

# Annual Compensation for Pipelines in Alberta



## Context

The FAO reviewed the published decision of the Surface Rights Board (SRB), when it became available in November 2008, in the matter of a right of entry for an Enbridge Pipelines (Athabasca) Inc. pipeline covering numerous titled lands in the area of Townships 66,67 and 68, Ranges 17,18, and 19, West of the 4<sup>th</sup> Meridian. What follows is verbatim text from the decision that outlines the rationale the SRB used to award annual compensation for loss and/or ongoing nuisance and inconvenience. This information may be useful to landowners as they determine their negotiation strategy when faced with considering future pipeline access agreements.

It is important to note that the SRB did not accept the company's proposal or the landowner's proposal. The Board was persuaded that there will be ongoing and recurring compensable loss and they considered alternative compensation options. The SRB states that they see merit in a system that would allow landowners to choose between a lump sum settlement and a compensation package that includes an annual component. However, it is necessary to distinguish between the magnitude and the structure of the award to ensure that there is not "double compensation". It is also interesting to note that in this particular decision, the final award is actually lower than the initial company payment. The landowners must pay back some of the payment forwarded to them by the company; however, the Board gave the landowners time until 2011 to do so.

This information is intended to provide landowners with ongoing education and understanding of how arguments before the SRB are either acceptable or unacceptable to the Board and what arguments may require further research, explanation or clarification if they are to be used in subsequent arguments. These arguments do not create absolute precedence for future awards as each case before the SRB is heard on an individual basis. However, it can be assumed that since these arguments worked in this hearing, they have merit and may be used by landowners in freely negotiated agreements in the future if landowners believe annual compensation of pipelines is desirable. Please remember that this SRB decision may be appealed to the courts by the company which is fully within their rights to do so. The courts may or may not alter this decision and may or may not add further clarification to the decision rationale. If this occurs, the FAO will endeavour to report the court findings as another educational/information tool for landowners to assess.

## Case Review

On November 19-20, 2007 the Surface Rights Board held a hearing to determine three issues involving a pipeline for Enbridge Pipelines (Athabasca) Inc and several land owners covering Townships 66-68 and Ranges 17-19, all west of the 4<sup>th</sup> Meridian.

The issues were:

- 1. What is the appropriate amount (i.e. magnitude) of compensation payable under Right of Entry Orders under consideration?*
- 2. What is the appropriate structure of the compensation award?*
- 3. To whom is this compensation payable?*

After the hearing and deliberation the Board found several findings of fact. These were:

- 1. Right-of-way acquisition for this portion of the Enbridge Waupisoo Pipeline project occurred during 2006 and early 2007.*
- 2. Construction of this portion of the pipeline occurred during the summer of 2007.*
- 3. The Land is currently being used for agricultural production.*
- 4. The Highest Approved Use of all of the Land is Agriculture.*
- 5. Annual payments were not paid in any of the comparable agreements provided by the Operator.*
- 6. The Operator has paid 100 percent of their final offer to all of the Landowners. This offer was based on \$1,900.00 per acre for both right-of-way and temporary workspace.*
- 7. Wasmuth appraised the Land at \$650.00 per acre or \$715.00 per acre depending on the soil type.*
- 8. The Operator has placed caveats on all Land Title Certificates comprising the Land.*
- 9. All Entry Fees were paid in full prior to the start of construction.*

**The Board was persuaded that there will be ongoing and or recurring compensable losses in this case. Once this determination was made, it is reasonable to award annual compensation.**

The Board outlined in its decision their reasoning.

*The Board was persuaded that the Act “. . . should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner (sic) whose property has been taken.” (Dell Holdings Ltd. V. Toronto Area Transit Authority, Supreme Court of Canada, para. 23). The Board acknowledges that this quotation refers to a different “Act” but concludes that the principle still applies.*

The Board then looked at the argument and evidence put forward by the landowners. They required evidence in three areas and weighted the evidence presented. These were:

- 1. The Landowners will experience losses, and these losses will be ongoing and/or recurring,*
- 2. Any alleged ongoing/recurring losses are not speculative “effects” that “might happen” or “could happen,” and*
- 3. These “effects” were not already factored into, and compensated for, in the \$1,900.00 per acre base proposed by the Landowners.*

The process the Board used to sort the evidence was as follows. The effects are sorted below each test.

*A. The Board is persuaded that items categorized as “A” in the table below have an ongoing and/or recurring component and are compensable.*

- The Board is persuaded that the Landowners will have to alter and adapt their agronomic practices on an ongoing basis because of the presence of the pipeline. The Landowners will have to consider the effect of the pipeline every year at seeding time.*
- The Board is persuaded that the Landowners dare not ever forget about the presence of this pipeline. They would do so at their peril. To forget could lead to catastrophic results. Out of sight is not out of mind. The Board is persuaded that if the Landowners cannot forget about the pipeline, it must be considered an ongoing nuisance or inconvenience.*
- The Board notes from the Land Title Certificates that Enbridge Pipelines (Athabasca) Inc. has registered caveats on the all respective Land Title Certificates to register their interest in the Land. This, by itself, will be an ongoing nuisance and inconvenience to the landowner when they try to enter into future agreements/contracts.*

Category	Long Term Effects of Pipeline Arguments	Board Commentary
A	<i>There may be opportunities to grow trees commercially but operators do not allow this on pipeline rights-of-way.</i>	<i>The Board is persuaded that the presence of this pipeline will introduce new factors into the Landowners' annual cropping decisions. As such it will be an ongoing nuisance and inconvenience. Trees are a crop. Tree production is a cropping alternative. The Board heard evidence that the Lands are very close to the Alpac mill and that Alpac contracts commercial tree growth on an ongoing basis. The Board is persuaded that this is not a speculative item.</i>
A	<i>Livestock and crop handling facilities cannot be built over pipeline rights-of-way.</i>	<i>The Board is persuaded that the presence of this pipeline will introduce new factors into the Landowners' ongoing decision-making processes and, as such, will be an ongoing and/or recurring nuisance and inconvenience.</i>
A	<i>"Landowners have been restricted to a maximum depth of 18 inches of cultivation." This restriction rules out the option of deep plowing. This restriction rules out the possibility of new crops which could require deeper planting.</i>	<i>The Board is persuaded that the presence of this pipeline will introduce new factors into the Landowners' ongoing decision-making processes and, as such, will be an ongoing and/or recurring nuisance and inconvenience.</i>
A	<i>Landowners must call "Alberta First Call" before they can do groundwork (digging, trenching, installing fence posts, etc.) anywhere near the vicinity of a linear facility.</i>	<i>The Board acknowledges that Landowners dare not ever forget about the presence of the pipeline. They forget about the pipeline at their peril. The Board is persuaded that this is an ongoing nuisance and inconvenience.</i>
A	<i>Pipelines create "hot strips" as a result of heat loss from the lines. This affects the crop and can contribute to weed problems.</i>	<i>The Board is persuaded that the presence of this pipeline will introduce new factors into the Landowners' ongoing decision-making processes and, as such, represents an ongoing nuisance and inconvenience.</i>

- A      *Safety issues are a concern. “While the actual incidences may be low in number, the perception still exists that these facilities, at some time, may be a safety concern.”*
- A      *Many of the benefits of GPS yield mapping, grid soil sampling, and prescription fertilizer and crop protection application are lost. Data from these practices are distorted.*
- A      *The presence of a pipeline right-of-way may limit a landowner’s ability to contract identity-preserved or specialty crops.*
- The actual incident would be a damage issue. The concern and fear of an incident is an ongoing nuisance and inconvenience.*
- The Board is persuaded that GPS yield data will likely be compromised on an ongoing basis in the future.*
- The Board is persuaded that the presence of this pipeline will introduce new factors into the Landowners’ annual cropping decisions. As such it is an ongoing nuisance and inconvenience.*

*B. The Board is persuaded that these are “might happen” or “could happen” items. In not including these items in the determination of an award of compensation, the Board is guided by Mr. Justice Sterling Sanderman when he stated that compensation “. . . cannot relate to some uncertain event that may take place at some uncertain time in the future.” (Zubick et al. v. Corridor Pipeline Limited at para. 55)*

<b>Category</b>	<b>Long Term Effects of Pipeline Arguments</b>	<b>Board Commentary</b>
<i>B</i>	<i>Industrial and residential development cannot occur on pipeline rights-of-way.</i>	<i>This is speculative. None of the Landowners presented evidence that they were foregoing development opportunities. None of the Landowners suggested any impending development.</i>
<i>B</i>	<i>New crops/livestock may develop in the future and this may not be compatible with a pipeline right-of-way.</i>	<i>This effect is speculative.</i>
<i>B</i>	<i>“There are continuing and ongoing access issues that come with a linear facility.”</i>	<i>The Operator will have the right to enter the right of way as required for its operations. Compensation will have to be determined when and if that happens.</i>
<i>B</i>	<i>Some company employees harass landowners when these landowners cross the right-of-way with their farm equipment.</i>	<i>The Board did not hear any specific evidence of harassment.</i>
<i>B</i>	<i>Operators require that other industries build ramps before they cross pipeline rights-of-way with heavy equipment.</i>	<i>This effect is speculative.</i>

*C. The Board is persuaded that these “effects” are comments, precedents, or damage issues and do not attract annual compensation in and of themselves.*

<b>Category</b>	<b>Long Term Effects of Pipeline Arguments</b>	<b>Board Commentary</b>
<i>C</i>	<i>The effects last for 75-100 years.</i>	<i>This is not an adverse effect in and of itself.</i>
<i>C</i>	<i>Pipelines benefit the operators and all of society and therefore fair compensation should be paid.</i>	<i>This is a general statement.</i>

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| C | <i>A pipeline devalues property. "When a buyer has the option of purchasing two parcels of land, one with a linear facility and one without for the same price, the natural and most common sense approach would be to purchase the unencumbered parcel."</i>              | <i>The Board is persuaded by the Landowners that the marketability of the land is affected. The Board did not hear any quantitative evidence on land value. In any case, this would be an up-front and not an annual item.</i>      |
| C | <i>Landowners are paid for abandoned surface leases even when there is no surface facility. Why would this not also apply to pipeline installations?</i>   | <i>This does not represent a compensable loss.</i>  |
| C | <i>Nova has already set the precedent and it works well.</i>   | <i>This is a statement. It does not represent a compensable event.</i>  |
| C | <i>Landowners face a large number of issues such as settling over the line, damaged fences, and spreading of noxious weeds and operators do not address these issues until they are reported to regulatory bodies.</i>   | <i>The Board is persuaded by the Operator that these are damage issues and are best dealt with as such.</i>   |
| C | <i>Many of the benefits of zero-till farming are lost when a pipeline operator disturbs the soil.</i>  | <i>The Board is persuaded that this is a damage issue best dealt with when construction damages are addressed.</i>  |
| C | <i>Any trees that may have been on the property whether for harvest or for a livestock shelter are permanently gone.</i>   | <i>The Board is persuaded that this is a construction damage issue. The Board did not hear a specific request for compensation from any of the Landowners because of the loss of a shelter belt or a loss of marketable timber.</i> |
| C | <i>"Anywhere else in society, the loss of these rights would have the expectation of fair and equitable compensation and the only way, in our opinion, to do that compensation is through annual reviewable payments for the length of time that the rights are lost."</i> | <i>This is not a compensable impact. This is a position.</i>  |

The Board left one effect unanswered.

<b>Category</b>	<b>Long Term Effects of Pipeline Arguments</b>	<b>Board Commentary</b>
<i>Insufficient evidence</i>	<i>In some cases setbacks are in place. "These setbacks limit what can be done even further out on a landowner's property."</i>	<i>The Board did not hear sufficient evidence from any Landowners that this was a specific issue in their case.</i>

## **The Award**

The Board reviewed and accepted the land owners' proposition of a mechanism.

*Is there a way to reconcile/rationalize the different positions of the parties in this case?*

*The Operator argued for a one-time lump sum payment. Many landowners, for cash flow reasons, or for other personal reasons will prefer such a lump sum settlement. This has been the traditional approach to pipeline right of way compensation. Others, because they intend to pass their land on to their children, or for other personal reasons, will prefer to receive their compensation annually, contemporaneous with the initial and ongoing factors that are attracting the compensation.*

*The Board sees merit in a system that would allow landowners to choose between a lump sum settlement and a compensation package that includes an annual component. To do so, it is necessary to distinguish between the magnitude and the structure of a compensation award. The Landowners in this case have asked to receive a compensation package that includes an annual component.*

## **Determination**

*The Board was provided with very little quantification of the loss of use, adverse effect, noise, nuisance, inconvenience. The Board is persuaded by the Landowners that many of these factors are intangible and difficult to quantify. That, by itself, is not sufficient reason to dismiss the concept of annual compensation.*

*The Landowners are requesting annual compensation of \$100.00 per acre per year. The Board saw no reason to reduce this amount. The Board is persuaded that this request is more reasonable than the "zero" offered by the Operator. The Board notes that the Landowners will receive between \$200.00 per year and \$847.00 per year depending on the number of acres involved in the taking.*

*The Board is persuaded that this is a reasonable request considering the ongoing and/or recurring loss of use, adverse effect, noise, nuisance, and inconvenience that the Landowners will experience. For compensable factors falling under Sections*

*25(1)(c) and 25(1)(d) of the Act, the Board awards \$100.00 per acre per year reviewable every five years as provided for under the Act.*

*With respect to up-front compensation, the Board is persuaded that double compensation will result if it were to accept the proposal of the Landowners. The Board concludes that the \$1,900.00 base proposed by the Landowners already included at least some of the factors for which annual compensation is being sought. In the absence of further evidence and arguments specific to this issue, the Board awards up-front compensation of \$700.00 per acre. The Board arrives at this figure after considering the evidence, the arguments, the Act, the annual compensation already being awarded, and the time value of money.*

*The Board, once arriving at an award of compensation, is faced with the fact that the Landowners have already been paid a larger up-front payment than that awarded. Section 25(6)(a)(ii) of the Act requires that in such an instance, the Board “ ... shall order the respondent to pay the difference to the operator, ... .” The Board considered the following points.*

- The Landowners did not initiate the dealings with the Operator.*
- The Operator proceeded with the project by means of a Right of Entry Order.*
- The Landowners are unwilling participants in the entire process.*
- The overpayment is not likely sitting in a suspense account awaiting the Board’s Decision.*

*The Board is of the opinion that in the circumstances it would be unfair to order immediate repayment. To do so could create nuisance and inconvenience that was never considered in the original compensation proposals and in the award itself. Section 25(6)(a)(ii) of the Act states: “In determining the amount of compensation payable, the Board may fix certain amounts payable in the manner and over the periods the Board decides.” The Board orders that the overpayment be repaid on or before the respective anniversary dates in 2011. In arriving at the overall compensation award, the Board was aware of, and considered, the present value implications of providing for a repayment period.*

## **What Still Needs to be Done?**

The Board would still like to see evidence to answer several questions.

*The Board would have liked the arguments on annual compensation to go beyond whether there is ongoing and/or recurring loss of use, adverse effect, noise, nuisance or inconvenience.*

*The Board would have welcomed more discussion on,*

- (a) what will be the magnitude of any losses,*
- (b) to what degree, if any, has this nuisance, inconvenience, and loss of rights already been anticipated and factored into the Operator's final offer,*
- (c) what is the best manner in which to compensate for such ongoing and/or recurring losses,*
- (d) how compelling is the need "to effect a final resolution" Broomfield v. Canadian Western Natural Gas (supra),*
- (e) is there any way to reconcile/rationalize the positions of the parties, and*
- (f) is an annual award of compensation a practical solution. In hindsight, more discussion on these six specific points would have been helpful to the Board. Future evidence and argument must address these questions.*

For more information contact

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