

An Updated Definition for Adverse Effect Within a Surface Lease Agreement

Background

The comments and summary is based on Canadian Natural Resources Ltd. v. Bennett & Bennett Holdings Ltd., 2008 ABQB 19; and is the written decision by Justice J.H. Langston. This decision is a result of an appeal of the Surface Rights Board decision 2006/0009-0014.

The issues before the court were 4 fold. They were:

- The appropriate standard for review,
- Apply that standard to the Board,
- How should new evidence be treated,
- Should the SRB decision be upheld in relation to:
 - Pattern of dealings
 - Adverse Effect and Loss of Use,
 - Owner versus Occupant

Justice Langston concluded the following.

- Application to the Board – The decision of the Board will be assessed against the reasonableness standard.
- New evidence – The content and context of the evidence as presented is relevant.
- SRB Decision – Justice Langston varied the SRB decision because the methodology of how the Board reached its conclusions was missing in its decision.

Justice Langston made a major effort to put a definition around adverse effect.

- 1) Adverse Effect is for a future 5 year period (not past) and the calculation is for a probable future impacts.
- 2) Justice Langston added to the definition by referring to past decisions. These are:
 - *Includes any extra requirements of time and costs necessarily incurred in farming around the obstruction in the field; any likely incidental production losses outside the area granted due to compaction or pulverization of the soil, overlaps or misses, and combining losses; any effect on management decisions and practices; added strain and stress on all machinery from turning and maneuvering; and the probable need for more attention to effective weed control around the area.*
 - *Adverse effect is awarded to cover, inter alia (among other things), inconvenience to a farmer in having to farm around the well site in question, the extra turns*

required for his tractor and farm equipment and the general inconvenience which will result due to the location of the well site in the farmer efficiently and effectively carrying out his farming operations.

- *The Board considers [adverse effect] to include the **inconvenience and added cost to normal field operations in the vicinity of the demised premises; extra operating time resulting from the field obstruction; extra care and attention required in all field operations in the vicinity of the obstruction; any yield losses which may result from overlaps and misses, extra turning and combining losses due to the obstruction; any problems likely to arise from unattended weed infestations encroaching off the demised premises into adjoining land.***
- *Adverse effect refers to the impact on land adjacent to the lease and, for our purposes, would mean such things as **extra time needed to cultivate or care for land which is obstructed by a well head, or for extra time needed to supervise or inspect lands** because of the operator's right to enter thereon.*
- *In reviewing the statutory provision and these cases, it is my view that while there may be tangible and intangible components to adverse effect, they cannot be completely divorced from one another. For example, while there is a **quantifiable equipment cost to working over the same piece of land two or more times, simultaneously, there is an added stress on the operator to ensure that he or she does not hit any of the structures on the well site. Simultaneous with the extra caution being taken with each extra pass, there is extra time being expended.***
- *These are significant factors to consider; first, the **farmer has to decide how the land is going to be farmed with the obstruction now in place. Second, the revised farming pattern has to be executed.** As varying sizes and types of equipment are used with each farming operation, both steps are performed more than once in a growing season.*
- *The theme is that the adverse effect does not arise solely from the exclusion of the leased parcel from the landowner's operation, the existence of the physical structures, or, the presence of an access road. It also arises from the **need to interact with the operator as a business associate.** The problem for the landowner is that it **did not voluntarily choose to have this business relationship, and the operator constitutes a business associate that does not have the same objectives for the use of the now mutually-held business asset, the land, as the landowner.***

Work Sheet

Farmers and ranchers need to consider the following framework in assessing and setting a value(s) for the next 5 year adverse effect payment.

Tangible and intangible impacts which will result due to the location of the well site in the farmer efficiently and effectively carrying out his farming operations. This list includes the following below but not limited to:	Year 1	Year 2	Year 3	Year 4	Year 5
Extra requirements of time necessarily incurred in operating around the obstruction in the field for each operation.	\$	\$	\$	\$	\$
Extra requirements of costs necessarily incurred in operating around the obstruction in the field for each operation.	\$	\$	\$	\$	\$
Production losses (separate from Loss of Use calculations) outside the area granted due to: <ol style="list-style-type: none"> 1. Compaction or pulverization of the soil, 2. Overlaps or misses, and combining losses yield losses 3. Extra turning and combining losses due to the obstruction. 	\$	\$	\$	\$	\$
Added impact on management decisions and practices. Impairment of GSP steering equipment. Dust impact on Roundup Ready® crops. Unauthorized access by third parties.	\$	\$	\$	\$	\$
Added strain and stress on all machinery.	\$	\$	\$	\$	\$
Added effort and cost for effective	\$	\$	\$	\$	\$

weed control around the area required to protect surrounding fields.					
The inconvenience to normal field operations in the vicinity of the demised premises: 1. Extra care and attention required in all field operations in the vicinity of the obstruction. 2. Extra time needed to supervise or inspect lands. 3. Added stress on the operator to ensure that he or she does not hit any of the structures on the well site. 4. The extra caution being taken with each extra pass, there is extra time being expended.	\$	\$	\$	\$	\$
The extra time a farmer has to decide how the land is going to be farmed with the obstruction now in place. Second, the extra execution time to revise the farming pattern.	\$	\$	\$	\$	\$
The extra and unplanned time and cost to deal with the forced need to interact with the operator as a business associate on the land.	\$	\$	\$	\$	\$
Impact from a non-lethal exposure to H2S for Livestock	\$	\$	\$	\$	\$
Impact from a non-lethal exposure to H2S for land owner.	\$	\$	\$	\$	\$
General payment for forced business relationship.	\$	\$	\$	\$	\$
Impacts from low noise vibration exposure to land owner.	\$	\$	\$	\$	\$
Other items unique to the actual agreement, land owner and land location.	\$	\$	\$	\$	\$
Total Estimate of Adverse Effect	\$	\$	\$	\$	\$

For more information contact

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