

Creating Value in Surface Rights Negotiations

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Surface rights have been a topic of increasing importance in Manitoba over the last several years. While much of this can be attributed to increased oil and gas activity, this does not tell the entire story. Previous oil booms did not create the level of tension between surface holders and mineral owners that is often seen today, largely because these two people were usually one and the same. However, as land has been rented or sold, the dichotomy of ownership was broken down such that the person who stands to profit most from oil and gas exploration (i.e. the mineral owner) is rarely the person who has to deal with the inconvenience of that exploration (i.e. the surface owner or occupant). This is precisely the tension that *The Surface Rights Act*, CCSM., c. S235 was designed to address.



The scheme of *The Surface Rights Act* ("the "Act") is relatively simple. Mineral owners must be allowed access to their minerals provided that they pay "just and equitable compensation". Compensation is usually split into first year compensation and annual compensation. "Annual compensation" will be paid yearly until the facilities are decommissioned and the land restored. It includes amounts to compensate the occupant for the loss of use of the land (i.e. annual crop loss), nuisance and inconvenience (e.g. extra turns, overlap, excessive noise, etc.), and adverse effects. "First year compensation" includes these amounts for the first year, as well as amounts to compensate for the lost value of the land (typically its fair market value on a per acre basis), losses incurred as a result of initial development and expenses incidental to negotiations.

In fixing compensation, The Surface Rights Board (the "Board") is required to consider the factors listed in s. 26 of the Act, including land value, loss of use, permanent damage, increased costs, adverse effects, nuisance and inconvenience, and "any other relevant matter that may be peculiar to each case". The Board will also consider comparable orders or leases to determine if the compensation being proposed is reasonable. This is known as the "global approach".

A guiding rule of surface rights law is that lease agreements negotiated between parties at arm's length are the best indicator of fair and reasonable compensation (*Siebens Oil & Gas*

Ltd. v. Livingston (1978), 15 LCR 32 (Alta. SC – App. Div.)). While this point may be debateable, occupants before the Board must come prepared to differentiate or call into question recent leases if they are going to have any chance of success. This will involve showing that the land is more valuable or more productive, that the use is more intrusive, or that the adverse effects are more acutely felt. It could also involve showing that past leases are out of date or were not the product of vigorous negotiation.

Once compensation is agreed to, surface rights may be given legal force by a surface lease or a board order. In Manitoba, the vast majority of surface rights are finalized by a lease without any involvement by the Board. This is in contrast to Alberta where many landowners will insist on a Board order finalizing their arrangements. While it remains to be seen whether this practice will become more common in Manitoba, a Board order may provide more protection for occupants than the standard form commercial leases typically used by oil companies. For instance:

1. Oil companies typically use standard form agreements that span a long period of time and may become out of date during the lifetime of a project. Once signed, a lease cannot be re-opened by the Board other than to review compensation after 3 years. In contrast, a Board order may be varied by the Board in some instances where the circumstances warrant;
2. A Board order may be terminated by the Board if the holder has not exercised its rights within a certain period of time. The standard terms of most leases do not provide for termination by the occupant absent extraordinary circumstances; and
3. A Board order only permits the company to use the land for the purpose that it was acquired at the time. Standard lease forms are often drafted more broadly, allowing the potential for ‘use creep’ over time.

An occupant is best advised to consider its legal position at the outset of any surface lease discussions. If the process goes too far along, it may be more difficult to challenge issues like well location and mitigation that are addressed under other statutes. Many companies will reimburse an occupant for its reasonable legal costs in negotiating a lease or order if asked to do so, and legal costs may be recoverable from the Board in some cases.

Author Stephen Beernaert has left TDS to pursue a new opportunity. Anyone wishing to contact Stephen should contact Paul Roy at per@tdslaw.com or by phone at (204) 727-0761 and he will be happy to assist you.

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