

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
(hereinafter "the Board").

IN THE MATTER OF certain lands within the South East Quarter of Section 22, Township 57, Range 21, West of the 4th Meridian, in the Province of Alberta (the Lands).
Excepting thereout all Mines and Minerals.

BETWEEN:

ACCESS PIPELINE INC.,

Operator,

- and -

KENNETH PRODANIUK,
SHERRI PRODANIUK,
DEBORAH CHABA,
OREST JOHN YAKIMETS,
IMPERIAL OIL RESOURCES LIMITED,
FORTISALBERTA INC.

and

REDWATER WATER DISPOSAL COMPANY LIMITED,

Respondents.

DECISION

Order No. 0685/2006 granting right of entry to the Operator was issued by the Board on June 8, 2006.

The land subject to the said Order is 4.97 acres for a pipeline in the said land as shown on the plan attached to the Order.

A hearing was held by the Board on April 3, 2008, at Edmonton, Alberta.

PRESIDING BOARD:

- Edward V. Zenko Presiding Chair
- Gregg A. Hook
- Karen R. Fraser

APPEARANCES:

- For the Operator:
- Daron K. Naffin with the law firm Bennett Jones LLP, Legal Counsel;

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For the Respondents:

- Blake Williams with the law firm Bennett Jones LLP, Legal Counsel;
 - Robert J. Telford, B.Sc., AACI, P.App., P.Land, Land Consultant & Appraiser, with McNally Land Services Ltd.; and
 - Paul R. Folkmann, RPF, Registered Professional Forester and President of Ezra Consulting Limited.
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- Richard C. Secord, with the law firm Ackroyd LLP, Legal Counsel;
 - Eva Chipiuk, with the law firm Ackroyd LLP, Legal Counsel;
 - Sherri Prodaniuk, also representing Kenneth Prodaniuk, Landowners;
 - Deborah Chaba, Landowner;
 - Ivan T. Weleschuk, B.Sc.(Agr), M.Econ, P.Ag., A.R.A., President of Weleschuk Associates Ltd.; and
 - Leonard J. Knapik, P.Ag., with Pedocan Land Evaluation Ltd.

The other Respondents were not present or represented at the hearing although duly notified of the hearing.

PRELIMINARY MATTERS:

There were no preliminary matters.

BACKGROUND:

The Land is located approximately 5.6 kilometers southeast of Redwater and 2.4 kilometers west of the Redwater Sandhills Natural Area. It is north and east of the lands designated as Alberta's Industrial Heartland. The majority of the Land is covered by deciduous trees with some open areas. A creek, forming a tributary to the Redwater River, runs across the top one-third of the Land. An area adjacent to the southern and western boundaries, comprising approximately twenty-five percent of the quarter, has been cleared of trees and cultivated. The Operator required a right of way across the northwest corner of the Land to install two pipelines; one carrying blended bitumen from a terminal near Fort McMurray to Edmonton and the other carrying diluent back to the terminal. The Operator and Landowners were unable to agree on terms for a right of way agreement. The Board granted a right of entry to the Operator for the construction, operation or removal of a single pipeline. During the hearing, the Board became aware from the evidence presented that the Operator had installed two pipelines in the same trench.

This matter concerns the determination of compensation payable by the Operator for the rights taken under Right of Entry Order No. 0685/2006, dated June 8, 2006.

ISSUES TO BE DECIDED:

1. Should the Board issue a Decision awarding compensation for the Right of Entry Order or reserve its Decision until the issue of the second pipeline on the area of the taking is resolved?
2. If the answer to 1 is Yes, what is the appropriate compensation payable by the Operator?
3. If the answer to 1 is Yes, to whom is the compensation payable?

RELEVANT LEGISLATION:

Surface Rights Act RSA 2000, Chapter S-24

Compensation hearing

23(1) Forthwith on making a right of entry order, the Board shall give notice to the operator and each respondent of the date on which it will hold a hearing to determine the amount of compensation payable and the persons to whom it is payable.

(2) The compensation hearing shall be scheduled for a date that is not more than 90 days after the date the right of entry order was made.

(3) The Board shall make a compensation order not more than 60 days after the date on which the compensation hearing concluded.

(4) On notice to the parties, the Board may, if it considers it necessary to do so, extend the time limits referred to in subsections (2) and (3).

1983 cS-27.1 s23; 1987 c2 s8

Determining compensation

25(1) The Board, in determining the amount of compensation payable, may consider

- (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,*
- (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land,*
- (c) the loss of use by the owner or occupant of the area granted to the operator,*
- (d) the adverse effect of the area granted to the operator on the remaining land of the owner or occupant and the nuisance, inconvenience and noise that might be caused by or arise from or in connection with the operations of the operator,*
- (e) the damage to the land in the area granted to the operator that might be caused by the operations of the operator, and*
- (f) any other factors that the Board considers proper under the circumstances. ...*

1983 cS-27.1 s25

25 (5) In making a compensation order, the Board may also determine the amount of compensation payable by the operator

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- (a) for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator, if those operations were incidental to the operations of that operator on the area granted to the operator under the right of entry order,*
- (b) for the loss of or damage to livestock or other personal property of the owner or occupant caused by or arising out of the operations of the operator, and*
- (c) for time spent or expense incurred by the owner or occupant in recovering any of the owner's or occupant's livestock that have strayed due to an act or omission of the operator,*

and shall determine the person to whom the compensation is payable.

1983 cS-27.1 s25

EXHIBITS FILED:

- Exhibit 1: Compensation Record.
- Exhibit 2: Market Value Appraisal and Compensation Report, prepared by McNally Land Services Ltd.
- Exhibit 3: Negotiated Agreements in Sturgeon County.
- Exhibit 4: Copies of five photographs.
- Exhibit 5: Curriculum Vitae of Paul R. Folkmann.
- Exhibit 6: 2006 AVI Timber Damage Appraisal Table-Full Value.
- Exhibit 7: Respondents' Binder of evidence.
- Exhibit 8: Sturgeon County map — Industrial Heartland Land Ownership.
- Exhibit 9: Appraisal of Market Value Report, prepared by Berrien Associates Ltd.
- Exhibit 10: Future Land Use Map — Sturgeon County East, Municipal Development Plan.
- Exhibit 11: Sherri Prodaniuk's Chronology of Events.
- Exhibit 12: Documentation regarding damages and compensation
- Exhibit 13: Sunstone Projects Ltd.'s Daily Environmental Report.
- Exhibit 14: Pipeline Special Conditions Agreement.

Exhibit numbers 1 to 6, inclusive, and 13 and 14 were filed for the Operator. Exhibit numbers 7 to 12, inclusive, were filed for the Respondents.

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SUMMARY OF THE OPERATOR'S POSITION:

The Operator proposes compensation at the rate of \$1,200.00 per acre of right of way. This includes compensation for any trees removed from the right of way. The Operator also proposed that compensation for the time, nuisance and inconvenience associated with the Landowners' interactions with the Operator should be settled by the parties along with damages related to the pipeline construction. The Operator did not specifically address the issue of loss of use during or after construction activities were complete.

Robert Telford (Telford) presented his appraisal report (Exhibit 2) on the en bloc per acre value of the Land. He described the current use of the land as "recreation/agricultural production (hay and potential grazing of livestock)". The current Land Use Designation is Agricultural/Urban Fringe. In his opinion the land is not uniquely situated and is not within the Industrial Heartland Zone. A land use as country residential is not plausible without a lot of preparatory work. Telford concluded that Agricultural is the highest and best use for the Land and appraised it a \$1,200.00 per acre based on eight comparable sales in the vicinity of the Land.

Telford also presented pattern of dealings evidence (Exhibits 2 and 3) based on 88 negotiated right of way agreements for lands to the southwest and northeast of the Land. These were all agreements between the Operator and various landowners for the same pipeline project that crosses the Land. Each agreement was settled at \$1,200.00 per acre. Telford stated that he saw no evidence of unequal dealings between the Operator and landowners.

Paul Folkmann (Folkmann) was engaged by the Operator to conduct an assessment of the value of the trees that were cut down within the right of way. He stated that he had not visited the site prior to the construction work. Based on his subsequent visit to the site and examination of the surrounding area, he concluded that the trees removed from the right of way were generally poor quality aspen with some coniferous. The estimated area of tree loss was one hectare. Using an industry standard procedure to value merchantable timber, he estimated the value of the trees taken as \$1,028.00.

Folkmann also commented on the reforestation plan proposed by the Respondents. In his opinion it is more of a landscaping plan and not typical of a pipeline restoration plan. He stated that the area should be left for natural regeneration. He also noted that the Operator agreed to allow regeneration on the right of way except for ten meters immediately over the buried pipeline, i.e. ten meters on each side.

The Operator's Legal Counsel, Daron Naffin, summarized the Operator's position:

1. The Operator has been responsible in its dealings with the Landowners. He referred to a Pipeline Special Conditions Agreement (Exhibit 14) that was proposed by the Landowners' former legal counsel prior to construction. Although the agreement was not signed, the Operator has been adhering to its terms. For example, the Operator paid for an independent consultant to monitor specified aspects of construction on behalf of the Landowners and has acted on the consultant's reports and recommendations. In addition, allowing reforestation along part of each side of the right of way was a specific request of the Landowners prior to construction.
2. The value of the trees lost is minimal and should not be separately compensated as it is adequately provided for in the \$1,200.00 per acre payment.
3. Part of the Respondents' compensation claim involves the alleged removal of sand from a location elsewhere on the Land for use in backfilling the right of way. However, there is no evidence that the Operator took this sand and in fact the evidence (Exhibit 12) points to another operator, ARC Resources Ltd., which removed this sand in two stages and subsequently paid the Landowners for it. Consequently, there shouldn't be any further compensation awarded.

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4. Damages shouldn't be determined and settled until after reclamation work is complete.

During his rebuttal of the Respondents' summation and argument, Naffin stated that:

- The Operator agreed that both right of way acres and temporary work space acres should be compensated at the same rate.
- The Operator has adhered to the provisions of the right of entry order and paid for the Landowners to have an on-site supervisor. The Operator accepted advice from the supervisor.
- The Operator doesn't agree that planted trees are essential to erosion control.
- The photographs introduced into evidence by the Respondents are typical of a pipeline under construction.

SUMMARY OF THE RESPONDENTS' POSITION:

The Respondents want compensation based on the following factors:

1. En bloc value per acre of the Land of \$3,500.00
2. Annual "economic loss" of \$800.00
3. Compensation for the Landowners' time and out of pocket expenses to deal with the Operator, monitor construction and attend the hearing based on:
 - 94.17 hours @ \$45.00/hour or \$4,237.65
 - 660 kilometers @ \$.475/kilometer or \$313.50
 - Long distance phone calls of \$6.50
 - Photo developing costs of \$52.24
 - Parking costs of \$19.00
4. Loss of merchantable trees valued at \$1,028.00
5. Reforestation program costs of \$49,000.00 to replace lost trees
6. Payment of \$5,575.50 including GST for the unauthorized removal of sand from elsewhere on the Land and use on the right of way
7. Pre-judgment interest between June 8, 2006 and April 3, 2008 of \$1,648.67 calculated at the rate of 4.00% per annum

Ivan Weleschuk (Weleschuk) presented the market value appraisal he completed for the Respondents. The report includes appraised values at June 8, 2006 and February 28, 2007. He asked the Board to ignore the latter valuation date which does not conform to the requirements in Section 25 (1) (b) of the *Act*. He stated that zoning is dynamic over time as land use designation changes. The Town of Redwater, west of the Land, is growing rapidly after additional land annexation. There was a lot of speculation going on resulting in rapid price escalation. Although the Operator might have paid \$1,200.00 per acre in 2005, this was not relevant in 2006.

Weleschuk said that in such a market, it isn't possible to use the standard practice of appraisal based on comparable land sales because the 2006 market was substantially higher. He noted that land values in the area had increased 35% between 2004 and 2006. Notwithstanding these comments, he did review 36 other land sales in the area that were stated to have occurred between June 2005 and September 2006 but he did acknowledge that at least one of these had yet to close. Of these 36 sales, Weleschuk selected four as the best indicators of the market value of the Land.

In Weleschuk's opinion, the highest and best use of the Land is Country Residential. He explained that a landowner can sub-divide any quarter into two parcels without the need for a zoning change. Weleschuk appraised the Land at \$3,500.00 per acre.

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Weleschuk also commented on the pattern of dealings approach. He said that major pipelines only occur every three to four years. This makes it hard to find relevant data when the next one comes along. A pattern based on 2005 negotiations is no longer relevant in 2006 due to rapid escalation in sale prices, speculation, and zoning changes.

Len Knapik (Knapik) is a professional agrologist and was engaged in June 2006 to monitor the reclamation and re-vegetation of the right of way. He was hired because of the provision in the Pipeline Special Conditions Agreement (Exhibit 14) and acted on behalf of the Respondents. He did not visit the site until July 9, 2006 after the pipeline had been installed.

Knapik described the impact of the pipeline construction on a hill leading down to a creek which crosses the Land. Because two big pipes were installed in a single ditch, the Operator had to use big equipment and cut deeply into the hill to minimize pipe bending. There was also extensive tree loss. Adding new trees would help to stabilize the slope above the creek. The Operator practiced good soil conservation overall but there will be a need for follow-up to ensure soil containment devices remain functional for erosion control and sediment control. Knapik proposed a reforestation plan involving the planting of 1,500 trees and 100 saskatoon bushes at a cost of \$31,000.00 plus a maintenance and watering program over three years at a cost of \$18,000.00. He acknowledged that the Land wasn't a merchantable forest, rather it is a recreation area for the Landowners or as he described it —“someone's backyard”.

Sherri Prodaniuk (Prodaniuk) is one of the Landowners. She lives on another parcel of land diagonally across from the Land and pipeline right of way. She stated that her family considers the Land their national park with its trees, variety of terrain, a creek and a diversity of wildlife. She uses the Land as inspiration for her art photos. Prior to the pipeline construction, her main concerns were environmental and loss of trees. She believes that the Operator was not forthcoming and downplayed her concerns. For example, the depth of the planned hill cut was never disclosed. When she became aware of the Operator's plans, she asked that they drill directionally but the Operator opted for the open cut method instead.

During construction, Prodaniuk and her family were subjected to inconvenience, noise and lots of dust caused by the heavy equipment. She believes that she wasn't kept informed and had to inspect the site daily. She provided the Board with a log (Exhibit 7, Tab 13) of her daily activities related to the pipeline, commencing on September 5, 2005 and continuing through March 20, 2008.

Now that construction is complete, Prodaniuk continues to be concerned about erosion into the tributary creek, piles of trees, weed infestation, and the potential impact of unsecured landscape mesh on small animals. She would also like a copy of the as-built drawings for the pipeline.

Prodaniuk was not aware that any sand had been taken from a pit elsewhere on the Land until Knapik advised her. She and Knapik painted a scenario that the Operator took sand from the hill during the pipeline installation to build a road. It was then faced with a sand deficit when it tried to rebuild the hill so it took the sand from the pit without authorization. About 200 loads were hauled over the course of two days but Prodaniuk never saw this occurring nor did Knapik. Prodaniuk acknowledged that ARC Resources does have an agreement to haul sand from the pit. When she was asked to comment on Exhibit 12, she insisted that this was for different sand.

The Respondents' Legal Counsel, Richard Secord, summarized the Respondents' position.

1. Although the Right of Entry Order conditions (Exhibit 1, Tab 2) require the Operator to adhere to good soil conservation practices, it failed to do so.
2. The Operator offered different rates of compensation for right of way and temporary work spaces even though previous Board Decisions have ruled that they are to be treated the same as both are covered by the right of entry order (Exhibit 7, Tab 4).

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3. Weleschuk, a professional appraiser, appraised the en bloc parcel of the Land at \$3,500.00 per acre.
4. The Operator was intrusive and has shown a lack of generosity, for example, even refusing to pay the minimal amount for the loss of trees.
5. The Respondents' have lost their idyllic retreat as evidenced by the site photographs submitted as Exhibit 7, Tabs 9 and 11.
6. All the trees in the thirty meter right of way were taken leading to concerns about future erosion.

FINDINGS OF FACT:

1. The Land is jointly owned by Kenneth Prodaniuk, Sherri Prodaniuk and Deborah Chaba.
2. The current approved use of the Land is Agricultural.
3. The Landowners use the Land primarily as a family gathering place for recreation, relaxation and artistic inspiration.
4. The Board granted the Operator a Right of Entry Order No. 0685/2006 dated June 8, 2006 for the construction, operation or removal of a pipeline.
5. The Operator installed two pipelines in the right of way.
6. In the process of pipeline construction, the Operator clear cut all the trees on the right of way and significantly altered the slope of a hill leading down to a creek crossing the right of way.
7. The Landowners spent a significant amount of time and incurred out of pocket expenses during negotiations with Operator prior to, during and after construction of the pipeline.
8. The Operator generally followed good soil management practices but its construction activities were extensive and will require further remedial measures and monitoring.

DECISION:

The Board is not prepared to issue the compensation order at this time and reserves its decision pending the outcome of the following:

1. The Operator will be required to make an application to the Board within 30 days to remedy the problem with the Right of Entry Order No. 0685/2006 which reflects a right of entry to the surface of the Land for the construction, operation or removal of a pipeline whereas the Operator has installed two pipelines in the right of way. The Operator's application may be either under Section 29 of the *Act* or for a new Right of Entry Order for the second pipeline.
2. Should the Operator fail to make an application within 30 days, the Board will initiate an inquiry under Section 29 of the *Act* to review Right of Entry Order No. 0685/2006 and the rights granted.

REASONS FOR THE DECISION:

After the hearing had concluded, the Board asked the parties to provide information concerning the number of pipelines present in the area granted under Right of Entry Order No. 0685/2006 and to provide submissions as to whether the compensation hearing should be re-opened or not.

The Operator's Legal Counsel confirmed that two pipelines were present as provided under the AEUB pipeline licence. The Operator did not address the inconsistency between the AEUB licence and the application for the right of entry order and the granted Right of Entry Order. The Operator did not want the compensation hearing re-opened.

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The Legal Counsel for the Landowners advised the Board that it seems that the Operator was not granted the right to construct or operate a second pipeline and that in doing so the Operator is trespassing on the Land. The Landowners did not wish to re-open the compensation hearing but their Legal Counsel reserved the right to make a further application to the Board on this matter.

Given the significance of the inconsistency between what the Board granted under Right of Entry Order No. 0685/2006 and the construction work actually completed by the Operator as well as the Landowners' assertion of a trespass and reservation of the right to make a further application to the Board to re-open the compensation hearing, it would be unwise and inappropriate for the Board to make an award of compensation until these issues have been resolved.

COSTS:

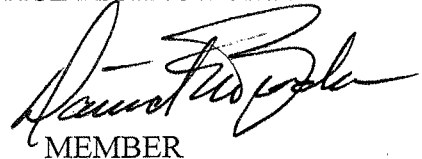
The Legal Counsel for the Operator advised the Board on April 18, 2008 that the Parties had reached an agreement on costs and the Board need not render a decision on the issue of the Landowners' hearing costs. Costs of and incidental to the proceedings under the *Act* were settled by the parties.

ORDERS:

An order will issue reserving the compensation as set out above.

Dated at the City of Edmonton in the Province of Alberta this 3rd day of June, 2009.

SURFACE RIGHTS BOARD



MEMBER

SURFACE RIGHTS ACT
RSA 2000
Chapter S-24
(hereinafter "the Act")

Before:

SURFACE RIGHTS BOARD
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IN THE MATTER OF certain lands within the South East Quarter of Section 22, Township 57, Range 21, West of the 4th Meridian, in the Province of Alberta.
Excepting thereout all Mines and Minerals.

B E T W E E N:

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IMPERIAL OIL RESOURCES LIMITED,
FORTISALBERTA INC.

and

REDWATER WATER DISPOSAL COMPANY LIMITED,

Respondents.

COMPENSATION ORDER

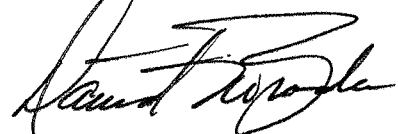
WHEREAS by Order No. 0685/2006, dated June 8, 2006, the Board granted to the Operator right of entry in respect of part of the surface of the land above described;

IT IS ORDERED that the compensation payable by the Operator for the rights granted by the said Order shall be reserved.

Costs were settled by the parties.

Dated at the City of Edmonton in the Province of Alberta this 3rd day of June, 2009.

SURFACE RIGHTS BOARD



MEMBER