estate values and marketing. Encana objected. The Board had issued pre-hearing orders for the production of documentary evidence, including expert letters and reports. The Landowners did not file a report or written statement of Mr. Nicholson's expert opinion prior to the hearing. The Landowners submitted they were relying only on his verbal testimony. But, despite pre-hearing conferences, the Landowners did not notify the Board or Encana prior to the hearing, or even, at the start of the hearing of their

intention to call Mr. Nicholson. The Board refused to admit Mr. Nicholson's expert opinion and testimony other than as to facts within his direct knowledge. The Landowners requested that Mr. Nicholson's opinions be admitted and the Board consider any concerns regarding the lack of notification in assigning weight to his evidence. However, Rule 13(3) of the Board's Rules clearly provides that "unless otherwise ordered by the Board, if a party wants to tender the opinion evidence of an expert at an arbitration hearing, the party must deliver the expert's written report to the other parties and to the Board no later than 60 days before the start of the hearing." The Landowners did not comply with this rule or the pre-hearing orders for production of documentary evidence. I found that admitting the evidence would be prejudicial to Encana as they did not have advance notice of the evidence or an adequate opportunity to respond. In addition, admitting this evidence would have likely required an adjournment of the hearing to allow Encana an opportunity to respond, significantly disrupting the hearing process and increasing costs of all parties. Based on these considerations, I ruled Mr. Nicholson's opinion evidence was inadmissible.

[11] At the hearing, I heard from Encana's witnesses, Sherri Wannamaker and Heidi Berscht of Encana, and John Wasmuth and Trevor Sheehan, in support of their expert report. The sole witness for the Landowners was Kane Piper, a local farmer who does not farm the Lands. The Landowners, themselves, did not testify but relied solely on documentary evidence and submissions from their agent.

THE LEGISLATIVE FRAMEWORK

[12] In determining the appropriate compensation to be paid to landowners, the Board awards the equivalent in money for loss or damage sustained as a result of a company's entry, use and occupation of their lands; this compensation does not represent a purchase price or rental of the lands. If the Board orders an amount be paid that exceeds the loss sustained, it no longer provides compensation and exceeds its jurisdiction (*Western Industrial Clay Productions Ltd. v. MAB*, 2001 BCSC 145).

[13] Section 154 (1) of the *Act* sets out factors the Board may consider, including,

(a) the compulsory aspect of the right of entry;
(b) the value of the applicable land;
(c) a person's loss of a 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 one or more 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.

[14] In addition to the legislation, the Board and the courts have developed principles of compensation that apply in determining compensation. I reference the applicable principles below.

COMPENSATION EVIDENCE AND ANALYSIS

[15] Encana relied on an analysis of the compensation factors set out in section 154. The Landowners did not provide an analysis of these specific factors, but instead relied on documentary evidence of other leases and sales of properties from which the Board is expected to extrapolate a rent or value per acre. However, the legislation and case law confirm that an appropriate analysis of compensation is not based solely on a per acre basis. Rather, the Board considers the section 154 factors in determining the appropriate compensation to be paid and determines a global award. Some factors contributing to loss can be quantified on a per acre basis and some, like nuisance and disturbance, cannot and are specific to the circumstances.

[16] In any event, the Board must have evidence of actual, or reasonably foreseeable, loss suffered by the Landowners as a result of the entry to and use of their land. It is notable that the Landowners here did not present any evidence of their use of the Lands or of what loss they have incurred or may reasonably incur as a result of Encana's entry and operations. They do not reside on the Property. They did not testify as to how they presently use, or may foreseeably use, the Lands. They do not farm the Lands but another farmer does. Presumably, the farmer is the party largely suffering loss from Encana's entry and operations and it is his or her use of the Lands and farming operations that are affected, but the farmer did not testify or present any evidence of his or her crop loss or loss of revenue. There is no evidence that the Landowners receive rent or lease payments from the farmer and if so, no evidence as to how the rent received is affected by Encana's use of the Lands. The issue of who has suffered loss was not raised or argued by the parties and Encana is willing to provide compensation to the Landowners based on probable loss, therefore, I will proceed on this basis and determine compensation based on an analysis of the section 154 factors and principles set out in previous case law.

I. Section 154 Factors:

a) The Board may consider the value of the land in determining appropriate compensation;

[17] The value of the land is typically taken into consideration in a one-time payment for an initial entry.

[18] Encana relied on Mr. Wasmuth's report in which he provides an opinion of the per acre market value of the Lands, as of May 17, 2013, and an assessment of loss of use, adverse effects and other damages incidental to the expanded well site and pipeline right of way.

[19] For the permanent right of entry, he determined the market value of the fee simple interest in the Lands based on a highest and best use of continued agricultural production. However, in concluding a value for the temporary work space, he considered the residual rights to the landowners/farmer for these areas as the rights are only granted for short term use during construction activities.

[20] Mr. Wasmuth relied on the sales or transfers of six properties, including the subject in October 2010, that range in adjusted sale price from $706 to $769 per acre. He adjusted two of the sales for motivation as they were non- arm's length transactions, and one of the sales for location and access due to that property's superior location relative to the subject. He did not apply any time adjustments as the market for agricultural land for grazing and/or forage production in the area was relatively stable over the relevant time period. He concluded a market value of the fee simple interest in the Lands at $750 per acre as of May 17, 2013.

[21] In response, the Landowners presented a table setting out details of five sales, including the sale price, $/acre, sale date, property size and legal description, along with a Google Earth map pinpointing the sale properties. No other information was provided, such as the use of the properties, whether the sales were arm's length, motivations of the parties, location information, or whether the sales should be adjusted for differences with the subject. No witness spoke to this evidence and no analysis of the sales was provided. Without this evidentiary foundation and analysis, I can put little weight on this evidence. During submissions, the Landowners argued the subject's land value has doubled in the last four years. However, there is no evidence to support the statement that the market has changed and as such, I cannot rely on this submission.

[22] In comparison, Mr. Wasmuth analyzed sales near the effective date, provided supporting information, and made appropriate adjustments to those sales to determine the market value of the fee simple interest in the Lands. He attended to speak to the report and was cross-examined. Despite issues with the report, such as the subjective nature and lack of support for adjustments, I place greater weight on Mr. Wasmuth's opinion of the market value of the Lands at $750.00 per acre for the permanent rights of entry for the expanded well site and pipelines. For the temporary workspace, I also accept his opinion of value at half of the fee simple value, or $375.00 based on the standard practice of industry and landowners to use 50% of the fee simple interest value.

[23] This results in the first year consideration relative to the expanded well site (10.11 acres) at $750.00 per acre or a total of $7,590 (rounded), with the temporary workspace (2.62 acres) at $375.00 per acre or a total of $990 (rounded). The value of the pipeline right of way area (4.07 acres) is $750 per acre or a total of $3,060 (rounded)and the temporary workspace (5.49 acres) is $375 per acre or a total of $2,060 (rounded).

b) The Board may consider the compulsory aspect of the taking;

[24] The Landowners are faced with two separate rights of entry orders or "takings", one for the expanded well site and the other for the pipeline right of way.

[25] For the compulsory aspect of the taking, the upper limit of compensation is the value of the land; if the landowner receives full value for the land, no additional payment is required for this factor (*Western Industrial Clay Productions Ltd. v. MAB*, supra).Similarly, the Board has said payment of the market value of the land is sufficient to compensate a landowner for the intangible loss of rights, including the compulsory aspect (*Arc v, Miller, supra,)*.

[26] Despite this, I note that some of the agreements provided in evidence, including Encana agreements, additionally compensate for the compulsory aspect of the taking over and above compensation for the market value of the land.

[27] Encana's expert, Mr. Wasmuth, did not specifically address this factor in his report but acknowledged that the Board has previously considered this factor for the initial year of entry and has often considered it accounted for in compensation for the full fee simple value of the land.

c) The Board may consider a person's loss of a right or profit with respect to the land;

[28] This factor is intended to compensate a landowner for the loss of a right or use of the land relating to the entry and operation of the operator.

[29] This award must be based on evidence of actual or reasonably probable or foreseeable loss or damage that can be quantified, not speculative future loss or damage. The Board has repeatedly stated that compensation under the *Act* is only intended to compensate for loss or damage that has actually occurred or is reasonably probable and foreseeable arising out of the company's entry, occupation and use of the surface. *(Arc Petroleum Inc. v. Piper*, MAB Order 1598-2; *Arc Petroleum Inc. v. Miller,* SRB Order 1633). It is not reasonable for the Board to make a finding that loss is reasonably probable and foreseeable without evidence that the loss is likely to occur (*Progress Energy Canada Ltd. v. Salustro*, 2014 BCSC 960).

[30] Mr. Wasmuth identified loss of profit or crop loss resulting from the Landowners' inability to farm and produce crops from the leased areas as well as any severed or inaccessible areas adjacent to the lease sites. Mr. Wasmuth assumed there is added difficulty experienced in the farming operations as a result of having to farm around the lease sites, added equipment operating costs due to additional time involved, additional crop revenue losses and additional input costs due to overlapping required during field operations.

[31] As discussed above, these are losses likely incurred by the farmer and not the Landowners. However, as Encana is willing to pay compensation to the Landowners, the Board will proceed with the determination on this basis.

[32] The Landowners questioned the use of a software program and some of the assumptions used in Mr. Wasmuth's calculations, but they provided no evidence of their own to support different inputs or different conclusions on loss of profit, etc. Despite the Landowners' questioning, the only evidence of loss before me is that provided by Encana and Mr. Wasmuth.

[33] Mr. Wasmuth reviewed the net losses from the Original Lease area of 7.09 acres and the expanded well site of 10.11 acre, and determined the difference as a net loss of profit and adverse effect of $1,198.30.

[34] For the pipeline right of way and temporary workspace, Mr. Wasmuth advised that the forage on the Lands had been cut for hay as of September 2013 as the pipeline construction had not yet commenced, therefore, there was no forage loss for 2013. However, the forage loss was 100% for the 2014 season due to construction and the Landowners will experience reduced forage production for a few years thereafter while the forage crop becomes re-established after re-seeding. With losses in 2014-2017, he estimated net forage losses from the pipeline right of way at $1,540, the pipeline temporary workspace at $2,070, and the expanded well site temporary workspace at $990.

[35] As I have no contrary evidence from the Landowners, I accept these figures.

d) The Board may also consider any temporary and permanent damage from the entry and occupation of the Lands;

[36] This factor reimburses the Landowners for actual damage suffered as a result of the entry.

[37] Encana agreed there is typically some damage, at least temporary, caused to land within well site areas resulting from an entry, occupation and/or use. The damage may

be temporary in nature depending on the production life of the well, soil conservation practices used during site preparation, prevention of spills and reclamation and restoration methods used once production on the site ceases. Mr. Wasmuth says instances of damage to the Lands outside the well site area and pipeline area have not been reported in this instance. However, during the hearing, Encana agreed to pay $1,000 to compensate for snow blown off the temporary workspace onto adjacent Lands.

[38] The Landowners did not present evidence to substantiate a claim for damages resulting from the entry and operations relative to the expanded well site and pipeline right of way or relative to the rent review of the Original Lease. Therefore, based on the lack of evidence to substantiate a claim for damages, I find that there is no compensation to be paid for damages beyond the $1,000 Encana has agreed to pay for blown snow.

e) The Board may consider compensation for severance;

[39] This factor is intended to compensate a landowner where land is severed as a result of the entry and installation such that the landowner either loses the use of the severed land or makes the use of the severed area less profitable (*Helm v. Progress Energy Ltd.*, SRB Order 1634-1).

[40] Mr. Wasmuth explained that the imposition of the expanded well site resulted in a 1.80 acre area being severed from the remainder of the Lands. He included this severed area in calculating crop loss and loss of profit/revenue. He also estimated annual cost of $1,200 to control weeds on the severed area.

[41] In a notation on a Google Earth map provided by the Landowners, there is a notation that outlines three "severance areas" adjacent to the expanded well site. There is no further explanation of this and how it was calculated. Mr. Kane Piper testified for the Landowners. He is a grain farmer in the area though he does not farm the Lands. He provided his opinion that he could not see why anyone would farm those three smaller areas due to the difficulty of getting in and around the areas. However, in cross-examination, he confirmed that he was farming sites with small severed areas, discounting his earlier opinion. I am not sure what the Board is to make of this evidence. The Landowners provided no explanation of how his evidence supports their claims or how his evidence affects compensation. There is no evidentiary foundation for three "severance areas", or evidence of how they were calculated or determined.

[42] Therefore, I find that the amount of the severed area is 1.80 acres. Compensation for this area is included in compensation for other factors, as set out below.

f) The Board may award compensation for nuisance and disturbance from the entry and occupation of the Lands;

[43] A landowner is entitled to be compensated for nuisance and disturbance arising from the operator's entry and use of the lands. Nuisance and disturbance can be tangible or intangible, and is also sometimes referred to as "adverse effect".

[44] In *Merrick, supra.,* the Board defined "tangible" nuisance and disturbance as being objectively quantifiable, such as time incurred by the landowner in dealing with the right of entry, quantifiable equipment cost to working over a piece of land two or more times, or extra time required to work a field because of an installation. "Intangible" nuisance and disturbance is not readily capable of objective quantification, and can include additional stress on the landowner, or the effect of noise, traffic or dust from activities surrounding the entry or operation.

[45] The Landowners presented no evidence of tangible or intangible nuisance and disturbance that they are suffering or may suffer from Encana's entry or operations. They included in their documentary evidence information on prescribed setback requirements from a pipeline right of way, in particular section 76 of the *Oil & Gas Activity Act* and the *Pipeline Crossing Regulation*. However, the Landowners did not explain how this would specifically affect the farming operations and use of their Lands. There is no evidentiary foundation to support any claim on this basis.

[46] Mr. Wasmuth, in his report, indicated that he did not attempt to assess intangible nuisance and disturbance but accounted for tangible nuisance and disturbance attributable to farming around the expanded well site and additional farming costs in his loss of revenue and adverse effect calculations.

[47] He calculated loss of profit (on a net basis) and adverse effect and weed control for the original lease area and the well site expansion area and severed area. He arrived at total net annual losses at $3,250, which includes the Original Lease area ($850) and well site expansion ($1,200). As indicated by the Board in *Salustro, supra.,* the accepted approach in awarding loss of profit or revenue is to award compensation in the form of gross revenue, rather than net revenue (except for specialty crops).

[48] Encana, however, submitted a flat rate for both tangible and intangible nuisance and disturbance should be added to the compensation paid. They suggested $1,000 for the initial nuisance and disturbance for the expanded well site, in keeping with the going rate for this factor, for a total initial compensation for the expanded well site of $10,570 with crop loss of $990 included. Encana also suggested adding $1,000 for continuing nuisance and disturbance to Mr. Wasmuth's estimate of annual losses (based on gross revenue) for the expanded well site for a total of $3,200. With respect to the rent review for the Original Lease area, Encana suggested adding $2,400 annually to Mr. Wasmuth's estimate of total annual losses (based on gross revenue), for a total of

$3,820. This total amount would represent the annual rental payment for the Original Lease area, which is actually less than the current annual rental payment under the Original Lease.

[49] For the pipeline right of way, Encana submitted that $300 should be added for nuisance and disturbance (again based on the going rate) to Mr. Wasmuth's assessment of initial compensation for the right of way and temporary workspace, including lump sum crop losses ($8,730) for a total of $9,030.

[50] In the absence of evidence from the Landowners to substantiate greater payments for nuisance and disturbance, I accept Encana's submissions in this regard as appropriate.

> g) The Board may consider the effect, if any, of one or more other rights of entry with respect to the land, money previously paid for entry, occupation or use, the terms of any surface lease or agreement submitted to the board or to which the board has access, and previous orders of the board;

[51] The Landowners say there should be additional compensation for the multiple rights of entry on the Lands. For the expanded well site, they seek an initial payment of $32,000 based on their lease comparables that range from $1,200 -1,300 per acre and based on the number of additional wells proposed. For the pipeline right of way, the Landowners say they should receive $8,000-10,000 per acre due to the inconvenience caused by the setback requirements, the fact there will be multiple pipelines in the right of way and comparability with compensation awarded for other right of ways. The Landowners provided no breakdown or explanation as to how they arrived at these figures or how the section 154 factors were considered or accounted for. They also provide scatter graph of 1985 oil and gas lease data with a list of 1985 oil and gas lease data. Again, there is no explanation of this evidence is provided. I am left to assume that it is based 1985 oil and gas leases. It breaks down the leases into a $/acre and provides an average $/acre of $542 and a median $/acre of $554. I have no analysis of this evidence, or who compiled and created the data and scatter graph. There was no witness that spoke to this evidence or explained how I am to consider evidence of 1985 leases in my determination of the appropriate compensation in this instance. Without this analysis and supporting evidence, I am not able to give this much weight, if at all.

[52] The Board may consider the terms of any surface lease or pervious Board orders. For both the well site and pipeline right of way compensation, the Landowners provided copies of registered leases from 1978 to 2013, survey plans with no leases attached but notations, aerial photographs of properties with notations, an unsigned offer, and previous Board and court authorities, all to substantiate a rent per acre; this information is summarized in two tables included in the documentary evidence. The Landowners relied, in particular, on a surface lease with Crocotta Energy Inc. on lands owned by the

Steeves, a Bonavista surface Lease for district Lot 3187 owned by Wilderness Ranch, and *Arc v. Miller, supra.*

[53] The Landowners expect the Board to extrapolate a range of rent per acre from this information and pick an award based on this range. However, even if one were to simply make an analysis based on a rent per acre (which as indicated above is inappropriate), the Landowners provided no evidentiary foundation for the comparable leases or analysis of them. There is no evidence of the circumstances involved in the surface leases provided or referenced. There is no evidence on where these properties are located relative to the subject. There is no evidence to show how these properties and use of the properties are similar or comparable to the Lands; for example, are they home quarters, do they have similar farming operations (or are they farmed at all?), what crops are farmed on the lands, are they of similar soil classification etc. Without this information, it is inappropriate to extrapolate a rent per acre and apply it to the circumstances of this case. The evidence must show that either there is a clear pattern of dealings in the area or that the circumstances of the comparable leases are highly similar to the circumstances of the present case. The Landowners have not provided that evidence. Ms. Wannamaker for Encana spoke to some of the Landowners' lease comparables. For example, regarding the Crocotta lease, she spoke to the land agent and was advised that the land was bush/pasture land and the crop loss was based on cereal and oil seed production. The site is a battery site with increased traffic and nuisance and disturbance. Therefore, the circumstances of the Crocotta lease do not appear to be similar to the circumstances here and it would be inappropriate to simply apply that rent per acre to this case.

[54] As for the Landowners' reliance on previous Board decisions, prior Board decisions are not binding. Also, these decisions cannot be used as evidence of the facts in those decisions nor can they prove loss of the Landowners. The loss of one landowner is not automatically the same as the loss of another without some evidence to support that conclusion.

[55] Although Encana submits Mr. Wasmuth's report is the best evidence of appropriate compensation, they submit, in the alternative, that Encana's offers for compensation (tendered into evidence) could be an alternative basis for compensation when viewed in light of their comparable data. Encana's offers are higher than Mr. Wasmuth's conclusions on compensation and higher on a per acre basis than their comparables. Encana's offers include initial payments for the compulsory aspect for both the expanded well site and pipeline, along with an award for the value of land at $1,000 per acre contrary to the evidence of the market value of the lands at $750 per acre and contrary to the principle that an award for the compulsory aspect is not warranted when the Landowner is compensated for the full market value of the fee simple interest.

[56] Encana provided lease comparables for the well site and pipeline rights of way and submitted this evidence supports a clear pattern of dealings. Ms. Berscht, for Encana,

testified on her methodology for gathering comparables; she obtained information for all wells and pipelines from 2010 to 2013 within a 10 km radius of the Lands. She obtained copies of those agreements from various sources. Encana submitted that the most comparable leases are leases of other larger site expansions that are not home quarters. Encana argued that smaller sites are not comparable to the subject as the rent per acre decreases as the leased area increases. In support, Encana relied on a regression analysis provided by Mr. Wasmuth as part of his expert report. Encana argued that many of the Landowners' lease comparables are smaller than the subject and because they have higher consideration per acre due to the smaller size, they are not comparable to the subject.

[57] The Landowners argued that the Encana's lease comparables are largely Encana leases not duly signed and with provisions that misrepresent the law in B.C., particularly with regards to setting an upper limit for compensation on the compulsory aspect, making the leases "void or voidable at law". Therefore, the leases cannot be relied upon. However, no evidence was provided to support the submission that the leases were not enforceable agreements or that the landowners that signed the agreements were misled or were unaware of the law in BC. I am unable to simply dismiss this evidence based only on allegations.

[58] Although there may be some issues with Encana's comparables, they are more reliable as indicative of "going rates" than those provided by the Landowners. Encana has provided supporting evidence to show the comparability of those properties with the subject. The ten leases Encana submits are the most comparable are similarly of larger lease sites with multiple wells and expansions to the sites, and are of cultivated land. The Landowners say if their evidence is insufficient and the Board is not able to make a decision, it is because the government has created a situation where landowners cannot meet the test or burden placed on them to make their claims. The Landowners say the Board can refer to other Board orders and leases in its possession to obtain evidence that it requires. The Board will not be doing research for the parties on its own or attempt to rectify a party or parties' evidentiary deficiencies. The Board can only rely upon the evidence provided by the parties.

h) The Board may consider other factors;

[59] Mr. Wasmuth estimated the additional cost to control weeds on the severed area was $1,200. Encana argued that this should not be included in compensation as their offer on nuisance and disturbance for both the Original Lease and well site expansion area is more than the nuisance and disturbance payments for larger lease sites. However, I find that the cost of weed control of $1,200 is a factor different from nuisance and disturbance and requires separate compensation. The need for weed control is required due to the configuration of the well site and access road and is an additional cost of maintaining the severed area.

[60] Another factor to consider is compensation for additional wells to be drilled on the expanded well site. Encana had offered $2,000 initial payment per additional well and $500 per well annual compensation per additional well. The Landowners seek an additional $1,000 per well annual compensation per additional well. A review of the leases suggest a "going rate" of $1,000 - $2000 initial compensation per additional well and a range of $250-$500 per well annual compensation for additional wells. I accept that Encana's offer for additional wells is within that range.

II. Rent Review Application:

[61] 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)).It is to compensate for actual or reasonably probable loss or damage caused by an operator's continuing use of the lands. In a 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).*

[62] 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.

[63] Finally, in an application for rent review, the applicants, or the Landowners in this case, have the onus to establish ongoing prospective losses and to establish that an increase in the annual rent is warranted (*Progress Energy Canada Ltd. v. Salustro,* 2014 BCSC 960*).*

[64] The Landowners submitted that the appropriate compensation for the Original Lease site is $1,350 per acre based on comparables provided, $2,000 for initial compensation for additional wells and $1,000 per additional well for annual compensation. The Landowners rely on the rent per acre set out in their lease comparables and in the Board's decision in *Arc v. Miller, supra.*

[65] The Landowners have not discharged their onus of proof in establishing ongoing prospective loses or in establishing that an increase in rent is warranted. As indicated above, the Landowners relied solely on lease and sale comparables, and past Board decisions, with no evidentiary foundation or supporting information such that I am unable to rely upon that evidence. They relied on past Board decisions to set compensation rates, however, the evidence that was before the Board in those decisions is not before me nor is there any evidence that the circumstances of those

decisions are similar to the circumstances here. The Landowners presented no evidence on how Encana's operations have affected their use of the Lands or of actual or reasonably probable or foreseeable loss resulting from the operations. I have no evidence to consider any change in the value of money since the date of the Original Lease or last renewal. As for the change in the value of land, Encana provided some evidence there has been no change in use or value of the Lands since the transfer of the Lands to the Landowners in 2010.

[66] Therefore, I dismiss the Landowners' application for an increase to the annual rent under the Original Lease. The parties to the Original Lease agreed to the compensation set out in the Original Lease, and I find that the rental payment should remain unchanged.

III. Global Review of Compensation:

[67] As indicated above, compensation under the *Act* is for loss or damage sustained as a result of a company's entry to, and use and occupation of a landowner's lands (*Western Clay, supra.*). It has been a struggle to determine the appropriate compensation due to the lack of evidence provided from the Landowners, in particular, the lack of evidence of their actual or reasonably foreseeable and probable loss. Due to this, I am left to try to determine compensation based on the evidence before me, some of which, such as nuisance and disturbance, is arbitrary and some of which is based, not on evidence of loss, but on the willingness of Encana to pay the Landowners amounts comparable to those paid to other landowners. As indicated by the Court in *Salustro, supra.,* the Board operates in the context of a system of administrative justice where reviews of its decisions are governed by the *Administrative Tribunals Act* and the Board's decision can be set aside if there is insufficient evidence to support it.

[68] Applying my findings above in relation to the section 154 factors, the Landowners are entitled to the following compensation:

Original Lease (7.10 acres): There is no change to the rent payable as of August 15, 2012.

Expanded Well site (10.11 acres): Initial one-time consideration for the value of the land (which forms the upper limit for the compulsory aspect of the taking):

Permanent entry:	$750.00 x 10.11 acres = $7,590
Temporary workspace:	$375.00 X 2.62 acres = $990
Crop loss (temporary workspace):	$990
Damages (snow blown onto adjacent land):	$1,000
Nuisance and Disturbance:	$1,000
Total Initial Payment:	**$11,570**

Annual payment for the expanded well site:

Annual loss:	$2,200
Nuisance & Disturbance:	$1,000
Weed control:	$1,200
Total: Annual Payment on expanded well site:	**$4,400**

Additional drills:

Initial payment:	**$2,000 per drill** as the additional wells are drilled
Annual compensation:	**$500 per well** as each additional well is drilled

Pipeline Right of Way: Initial one-time compensation:

Value of the permanent right of way:	$750 x 4.07 = $3,060
Value of temporary workspace:	$375 x 5.49 = $2,060
Nuisance & Disturbance:	$300
Crop Loss on right way:	$1,540
Crop loss on temporary workspace:	$2,070
Total right of way compensation:	**$9,030**

[69] Following consideration of the enumerated factors, the Board must step back and consider whether the award in its totality is appropriate compensation, as there may be cases where the sum of the parts exceeds, or falls short, of proper compensation *(Scurry Rainbow Oil v. Lamoureux* [19850 BCJ No. 1430 (BCSC)).

[70] Stepping back and reviewing the totality of the compensation for the expanded well site and the pipeline right of way, I find the compensation above falls short when compared to Encana's lease comparables. When reviewing the ten leases that Encana says are most comparable (leases of similar larger leases with well site expansion), some of the leases disclose that Encana pays a sum of $500 per acre for the compulsory aspect of the taking (to a maximum of $5,000) plus the value of the land in the initial, one-time compensation award. The other leases and leases from other operators do not disclose whether the initial payment includes awards for both the compulsory aspect and the market value of the lands. However, Encana's offer to the Landowners included both awards. Therefore, contrary to the principle that the market value of the land represents the upper limit of compensation, Encana's practice, at least in some instances (including this one) appears to be to allow compensation for both the compulsory aspect and the market value of the land. Therefore, for both the expanded well site and pipeline right of way, I find appropriate compensation should include a further award for the compulsory aspect of the taking at $500 per acre to a maximum of $5,000 in line with what appears to be Encana's practice. For the expanded well site,

the initial compensation should be increased by $5,000, for a global award of $16,570 plus $2,000 for each additional well drilled and annual rent of $4,400 to be increased by $500/year for each additional well drilled. For the pipeline right of way, compensation should be increased by $2,035 for a global award of $11,065.

[71] The result of my determination is that the Landowners are entitled to compensation that is less than what they were seeking and even less than what Encana offered. This result may be distressing to them, however, at arbitration, the Board's hands are tied by legislation, binding case law, and the evidence, or, in this instance, the lack of evidence, before it.

ORDER

[72] For the rent review period commencing August 15, 2012, there is no change in the annual rent payable under the Original Lease.

[73] For the expanded well site, the Landowners are entitled to an initial payment of $16,570 along with initial compensation of $2,000 per well for additional wells as they are drilled. Encana shall pay annual rent of $4,400 increasing by $500 per well per year for each of the additional wells drilled. Encana's partial payment of $25,000 made pursuant to the Board's order of May 17, 2013, shall include the initial payment and annual rental payments until the partial compensation is depleted. Once the partial compensation is depleted, Encana shall continue to pay annual rent as set out above.

[74] For the pipelines, the Landowners are entitled to initial payment of $11,065. As the partial payment to the Landowners of $22,000 made pursuant to the Board's order of June 14, 2013, exceeds the Landowners' entitlement, the Landowners shall forthwith pay to Encana the difference of $10,935.00.

DATED: August 25, 2014

FOR THE BOARD

Simmi Sandhu, Vice Chair