# Court of Queen's Bench of Alberta

**Citation: Hart v ATCO Electric Ltd, 2021 ABQB 162**

**Date:** 20210302
**Docket:** 1910 01068
**Registry:** Red Deer

Between:

**Stella May Hart**

Appellant

- and -

**ATCO Electric Ltd**

Respondent

- and -

**Alberta Surface Rights Board**

Respondent/Tribunal

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice John T. Henderson**

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## I. OVERVIEW

[1] This appeal requires the Court to consider the decision of the Alberta Surface Rights Board [Board or SRB] that determined the amount of surface rights annual compensation payable to the Appellant arising from the presence of two steel tower structures on the Appellant's lands.

[2] This assessment must be conducted in accordance with the *Surface Rights Act*, RSA 2000 c S-24 [*Act*]. The assessment will, at least in part, involve a consideration of whether the

Appellant's lands are "improved pasture" lands; whether, on the totality of the evidence, compensation payable in relation to "improved pasture" lands should be the same as, or different from, the surface rights annual compensation payable for "native prairie" lands, and whether, on the totality of the evidence, "improved pasture" lands are the same as, or different from "Cultivated Lands."

[3] If the Appellant successfully challenges the decision of the SRB, then it will be necessary to determine whether the Appellant has met her onus to prove the proper rate of annual compensation payable.

[4] Stella May Hart [Ms. Hart] appeals the decision of the SRB dated August 21, 2019: ***ATCO Electric Ltd v Hart***, 2019 ABSRB 559 [SRB Decision or Decision]. The SRB Decision directed ATCO Electric Ltd [ATCO] to pay Ms. Hart total annual compensation of $1,104.00 effective February 14, 2018 in relation to Ms. Hart's lands near Hanna, Alberta, which is legally described as SE1/4 12-30-14-W4M [Lands].

[5] In or before 2013, ATCO began construction of the Eastern Alberta Transmission Line, a 500-kilovolt power transmission line near Hanna, Alberta. The project crossed over, and required the installation of two 37-meter-tall steel tower structures on the Lands. ATCO and Ms. Hart entered into negotiations that resulted in Ms. Hart giving ATCO permission to use a portion of the Lands for the construction and operation of the transmission line.

[6] To govern the terms of their relationship regarding the Lands, Ms. Hart and ATCO entered into a number of agreements, including an "Alberta Electric Transmission Right of Way Agreement," dated February 14, 2013 [ROW Agreement].

[7] The ROW Agreement contains a number of defined terms including the following:

> **"Annual Compensation"** means the annual payment made by the Company to compensate the Landowner for:
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> (i) the loss of use by the Landowner of all or part of the Right of Way, and;
>
> (ii) the nuisance, noise, inconvenience, weed control and interference that might arise or be caused to the agricultural operations of the Landowner, and;
>
> (iii) such other items of periodic compensation for which the Surface Rights Board of Alberta may from time to time properly and lawfully make awards.
>
> **"Cultivated Lands"** means that portion of the Lands which are cultivated or worked in any way by farm machinery for the production of crops including hay crops, *improved pasture* and summer fallow.
>
> **"Head Lands"** means, where applicable, that narrow strip of the Lands bordering cultivated fields and separating such cultivated fields from other fields or uses within the Lands.
>
> **"Uncultivated Lands"** means that portion of the Lands which are not Cultivated Lands or Head Lands.
>
> (*Emphasis added*).

[8] Among other terms, the ROW Agreement required ATCO to pay "Annual Compensation" to Ms. Hart in the amount of:

(a) $1,380.00 for each structure to be placed on “Cultivated Lands,”

(b) $552.00 for each structure to be place on “Uncultivated Lands,” and

(c) $690.00 for each structure to be placed on “Head Lands.”

[9] Clause 9 of the ROW Agreement provides that the “Annual Compensation” payable under the terms of the agreement are subject to review in accordance with the provisions of the *Act*.

[10] The payment for the first three years of the ROW Agreement was included with a letter from ATCO to Ms. Hart dated January 27, 2015. The total payment was $3,412.35 consisting of three years payments for two steel towers on the Lands at the uncultivated rate of $552.00 per structure plus interest in the amount of $100.35. Because Ms. Hart considered the Lands to be “improved pasture” lands and not “Uncultivated Lands,” she sent a letter dated February 1, 2015 to ATCO, in which she objected to the calculation of the compensation based on the uncultivated rate and asked that ATCO correct their records.

[11] Ms. Hart received no response to her February 1, 2015 letter. As a result, she sent a further letter to ATCO dated August 26, 2015 and again expressed her unwillingness to accept payment at the uncultivated rate. She confirmed that annual compensation based on the rate for “Cultivated Lands” in the ROW Agreement would be acceptable. When she received no response to this letter, Ms. Hart wrote to the SRB on October 9, 2015 seeking a hearing “regarding annual payments.” The SRB advised Ms. Hart that the hearing was premature and that if the matter was not resolved between the parties, a hearing could be held with an effective date of February 14, 2018.

[12] On March 23, 2017, ATCO wrote to Ms. Hart regarding compensation for the next five-year term of the ROW Agreement. In this letter, ATCO explained that it had reviewed recent SRB decisions regarding compensation which indicated that the current compensation being paid adequately covered the loss of use and adverse effect associated with the two steel structures on the Lands. As a result, ATCO proposed that it continue paying total annual compensation of $1,104.00 for the next 5 years. This was unacceptable to Ms. Hart who then exercised her right under s 27 of the *Act* to have the Board review the compensation payable under the ROW Agreement. The effective date of the review was February 14, 2018.

[13] The SRB conducted the hearing in Airdrie, Alberta on September 27, 2018.

[14] Ms. Hart was not represented by counsel before the Board. Nevertheless, she argued that because the Lands were “improved pasture” lands, they were, by definition, “Cultivated Lands” and she was entitled to compensation based upon the rate for “Cultivated Lands,” $1,380 per tower. She argued that the ROW Agreement defined “Cultivated Lands” as that portion of the lands “which are cultivated or worked in any way by farm machinery for the production of crops including hay crops, <u>improved pasture</u> and summer fallow” (*emphasis added*).

[15] The Board heard the expert evidence of Mr. Darren Clarke [Mr. Clarke] who presented a written report and oral evidence regarding the annual rate of compensation that, in his opinion, should be payable. On the basis of this expert evidence, ATCO argued that there existed a “pattern of dealings” (PoD) that supported a continuation of annual compensation of $1,104.00 per year for the two steel towers on the Lands.

[16] The Board gave its Decision in writing on August 27, 2019. It found as a fact that the Lands were used exclusively as "pastureland", having been last seeded in the early 1970s. The Board also concluded that the evidence presented at the hearing demonstrated a PoD as described by ***Livingston v Siebens Oil & Gas Ltd*** (1978), 8 AR 439 (Alta SCAD) [***Livingston***]. The PoD involved 174 similar tower structure located within two Townships of the Lands, 143 of which were situated on "native prairie" lands or on "improved pasture" lands. Of those, all but two were receiving annual compensation at the rate of $552 per structure. The Board found that the "pattern" evidence did not distinguish between "native prairie" and "improved pasture." The evidence satisfied the Board that the prevailing rate of annual compensation for midfield structures located on "pastureland" was $552.00 per structure.

[17] After finding a PoD, the Board went on to consider whether there was a cogent reason to depart from the evidence in relation to the PoD. The Board found no cogent reason to depart from the pattern. As a result, the Board concluded that annual compensation should continue at the rate of $552.00 per structure, or a total of $1,104.00 per year.

[18] The SRB Decision was made pursuant to s 27(11) of the *Act* and is subject to an appeal as of right in accordance with s 27(12). The appeal provisions are found in s 26 of the *Act*. On an appeal the Court has those powers prescribed in ss 26(6) and 26(7):

> (6) An appeal to the Court shall be in the form of a new hearing.
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> (7) The Court
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> (a) has the power and jurisdiction of the Board in determining the amount of compensation payable and the person to whom the compensation is payable,
>
> (b) shall determine the amount of compensation payable and the person to whom the compensation is payable,
>
> (c) shall
>
> (i) confirm the order of the Board, or
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> (ii) direct that the compensation order be varied in accordance with its judgment,
>
> and
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> (d) shall make directions as to costs of the appeal in accordance with subsection (9).
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> (*Emphasis added*).

[19] Ms. Hart's appeal of the SRB Decision was heard on December 17 and 18, 2020 in Red Deer, Alberta. That hearing included *viva voce* evidence from Ms. Hart and her son, Michael Hart who is the manager of an extensive ranching operation conducted on lands near Hana Alberta, including the Lands. Evidence was also presented by experts retained by both of the parties.

[20] In addition, counsel tendered a complete set of the Exhibits that were presented to the Board at the time of the SRB hearing.

## II. STANDARD OF REVIEW

[21] The Supreme Court of Canada in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [***Vavilov***] created a revised framework to determine the standard of review to be applied when a court reviews the merits of an administrative decision. The Supreme Court explained that the analysis begins with a presumption that reasonableness is the applicable standard of review in all cases. However, the presumption can be rebutted by a clear indication of legislative intent or by the rule of law: ***Vavilov*** at paras 10, 16. A legislative intent to use some standard of review other than reasonableness can arise, *inter alia*, "where a legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision": ***Vavilov*** at paras 17, 36-37. Thus, ***Vavilov*** suggests that an appellate standard of review should be engaged on this appeal.

[22] Notwithstanding the direction from ***Vavilov***, ATCO invites me to employ a reasonableness standard of review in connection with this appeal. It makes this concession on a principled basis.

[23] Firstly, ATCO observes that prior to ***Vavilov***, decisions of the SRB have historically been reviewed on a reasonableness standard: ***Imperial Oil Resources Ltd v 826167 Alberta Ltd***, 2007 ABCA 131 at para 18 [***Imperial Oil Resources***]; ***Serink v ATCO Electric Ltd***, 2017 ABQB 327 at para 12. This standard has been applicable even though appeals from SRB decisions proceed by a *de novo* hearing.

[24] Secondly, on December 9, 2020, *Bill 48: Red Tape Reduction Implementation Act, 2020 (No. 2)* [Bill 48] received royal assent and will come into force on June 2, 2021. The effect of Bill 48 is to combine a number of provincial boards into a single agency. The new agency's enabling legislation, the *Land and Property Rights Tribunal Act* specifically provides that the reasonableness standard is applicable to all appeals from decisions of the new tribunal on a going forward basis. However, appeals commenced but not completed before the new legislation comes into force on June 2, 2021 are governed by the existing legislation. ATCO notes that the present appeal is the first appeal from a SRB decision since ***Vavilov*** and for appeals launched after June 2, 2021 the reasonableness standard will apply. ATCO argues that for consistency it may be preferable to simply engage the reasonableness standard on this appeal.

[25] While there should always be the desire to achieve consistency, and therefore, some attraction to the concession proposed by ATCO, I am nevertheless bound by the decisions of the Supreme Court of Canada. ***Vavilov*** makes it clear that where the Legislature has provided for a statutory appeal mechanism, the appellate standard of review should be used, absent a legislative direction to the contrary. There is presently no such contrary direction in the *Act*. Nor did the Legislature signal in Bill 48 that the reasonableness standard should be applied to appeals currently in the system. Therefore, I conclude that the appellate standard of review is engaged in this case.

[26] Appellate standards of review were described in paragraph 37 of ***Vavilov*** as follows:

> Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal

> includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37….

[27] This appeal involves a question of the amount of compensation payable to Ms. Hart by ATCO in relation to the Lands. In Alberta, the question of how much compensation should be payable by an operator to an owner is "in essence a question of fact or, if valuation principles such as pattern of dealing and adverse effect can be said to be legal principles, one of mixed fact and law": ***Imperial Oil Resources*** at para 17. As a result, the SRB Decision in relation to the amount of the compensation payable should be reviewed on a standard of palpable and overriding error.

[28] Questions involving interpretation of the *Act* are reviewed on a standard of correctness.

## III. POSITIONS OF THE PARTIES

[29] From the very outset, Ms. Hart's position has been refreshingly simple and very clear. She has consistently asserted that the Lands were "improved pasture" and that she should be compensated by ATCO on the basis of the rate specified in the ROW Agreement for "Cultivated Lands," because that is what the agreement says. She thought that this is what she negotiated in 2013. She wants no more than what she bargained for in 2013.

[30] Counsel on behalf of Ms. Hart puts this position in legal terms. She argues that the SRB erred when it concluded that compensation should be determined without reference to the agreement between the parties. More specifically, she argues that because the Lands are "improved pasture" lands they are included within the definition of the term "Cultivated Lands" in the ROW Agreement and that the appropriate compensation payable is $1,380.00 per structure, or a total of $2,760.00 per year. She also argues that the SRB erred in its assessment of the "pattern" evidence. She argues that on a proper assessment of the evidence, there is no "pattern" to support compensation based on "Uncultivated Land."

[31] Counsel for Ms. Hart argues that one or both of these errors amount to palpable and overriding error and that the appeal should be allowed with a direction, pursuant to s 26(7)(c)(ii), that the amount of compensation payable effective February 14, 2018 is $2,760.00 annually.

[32] ATCO argues that the purpose of the compensation review process in s 27 of the *Act* is to permit the SRB to engage in a forward-looking assessment of the appropriate level of compensation payable to the owner of lands. The SRB has the jurisdiction to increase or decrease the rate of compensation depending on the evidence presented, but there is no presumption that the compensation earlier agreed to by the parties is applicable. ATCO argues that the only evidence tendered on this appeal in relation to the amount of the compensation payable was given by the expert Mr. Clarke, who testified as to a "pattern of dealing." Thus, ATCO submits that there is no evidence on this appeal that would support any award of compensation other than that directed by the SRB. ATCO points out that, as an appellant, Ms. Hart has the onus of proof and she has failed to meet that onus.

[33] ATCO argues that the Decision of the SRB should be confirmed in accordance with s 26(7)(c)(i).

## IV. ISSUES TO BE DECIDED

[34] On appeal, the Court is required by s 26(7)(b) of the *Act* to determine the amount of compensation payable by ATCO. This determination is made in accordance with s 26(7)(a) by exercising the power and jurisdiction of the SRB.

[35] After determining the amount of compensation payable, the Court must then, pursuant to s 26(7)(c), either confirm the Order of the SRB or, if there has been a palpable and overriding error, direct that the compensation payable be varied.

[36] To properly reach a conclusion as to the amount of the compensation payable based on the evidence and argument presented in this case, the following key issues must be decided:

1. What is the scope and nature of this appeal?
2. Has the Appellant proven that the Lands are "improved pasture"?
3. In assessing the compensation payable by ATCO in relation to the Lands, is it appropriate to take into consideration the terms of the ROW Agreement?
4. Does the "pattern of dealing" (PoD) evidence support the conclusion of the SRB?
5. Did the Appellant meet its onus to prove compensation at a rate different than was found by the SRB?

## V. ANALYSIS

### a. Scope and Nature of this Appeal

[37] This appeal arises from a decision of the SRB. The SRB hearing was conducted in accordance with s 27 of the *Act* and was held because Ms. Hart was not prepared to accept the compensation ATCO proposed in its letter to her dated March 27, 2017. In that letter ATCO proposed that it continue to pay total annual compensation of $1,104.00 for the next 5 years.

[38] The SRB was very clear that it was proceeding with a review pursuant to s 27 of the *Act*. Para 1 of its decision provides that:

> The Surface Rights Board received an application from the Lessor dated October 9, 2017, seeking a review of the rate of annual compensation payable for a power transmission line right of way on the land pursuant to s 27 of the *Act*.

[39] During the course of this appeal, the position of the Appellant has, in part, migrated from an appeal of the SRB decision to an assertion that the process followed by the SRB was flawed because the SRB did not understand the nature of the process. The foundation for this position is that ATCO did not engage the review mechanism in the *Act* to seek a reduction of the rate of compensation payable to Ms. Hart. The Appellant argues that because the ROW Agreement called for ATCO to pay compensation at the rate of $1,380 per tower and, because ATCO did not make application to the SRB to reduce that compensation, ATCO must pay $1,380 per tower as compensation.

[40] There are two problems with the Appellant's modified position. Firstly, the compensation review can be initiated by either the operator or the landowner in accordance with s 27(5) and s 27(6). Once the process is engaged, the SRB must comply with the procedure in the *Act* and, if resolution is not possible, a hearing must be conducted pursuant to s 27(11). In this

case, the review was initiated by Ms. Hart when she was not prepared to accept the proposed compensation offered by ATCO. ATCO was under no obligation to seek a review because the review was already underway. The SRB was charged with the responsibility to determine the rate of compensation payable, based on the evidence tendered at the hearing. When determining the rate of compensation pursuant to s 27, the SRB was able to consider, but was not bound by, the compensation that had actually been paid in the past, or the compensation that should properly have been paid by the terms of any agreements between the parties.

[41] Secondly, the Appellant's modified position seems to be tantamount to asking this Court, at first instance, to conduct a hearing pursuant to s 36 of the *Act* in relation to a "non-payment under a surface lease" and in this way make a ruling as to what was properly payable for the 5-year period beginning February 13, 2013. The function of the SRB on a compensation review hearing under s 27 is not to determine what compensation should properly have been paid in the past. Instead, the compensation review is for the purpose of determining the appropriate compensation going forward.

[42] Issues relating to non-payment of amounts under a surface lease may be determined by the SRB pursuant to s 36. The Court has no jurisdiction to conduct a s 36 hearing at first instance.

[43] The issues engaged in this appeal relate only to the s 27 rate of compensation review for the 5-year period commencing February 14, 2018.

**b. Has the Appellant proven that the Lands are "improved pasture"?**

[44] At para 32 of the Decision, the SRB found that one of the two towers on the Lands was located on "improved pasture" (structure 1007) and the other was located on "native prairie" (structure 1008). In reaching its conclusion, the SRB relied on the expert report of Mr. Clarke.

[45] The SRB made a palpable and overriding error in reaching this conclusion.

[46] I find as a fact that fact both towers on the Lands (structure 1007 and structure 1008) are located on "improved pasture."

[47] In the *de novo* hearing on appeal, Ms. Hart tendered the evidence of an expert in farm management, John C. Reid. The SRB did not have the benefit of Mr. Reid's evidence. Mr. Reid inspected the Lands and observed the use to which it was being put. He explained that the dominant species growing on the Lands were Crested Wheat Grass and Russian Wild Rye. He explained that these species are non-native and are a perennial and well adapted to the environment. He also explained that the Harts spread granular fertilizer on the Lands from time to time, a practice that is recognized as a method of improving pastures. Evidence of the application of fertilizer using farm machinery on the Lands can be found in Exhibit 1; Tab 1(b) pages 20 – 25: – Exhibits filed at the SRB pages 141 – 146.

[48] Mr. Reid explained in his report filed with the Court on March 20, 2020 that the term "improved pasture" is a common term in the agricultural community and that the Lands are "improved pasture" lands because the Lands are used for grazing cattle, consists primarily of tame species of grass (meaning a non-native species) and the Lands are periodically fertilized. In his opinion, the Lands were "improved pasture."

[49] Mr. Reid had the opportunity to review the opinion of Mr. Clarke that structure 1008 was located on "native prairie." After Mr. Reid learned of this opinion (and the conclusion of the

SRB adopting this opinion), he attended a second time at the Lands to specifically inspect structure 1008. His conclusion remained that both structures were located on "improved pasture."

[50] In cross-examination on this appeal, Mr. Clarke acknowledged that his conclusion in relation to structure 1008 was based on an old map that had apparently been prepared by Ms. Hart and not based on that actual characteristics of the land on which structure 1008 was located. When provided with this additional information during cross-examination regarding the actual use of the lands on which structure 1008 is situated, Mr. Clarke agreed that both structures on the Lands are located on "improved pasture."

[51] I find that both ATCO structures on the Lands are located on "improved pasture."

**c. Is it Appropriate to take into Consideration the Terms of the ROW Agreement?**

[52] In conducting an assessment of the compensation payable by the operator to the landowner, the Court has no greater jurisdiction than that which is conferred on the SRB, as prescribed by s 27 of the *Act.*

[53] Section 27(11) requires that the SRB hold proceedings to determine the "rate of compensation" payable. The "rate of compensation" payable is defined by s 27(1)(d) as "meaning the amount of compensation payable on an annual or other periodic basis under a surface lease or compensation order in respect of the matters referred to in section 25(1)(c) and (d)." The relevant portions of s 25(1) of the *Act* are:

> 25(1) The Board, in determining the amount of compensation payable, may consider:
>
> .....
>
> (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 …
>
> [*Emphasis added*]

[54] Section 1(o) of the *Act* defines "surface lease" as: "a lease or other instrument under which the surface of land is being held for any purpose for which a right of entry order may be made under this Act and that provides for payment of compensation" (*emphasis added*).

[55] The ROW Agreement is a surface lease.

[56] The argument advanced on behalf of ATCO is that the terms of the ROW Agreement are not relevant for the purpose of a s 27 annual compensation review. In relation to the issue of relevancy, I conclude that it is necessary to consider ATCO's submission in two separate ways. First, I will consider relevancy in the context of whether it is appropriate to consider that portion of the ROW Agreement that specifically mandates the amounts of compensation payable.

[57] Second, I will consider relevancy in the context of whether, in a s 27 compensation review, other portions of the ROW Agreement, including in particular the definition of "Cultivated Lands" may be considered.

**(i) Can rates of compensation in ROW Agreement be considered?**

[58] ATCO notes that once a compensation review is undertaken by the SRB pursuant to s 27, the entire question of annual compensation is at large and a new rate of compensation must be fixed on the basis of the evidence presented to the SRB. The compensation that was payable during the preceding time period is merely one factor that the SRB can consider when determining the rate of compensation. There is no presumption for or against the prior rate of compensation and the new rate of compensation can go up or down. For this reason, ATCO urges me to conclude that the terms of the ROW Agreement are simply not relevant for the purpose of determining the compensation payable.

[59] I agree that the compensation paid during a prior period (or the compensation that should properly have been paid) is only one of many factors that can be considered by the SRB or by the Court when determining the proper rate of compensation payable pursuant to s 27: ***Jorsvick v Pennzoil Petroleum Ltd***, 1988 ABCA 108 at para 8. But this does not mean that the compensation specified in the ROW Agreement is irrelevant. It simply means that it is only one of many factors to be considered.

[60] Ms. Hart argued in her written submissions dated January 22, 2021 that the SRB erred when it "failed to use the current rate of compensation as established by the ROW Agreement ($1380/tower) as the starting point for their review ..."

[61] ATCO takes the contrary position. It asserts that the SRB properly took into consideration, as a starting point, the compensation that had actually been paid in the first 5 years of the ROW Agreement. In its final written argument ATCO says the following at para 66:

> ... The fact is that the rate of annual compensation being paid by ATCO under the ROW Agreement for the five year period between February 2013 and February 2018 was $552 per structure. That is what ATCO clearly explained in the fourth anniversary notice provided to the Appellant, and this is what the Board summarized at the outset of its decision ...

[62] No evidence was tendered to the SRB or during the *de novo* appeal hearing to explain why compensation was paid to Ms. Hart was $552 per structure, as opposed to $1,380 per structure. Nor did ATCO offer any explanation in any of their submissions. Instead ATCO has consistently taken the position that this is simply irrelevant.

[63] I conclude that this issue is not irrelevant. The proper amount of the compensation payable under the terms of the ROW Agreement is a relevant factor to be considered in a s 27 analysis: ***Jorsvick v Pennzoil Petroleum Ltd.***

[64] The very clear language of the ROW Agreement provides that compensation for "Cultivated Lands", which includes "improved pasture", is payable at the rate of $1,380 per structure.

[65] In the absence of evidence or argument, I am unable to explain why ATCO paid compensation at the lower rate for the first 5 years of the agreement. I am prepared to accept that there might be a reasonable explanation. One innocent explanation may be that ATCO simply

thought (incorrectly) that the Lands were "native prairie" and thus "Uncultivated Lands". But, no explanation was provided and I will not engage in speculation as to the actual reason for the payments of $552.

[66] I conclude that on a s 27 review, when determining the surface rights compensation payable, it is appropriate to consider the rates of compensation specified in the ROW Agreement. This is only one of many factors that must be considered in determining the compensation payable. When the SRB failed to do so they made a palpable and overriding error.

[67] In this case the rate of compensation paid or properly payable has a higher level of significance because the evidence demonstrates that ATCO's proposal to all or virtually all landowners for the second 5-year period was that the rate of compensation be the same as was the case in the preceding 5-year period.

### (ii) Are other terms of the ROW Agreement relevant?

[68] ATCO argues that because the SRB is a creature of statute, its powers are defined by the enabling legislation. The legislation mandates what factors may be considered when determining the amount of compensation payable. Those factors are specifically outlined in s 25(c) and (d) and are restricted to "loss of use" and "adverse effect."

[69] For this reason, ATCO argues that nothing in the *Act* requires or authorizes the SRB (and thus the Court) to consider the terms of the ROW Agreement since this is not one of the factors specifically identified in s 25(c) and (d). ATCO therefore argues that the terms of the ROW Agreement are simply irrelevant and that it is an error to consider these terms. This is the same position that ATCO presented to the SRB as summarized at para 17 of the SRB Decision and which was, for all practical purposes, accepted by the SRB at para 29 of the Decision. While the SRB said that it applied "little weight" to the ROW Agreement, it is apparent that it gave no weight to the definition of "Cultivated Lands" in the ROW Agreement.

[70] For the reasons that follow, I conclude that the terms of the ROW Agreement are fundamental to the relationship between the parties and it is a palpable and overriding error to fail to consider the ROW Agreement as the foundation for the s 27 rate of compensation review. More specifically, I conclude that the SRB erred when it failed to consider the terms of the ROW Agreement as it defines the term "Cultivated Lands," which includes "improved pasture."

[71] The explanation for this conclusion requires me to consider the interpretation and application of s 25(1)(c) and (d).

- Interpretation of s 25(1)(c) and (d)

[72] The question at this stage is whether on a proper interpretation of s 25(1)(c) and (d), it is appropriate to consider the terms of the ROW Agreement as part of the analysis for determining the "loss of use" or the "adverse effect" of the ATCO structures on the Lands.

[73] The modern approach to statutory interpretation is explained in ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27 at para 21. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[74] The Alberta Court of Appeal in ***Alberta v ENMAX Energy Corporation***, 2018 ABCA 147, also emphasized the importance of context in statutory interpretation and, specifically, the

need to consider the purpose of the statutory provision in the relevant context. The Court explained (at para 70):

> The modern rule of statutory interpretation requires courts to take a unified textual, contextual and purposive approach to this task: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) [Sullivan] at 7-8. A court must consider not only the textual wording of the statutory provision in dispute but also the purpose of that provision and all relevant context. That includes the legislative scheme of which the provision forms a part.

[75] Therefore, when fulfilling its function in determining the rate of compensation, the SRB must not consider s 25(1)(c) and (d) in isolation. Instead, the SRB must also consider the scheme of the *Act* and also consider the relevant context which, in this case, includes the agreements between the parties, specifically the ROW Agreement. It is only when the scheme of the *Act* and the relevant context is considered that the factors in s 25(1)(c) and (d) can be properly assessed.

[76] The scope of the compensation review mandated by s 27 of the *Act* makes it clear that some consideration must be given to the agreements between the parties. The overall scheme of the *Act* is to encourage the parties to reach agreements. For example, an operator does not have an automatic right of entry onto private lands to conduct its operations. Instead, the operator must first obtain the consent of the owner. Only if the consent is not forthcoming will the SRB consider a right of entry order (see *Act* s 12 and 15). The *Act* similarly recognizes the importance of agreements between land owners and operators in relation to the compensation payable and resort to a substantive SRB hearing is only available if agreement is not possible. In this regard, s 27(6) of the *Act* requires that where either party seeks a compensation review, the parties "shall enter into negotiations in good faith for that purpose." Thus, good faith negotiations are mandatory. If agreement is reached, then s 27(7) provides that the compensation agreement is amended and no resort to the SRB is required. Section 27(8) provides that it is only if agreement cannot be reached that the SRB will conduct proceedings to determine the rate of compensation.

[77] The *Act* permits decisions of the SRB to amend contracts between the parties, but only with respect to the rate of the compensation payable. This is made clear from s 27(13):

> With respect to the review or fixing of a rate of compensation under a surface lease, when the Board makes an order varying or fixing the rate of compensation, the order operates to amend the surface lease in respect of the rate of compensation under it, notwithstanding anything contained in the surface lease.
>
> [*Emphasis added*]

[78] Nothing in s 27, or any other part of the *Act*, permits the SRB (or this Court) to interfere with the contractual relations or modify contracts between the parties, except to the extent provided by s 27(13). Even at that, the SRB is not precluded from considering the terms of the ROW Agreement contextually in the process of exercising its authority pursuant to s 27(13).

[79] Therefore, the legislative scheme places great importance on the integrity of negotiations between the parties and the agreements that are made relating to compensation. This suggests

that the intention of the Legislature was to preserve agreements between the parties and to make any alterations to the agreements minimally invasive.

[80] The ROW Agreement provides relevant context for a number of reasons. First, the terms of the ROW Agreement, specifically the definition of "Cultivated Lands," informs the categories of use to which the Lands may be put. Second, a compensation Order made by the SRB can give rise to a forced statutory amendment to the terms of the ROW Agreement between the parties. Third, as I will explain later, the "pattern of dealing" (PoD) analysis has been approved by the Alberta Court of Appeal as a surrogate for the s 25(1)(c) and (d) analysis; and the PoD analysis is premised on a consideration of agreements negotiated in good faith between parties.

[81] Therefore, I conclude that s 25(1)(c) and (d) must be interpreted more broadly than the restrictive approach advocated by ATCO. Instead, I conclude that it is appropriate to consider the terms of the ROW Agreement as part of the context when assessing the factors in s 25(1)(c) and (d) and when considering the PoD analysis, which has become the surrogate for this analysis.

- Application of s 25(1)(c) and (d)

[82] Clause 7 of the ROW Agreement created a structure for the payment of compensation. It provided for 3 separate rates of compensation depending upon the nature and use of the Lands. One category of use defined in the ROW Agreement was "Cultivated Lands," which specifically included "improved pasture."

[83] The rates of compensation are specified in Clause 7 are said to be payable "during the term of this agreement," although Clause 9 of the ROW Agreement provides that the rates of compensation can be adjusted at the end of every 5-year period in accordance with s 27 of the *Act*.

[84] The function of the SRB was to consider the relevant evidence and determine the appropriate rates of compensation in the context of the ROW Agreement.

[85] When interpreting and applying the evidence to the factors in s 25(1)(c) and (d) and the PoD analysis, the SRB had jurisdiction to increase or decrease the rate of compensation for "Cultivated Lands," "Head Lands" and "Uncultivated Lands" but it did not have the jurisdiction to amend any other provision or term of the ROW Agreement. It did not have the power to alter the structure of the three categories of use that the parties had agreed to. It did not have jurisdiction to amend the definition of "Cultivated Land" in the ROW Agreement so as to remove "improved pasture" from the definition and to insert it into the definition of "Uncultivated Lands." This was contrary to the intention and reasonable expectations of the parties.

[86] Fundamental to the decision of the SRB was its conclusion that the PoD evidence did not distinguish between "native prairie" and "improved pasture." That was not a finding that was open to the SRB. The parties had specifically agreed that "improved pasture" was "Cultivated Lands." Conversely, "native prairie" is not within the definition of "Cultivated Lands" in the ROW and therefore by definition, "native prairie" is "Uncultivated Lands" within the meaning of the ROW Agreement. Thus, as between themselves, the parties had specifically agreed that there was a difference between "improved pasture" and "native prairie."

[87] Instead of determining whether the ATCO structures were on "improved pasture" or "native prairie," as it was required to do, the SRB at para 25 created a new category of land which it called "pasturelands." The SRB did not have the jurisdiction to create the new category of "pasturelands" and insinuate this into the categories that the parties had agreed to in the ROW Agreement.

[88] The SRB made a palpable and overriding error when it found no distinction between "improved pasture" and "native prairie" for the purpose of the s 27 compensation review process. This compounded the errors that it made in finding that, of the two ATCO structures, only one was on "improved pasture" and in failing to consider the rates of compensation in the ROW Agreement.

**d. Does the PoD Evidence Support the SRB Decision?**

[89] Determining the amount of compensation payable to an owner of land in accordance with s 27 of the *Act* is a forward-looking exercise that is designed to identify the amount of the annual compensation that is appropriate in all of the circumstances. Kerans JA in ***Jorsvick*** at para 8 explained this concept:

> It follows that once either party triggers a review, the entire question of annual compensation is at large, and must again be fixed by the Board on the basis of the material then before it. What happened earlier is merely a factor to be considered. It is not correct to say that the applicant, to gain a change in the award, must show altered circumstances. It is correct to say that, to gain any new award, the applicant will only get the award he proves he is entitled to. The onus is on the applicant, whoever he may be. There is no presumption for or against the previous award.

[90] While s 25(1)(c) and (d) identify the factors to be considered, no specific procedure is mandated by the *Act* for determining the amount of compensation payable. However, at least since 1978, evidence of a pattern of dealings (PoD) has been the preferred approach when conducting the analysis. The PoD serves as a surrogate for the s 25(1)(c) and (d) factors and arises "where there are such a number of deals established so that it may be said that a pattern has been established by negotiations between the landowners and oil companies in a district" (***Livingston*** at para 11). As was explained by ***Imperial Oil Resources***, the principle contemplates "comparable" patterns of dealing in terms of the rights granted, the type of land, proximity, date, acreage, and the nature of the parties.

[91] The PoD approach to the determination of compensation was summarized in ***Enbridge Pipelines (Athabasca) Inc v Karpetz,*** 2010 ABCA 185 at para 5 in the following way:

> The concept that fair compensation for rights of way can be based on a suitable PoD is a concept applied in the industry and acknowledged by the law. Part of the exercise of the Board's jurisdiction, for which deference is deserved, arises where it uses its expertise in the relevant spheres of knowledge in deciding if a PoD has been established and thereafter in determining the appropriate compensation: *Imperial Oil Resources Ltd. v 826167 Alberta Ltd*, 2007 ABCA 131, 404 A.R. 212 (Alta. C.A.) at para 14. In that regard, the Board would be entitled to consider whether a proposed PoD refers to truly comparable compensation packages. Once a suitable PoD is established by the evidence,

> however, the Board should only depart from compensation based upon an established PoD for the most cogent of reasons: *Imperial Oil Resources* at para 21.

[92] The SRB correctly observed, at para 23 of its Decision, that the practice of the Board is to base compensation on a PoD unless there are cogent reasons for doing otherwise. The SRB then went on to consider the evidence of the PoD before reaching its conclusion on compensation.

[93] The only evidence before the SRB regarding PoD was provided by the expert Mr. Clarke. He is a Designated Appraiser (both Commercial and Residential), a Professional Surface Landman, a Land Agent for the Province of Alberta and holds a Real Estate Agent's licence.

[94] Mr. Clarke also testified at the *de novo* appeal hearing. His evidence was provided in the form of a written report dated February 20, 2020, a Reply Report dated March 6, 2020 (both filed with the Court on March 13, 2020) and by *viva voce* evidence. He testified that the reports he filed in connection with his evidence before the SRB were essentially identical to the reports that have been filed with the Court.

[95] Mr. Clarke opined in his report and also testified that a pattern exists for the structures that are similarly situated on land within 3 townships of the Lands. In establishing the pattern Mr. Clarke considered the 174 towers in those townships but excluded 27 towers that he considered to be located on cultivated lands because they "were utilized for the production of annual cereal or oil see [sic] production crops, wheat, barley, canola, oats ... and hay lands."

[96] After excluding what he thought to be cultivated lands, Mr. Clarke assessed the balance of the towers in the 3 townships. He formed the opinion that the pattern demonstrated that 100% of the 122 towers on "native prairie" were paid at the midfield rate of $552.00 per tower and that 17 out of 19 towers on "improved pasture" were paid at a rate of $552.00 per tower. He explained that the other two towers located on "improved pasture" were being paid at a rate of $1,380.00 due to a clerical error. Mr. Clarke testified that in his opinion, the PoD evidence established that the rate of $552.00 is appropriate for each of the two towers on the Lands.

[97] While much of Mr. Clarke's evidence is helpful in determining the amount of compensation payable in relation to the Lands, his conclusion as to the appropriate compensation for each of the two towers on the Lands is simply not supported by the evidence when properly assessed. There are two fundamental flaws in his PoD analysis:

1. Mr. Clarke used his own understanding of what should be considered cultivated lands when undertaking the analysis. From his perspective, cultivated lands consisted of lands used for annual cereal or oil seed production crops, wheat, barley, canola, oats and hay. He did not take into consideration the terms of the ROW Agreement when conducting his analysis. Therefore, he was not aware, or he overlooked or he ignored the definition of "Cultivated Land" in the ROW Agreement, which included "improved pasture." This is a major flaw in Mr. Clarke's analysis. His understanding of the term cultivated lands was markedly different that the defined term "Cultivated Lands" in the ROW Agreement.
2. Furthermore, like the SRB which relied on his report, Mr. Clarke failed to draw a distinction between "improved pasture" and "native prairie" when he concluded that both should receive compensation at the rate of $552.00. This is despite the evidence in his own report that shows the "loss of use" and the "adverse effect" are much different for "improved pasture" and "native prairie." At page 30 of his report, using an empirical

approach, Mr. Clarke estimated that using the s 25(1)(c) and (d) factors, the compensation should be 42.6% higher for "improved pasture" than for "native prairie" ($186.25 compared to $130.63).

[98] Mr. Clarke's PoD analysis began by accessing the "Review Letters" provided by ATCO to the landowners. These are letters sent by ATCO in accordance with s 27(4) of the *Act* within 30 days after the 4th anniversary of the commencement of the original term of the surface lease, which by definition in s 1(o) includes instruments such as the ROW Agreement. In virtually all cases, these letters proposed continuing with the amount of compensation that had been paid in the first 5-year term.

[99] In his report and evidence Mr. Clarke was able to isolate 19 towers that were situated on "improved pasture" over the 3-township study area. He offered the opinion, at page 40 of his report, that 17 of the 19 towers (or 89%) were compensated at the rate of $552.00. From this he concluded that a PoD had been established that supported compensation at the rate of $552.00 per tower on "improved pasture."

[100] Even if I were to conclude that it was appropriate to assess compensation by isolating and removing "improved pasture" from "Cultivated Lands," (which I conclude is not appropriate given the express terms of the ROW Agreement), Mr. Clarke's conclusions on the PoD are still not supported by the evidence.

[101] The analysis conducted by Mr. Clarke shows that there is a total of 19 towers on "improved pasture" within the 3-township review area. Those 19 towers can be further broken down into the following sub-categories:

| | |
|---|---|
| Deeded Lands | 7 |
| Special Area Board | 6 |
| Grazing lease (occupied) | 6 |
| **Total "improved pasture"** | 19 |

[102] I conclude that Mr. Clarke's opinion in relation to the PoD for "improved pasture" is flawed for the following reasons:

- On at least 2 prior occasions the SRB has concluded that there was insufficient evidence to establish a PoD for "improved pasture." At para 42 of the SRB Decision, the Board acknowledges this but gives the prior decisions little weight because it was satisfied that the PoD evidence did not distinguish between "improved pasture" and "native prairie." For the reasons given earlier, the SRB made a palpable and overriding error in coming to this conclusion.
- The sample of 19 towers includes the two towers on the Lands that are the subject of this appeal. Mr. Clarke looked at the "Review Letter" to Ms. Hart proposing that compensation be at $552.00 per tower and included as part of the group of 17 that had "agreed" or not objected to the compensation rate. This is not consistent with the facts. Ms. Hart did not at any time agree to this rate and it is completely inappropriate to include these towers in a PoD analysis.
- Of the 19 towers on "improved pasture," the closest comparators are in relation to the Deeded lands and occupied grazing leases. Those are lands on which it is most likely

that there is evidence of genuine agreements between landowners/occupiers and the operator. One of the factors that must be taken into consideration in assessing whether a pattern is established is the "nature of the parties." Using unoccupied grazing leases (Special Area Board) as comparators does not provide a reasonable comparison because the rates are regulated and not negotiated: *ConocoPhillips Canada v HMQ*, 2005 ABSRB 51 at page 4. Using unoccupied Government lands defeats the underlying premise of the PoD analysis as described by ***Livingston.***

- Of the 5 towers on Deeded lands (after removing the two towers on the Lands subject to this appeal), three are compensated at a rate of $552.00 per year and two of the towers are paid at a rate of $1,380.00 per year. This data is not sufficient to establish a PoD for "improved pasture."
- Mr. Clarke explained that two of the towers on "improved pasture" (towers 1032 and 1033 on Mr. Pfahl's lands) were compensated at the higher cultivated rate because of a clerical error. His only explanation was that the owners also had an adjoining quarter that was producing hay. He therefore assumed that there was simply an error made when someone thought that the two towers in question were also on lands producing hay, thus leading to the higher compensation. While hearsay evidence is admissible on a hearing of this nature, the evidence given in relation to these towers amounts to nothing more than speculation. It is deserving of no weight. Furthermore, the SRB, at para 26, described these towers as "outliers." However, this was in the context of including them in a group of 141 towers for which compensation was paid at $552.00, including "native prairie" (SRB Decision, at para 26). The two towers in question cannot be properly described as "outliers" in the context of a total of 5 towers on Deeded land that is "improved pasture."

[103] For all of these reasons, I conclude that the evidence presented by Mr. Clarke does not establish a PoD in relation to "improved pasture."

[104] Mr. Clarke's opinion on the PoD is premised on the assumption that for cultivated lands involving cereal crops and seed crops, the compensation must be higher because those uses involve working the land to a much greater extent than is the case for "improved pasture." For example, cereal crops and seed crops might typically involve plowing, seeding, fertilizing and harvesting each season. At each stage the ATCO towers would interfere with the task and would add an extra layer of expense. Hay crops might involve one or more applications of fertilizer and one or more harvests each season. At each of these stages additional expense would be expected.

[105] The evidence established that "improved pasture" that make up the Lands are worked via the application of fertilizer using farm machinery, the cost of which can be expected to increase by presence of the ATCO towers.

[106] However, "native prairie" does not involve any steps to work the land.

[107] I infer from Mr. Clarke's evidence that he considered the additional costs associated with cereal crops and seed crops are much greater than the additional costs associated with "improved pasture." For this reason, Mr. Clarke concluded that "improved pasture" was much more similar to "native prairie" than to his own understanding of cultivated lands.

[108] This type of analysis may well have been reasonable, but for the fact that the express terms of the ROW Agreement prohibit this. The parties specifically agreed that lands that are "cultivated or worked in any way by farm machinery" are included in "Cultivated lands." This includes, for example, both "improved pasture" and summer fallow. The definition of "Cultivated Lands" is very broad. I conclude that the reason for this very broad definition is that the parties wished to avoid an expensive and protracted micro analysis of each parcel of land at every 5-year review. Instead, they simply agreed that any uses in which the land was "cultivated or worked in any way" would be considered "Cultivated Lands" and compensation would be payable at one specific rate. Similarly, the parties agreed that if the lands are not "worked in any way" then the lands are considered "Uncultivated," and compensation is paid at the lower rate.

[109] The structure of the compensation provisions in the ROW Agreement was intended to add an element of simplicity and predictability to the 5-year reviews.

[110] ATCO is a highly sophisticated utility operator and must be presumed to have been aware of the terms of the ROW Agreements before they were signed. In fact, it is inescapable that ATCO drafted the ROW Agreements. It cannot resile from the terms at this stage.

[111] The ROW Agreement expressly includes "improved pasture" in the definition of "Cultivated Lands". To properly establish a PoD, Mr. Clarke should have included all of the towers on lands that were included within the definition of "Cultivated Lands". Thus, he should have included the 27 towers that he acknowledged to be on cultivated lands, each of which were compensated at the rate of $1,380.00. In addition, he should have included many of those towers that were situated on "improved pasture" lands. On the other hand, Mr. Clarke should have excluded the 122 towers that were situated on "native prairie" and which were paid at the rate of $552.00 per tower. Mr. Clarke failed to do this. Had he done so he would have found a PoD that was dramatically different than indicated in his evidence to the SRB and on the *de novo* appeal hearing.

[112] I conclude that the evidence does not support the SRB Decision that the appropriate compensation for the two towers on the Lands should be $552.00 per tower. In coming to its decision, the SRB's reasoning process and outcome were infected with palpable and overriding error.

**e. Has Ms. Hart met the onus to prove a rate of compensation different than that determined by the SRB?**

[113] The Appellant argues that the appropriate compensation for each of the two structures on the Lands is the amount specified in the ROW Agreement, $1,380 per structure. I conclude that this simplistic approach is not consistent with the process mandated by s 27, which was a process that that Ms. Hart initiated. The s 27 review required the SRB, and thus the Court, to assess the evidence available and determine what the proper compensation should be in relation to the Lands. Simply defaulting to the rate specified in the ROW Agreement is not permitted by s 27.

[114] In conducting the analysis to determine the proper rate of compensation payable, Ms. Hart, as the Appellant, has the onus of proof.

[115] The data in Mr. Clarke's analysis is the only evidence available to assist in determining what conclusions can be properly drawn regarding the appropriate compensation to be paid in relation to the Lands. His report contains detailed data regarding the ATCO towers situated on

lands within 3 townships of the Lands. This data is summarized in a schedule to his report dated February 20, 2020 at pages 34 to 39.

[116] In reviewing this data, it is important to remember that the ROW Agreement was not unique to the arrangement between Ms. Hart and ATCO. The evidence demonstrates that the very same language was incorporated into all or virtually all of the right of way agreements ATCO entered into with landowners in relation to this transmission line. It is also clear that ATCO maintained consistency in its right of way agreements so that each landowner would receive the same compensation for each category of land: Cultivated Lands, Head Lands and Uncultivated Lands. Mr. Clarke testified that when ATCO first approached land owners seeking to obtain their approval for the use of the land, a negotiation took place in relation to rates. To provide reassurance to the land owners who signed early, ATCO agreed that if the rates in the other right of way agreements that were signed later were higher, then the owner would be paid at the higher rate, notwithstanding the rate in the agreement.

[117] In conducting his analysis, Mr. Clarke determined that there was a total of 174 towers within three townships of the Lands. Those were the towers that formed the basis of his review. The 174 towers can be broken down into the following categories:

| | |
|---|---|
| Cereal, oil seed or hay etc. | 27 |
| Head Lands (edge of property) | 4 |
| Treed | 1 |
| Riparian | 1 |
| Native Prairie | 122 |
| Improved Pasture | 19 |
| **Total** | 174 |

[118] Mr. Clarke's evidence, and the PoD analysis in his report, clearly shows that ATCO was successful at maintaining the compensation for the second 5-year term of the agreements at the same rates as had been paid in the first.

[119] Some patterns do clearly emerge from the data contained in Mr. Clarke's report as explained in his evidence.

[120] Mr. Clarke excluded from his report the 27 towers on lands that were used for cereal crops, oil seed production, wheat, barley, canola, oats and hay. As a result, Mr. Clarke did not provide detailed information in his report regarding the rates of compensation with respect to those towers. But he did acknowledge in *viva voce* evidence that each of those towers were paid at the rate of $1,380.00. For example:

- At page 81 lines 30 to 34, Mr. Clarke explained the patterns when he said:

> Basically, what I could identify from the pattern of dealings information the negotiations between the landowners and ATCO Electric was there was a division that I found between the cultivated rate of 1,380. Those lands were typically used, again for hay lands or cereal or oil see [sic] production and then the lands

> that were utilized for improved pasture or native pasture were compensated at the $552 rate.

- The same point was made by Mr. Clarke at page 116, lines 34 to 37:

> The differentiate was between the 1,380 and the 552. The 1,380 were typically all quarter sections that were used to – utilized for hay production or cultivation of cereal and oil seed crops and then the 552 was improved pasture and tame pasture lands that was derived from the market.

[121] The PoD evidence also clearly establishes that the appropriate compensation for land that Mr. Clark considered cultivated was $1,380.00 per tower and that the appropriate compensation for "Uncultivated Lands" was $552.00 per tower. This is completely consistent with the terms of the ROW Agreement.

[122] The schedule at pages 34 to 39 of Mr. Clarke's report demonstrates that there are 19 towers situated on "improved pasture" which can be summarized as:

| **Owner/Occupier** | **# of Towers** | **Notes** |
|---|---|---|
| Hart | 2 | (lands subject of this appeal) |
| Griffith | 1 | (no response and no SRB review) |
| Tolton | 2 | (landowner agreed to $552) |
| Pfahl | 2 | (ATCO has paid $1,380) |
| Grazing Leases (occupied) | | |
| Hart | 4 | (no agreement – but SRB decision) |
| Calgary Stampede | 2 | (agreed to $552) |
| Special Area Board | 6 | (Government sets compensation) |
| Total | 19 | |

[123] I conclude that for the purpose of undertaking a proper PoD analysis not all of these towers should be included. A number of the towers should be excluded because there is no evidence that the rates being paid in relation to some of the towers represent compensation based on negotiation between landowners and ATCO. The following towers should be excluded from the PoD analysis:

- Towers that are the subject of this appeal (2 towers): Mr. Clarke's schedule at pages 34 to 39 includes the towers on the Lands, towers 1007 and 1008. The evidence demonstrates that ATCO has been paying Ms. Hart at the rate of $552. Whether that rate satisfied the obligation of ATCO pursuant to the terms of the ROW Agreement is not a question that is before me. ATCO argues that this is irrelevant. However, because these lands are the subject of this appeal they should be excluded from the PoD analysis.
- Grazing Leases occupied by Ms. Hart (4 towers): Ms. Hart also occupies other "improved pasture" lands in the immediate area pursuant to government grazing leases. Towers 1014, 1015, 1016 and 1017 as described in the schedule to Mr. Clarke's February 20, 2020 report at page 36 are on these lands. Ms. Hart did not agree to accept ATCO's

offer of compensation at the uncultivated rate and instead exercised her right under s 27 of the *Act* to have the Board review the compensation payable. A hearing was held before the SRB (but before a different panel) on December 19, 2019 and the Board rendered its decision on July 24, 2020: ***Hart v ATCO Electric Ltd***, 2020 ABSRB 611. At para 38, the SRB concluded, as it did in this case under appeal, that the pattern evidence did not distinguish between "native prairie" and "improved pasture". At para 40 the SRB concluded that little weight should be given to the Right of Way Agreement in that case for compensation purposes. The reasoning in the two SRB decisions is virtually identical. These are the very issues that I am called upon to consider on this appeal.

I conclude that for the purpose of determining a PoD in relation to the Lands, it is not appropriate to include these 4 towers. These towers do not form part of a pattern "established by negotiations between the landowners and oil companies in a district", as described in ***Livingstone*** at para 11. It is a rate that has been imposed upon Ms. Hart.

- Special Area Board Lands (6 towers) – Towers 1068 to 1073 are situated on Special Area Board lands that are not occupied. The rate of compensation for these towers is set by regulation. For the reasons given earlier, I conclude that it is not appropriate to use these lands as part of the PoD analysis because there is no negotiation between the parties to establish an acceptable rate, which is fundamental to the PoD approach.

[124] After excluding these 12 towers from the PoD analysis, a total of 7 towers on "improved pasture" remain to be considered.

[125] The evidence discloses that there are 2 towers on deeded lands that are "improved pasture" where the owners (the Toltons – towers 998 and 999) have expressly agreed to $552 per tower. The evidence also discloses that two towers (towers 1074 and 1075) on leased Crown grazing lands that are "improved pasture," are occupied by the Calgary Exhibition and Stampede which has agreed to compensation at the rate of $552. The Appellants argue that the lower rates were only agreed to by the Toltons and the Calgary Stampede because ATCO provided misleading information in the letters to these owners/occupiers. There is simply no evidence to support this bald assertion and thus I reject this argument. These 4 towers must be included in the PoD analysis to reflect that some owners and occupiers have agreed to accept compensation at the rate of $552.00 per tower for "improved pasture".

[126] The evidence also discloses that in relation to 2 towers situated on "improved pasture", the owner (Mr. Pfahl – towers 1032 and 1033) is receiving $1,380 per tower. Mr. Clarke believes that this is rate is being paid because of a clerical error. As I have previously indicated, this evidence is speculation and worthy of little to no weight. These two towers should be included in the PoD analysis to reflect that $1,380.00 is being paid for 2 towers on "improved pasture".

[127] The remaining "improved pasture" land on which there is 1 tower (tower 1021) is owned by Mr. Griffith. ATCO sent a letter proposing the rate of $552 but there has been no response or express agreement, nor has there been any request for a review by the SRB. This should be included in the PoD analysis because Mr. Griffith has at least acquiesced in relation to payments in the amount of $552.00 for the single tower on his land.

[128] The provisions of s 27 require that I assess, on appeal, the evidence to determine what rate of compensation should be payable in relation to the towers on the Lands. The PoD analysis

provided by Mr. Clarke must be considered in the context of the ROW Agreement which specifically provides that "improved pasture" is included in the definition of "Cultivated lands." Mr. Clarke identifies 27 towers that fit his definition of cultivated lands. To that must be added the 7 "improved pasture" lands as discussed above. That gives a total of 34 towers to be considered. 29 of those towers, or 85.3% are paid at the rate of $1,380 per tower. 5 towers (including Mr. Griffith – tower 1021) or 14.7% are paid at the rate of $552 per tower.

[129] On this analysis a PoD of $1,380 is clearly identified for "Cultivated Land".

[130] Even if the PoD analysis is undertaken in a manner most favourable to ATCO, the results are not materially different. Under this scenario, I assume that all of the Special Area Board lands should be included and I assume that Ms. Hart's 4 grazing leases are included because there has been a determination of compensation payable. Under this scenario, 44 towers are included. 29 of the 44 towers (66%) are paid at a rate of $1,380.00 per tower and 15 (34%) are paid at a rate of $552.00.

[131] When I consider the totality of the evidence, I am satisfied that Ms. Hart has met the onus to prove a rate of compensation different than that determined by the SRB. I conclude that a proper PoD has been established for "Cultivated lands" within the meaning of the ROW Agreement. The rate of compensation is $1,380.00. Since the Lands are "improved pasture" and thus "Cultivated lands," the PoD suggests that the rate of compensation payable to Ms. Hart should be $1,380.00 per tower.

[132] Having determined that a proper PoD has been established it is still necessary to consider whether there is any cogent reason to depart from the use of the PoD in this case.

[133] The s 27 compensation review process is intended to make the landowner whole. The compensation should not enrich the landowner and should not give rise to a windfall.

[134] ATCO argues that if Ms. Hart is paid the Cultivated rate for the towers on her "improved pasture" lands then this would result in overcompensation and unjust enrichment and would be contrary to the fundamental principles underpinning the *Act*. I conclude that this argument has little merit for two reasons. First, ATCO agreed to include "improved pasture" in the definition of "Cultivated Lands" and thus agreed that "improved pasture" lands would be paid at the same rate as other types of cultivated lands. There were good reasons to have a broad definition of "Cultivated Lands". There is no unfairness associated with this. ATCO cannot resile from the terms of its own agreement.

[135] Second, the compensation process is not scientific and cannot readily identify with any precision the actual adverse impact or loss of use that a landowner incurs as a result of presence of the towers on the lands. Many of the impacts are subjective and intangible. This is highlighted by the very substantial differences between the two approaches to compensation that Mr. Clarke employed in his report. The use of the "empirical" approach would result in compensation that is dramatically less that the compensation that is determined using the PoD approach. That is why the SRB correctly uses the PoD analysis as the preferred approach to determine compensation. That approach incorporates the intangible and subjective factors because it is based upon what reasonable landowners would negotiate with reasonable operators in relation to similar lands being used in similar ways. The PoD analysis provides an estimate of the loss of use and the adverse effect associated with the towers on lands. But it is only an estimate.

[136] If the ROW Agreement is ignored, it is arguable that the ATCO towers have a greater adverse effect on lands planted with cereal crops than "improved pasture" lands. This is because of potentially greater additional costs to the cereal crop producers. But it is also arguable that the additional costs to a landowner producing cereal crops are much different than those additional costs incurred by a hay producer. The right of way agreements contemplate that both will receive the same compensation despite the fact that the actual additional costs they incur are different. That is simply the nature of grouping different types of uses in one PoD. The right of way agreements contain a very broad definition of "Cultivated Lands". This necessarily means that some owners will receive more attractive compensation than others. But that is what the parties agreed to.

[137] There is no evidence before me that the loss of use associated with cereal crops is greater than or less than that associated with winter grazing for bulls that Ms. Hart uses the Lands for.

[138] In this case the evidence demonstrates that the ATCO towers on "improved pasture" give rise to greater adverse effects by way of additional costs than landowners who operate on "native prairie". This is demonstrated by Mr. Clarke's empirical analysis which shows much greater costs associated with "improved pasture". If the conclusion of the SRB that "improved pasture" should be paid at the same rate as "native prairie" then it is very clear that Ms. Hart will be under compensated relative to owners of "native prairie". Neither Ms. Hart nor ATCO agreed to compensation for "improved pasture" at the same rate as "native prairie". In fact, they agreed to precisely the opposite.

[139] When I consider all of these factors, I am not satisfied that any windfalls or overcompensation would arise if the PoD for "Cultivated Lands" is used as the basis for compensation in relation to the Lands.

[140] Therefore, I can see no reason to deviate from the PoD in this case.

[141] I conclude that the proper annual compensation payable to Ms. Hart is $1,380 for each of the two towers on the Lands.

## VI. CONCLUSION

[142] The evidence satisfies me that the two ATCO towers on the Lands are situated on "improved pasture."

[143] The evidence satisfies me that the parties agreed by the terms of the ROW Agreement that compensation for "improved pasture" would be paid at the rate established for "Cultivated Lands."

[144] The evidence satisfies me that there is a clear distinction for compensation purpose between "improved pasture" and "native prairie."

[145] The evidence satisfies me that in 2017 and 2018, ATCO sought to have landowners agree to continue with the same compensation that had been paid in the first 5-year terms of the agreements.

[146] The evidence of Mr. Clarke satisfies me that there is a valid PoD in relation to "Cultivated Lands" and that the appropriate compensation for towers on those lands is $1,380.00 per tower. That is the very same rate specified in the ROW Agreement for "Cultivated Lands."

[147] The evidence of Mr. Clarke satisfies me that there is a valid PoD in relation to "Uncultivated Lands" and that the appropriate compensation for towers on those lands is $552.00 per tower. That is the very same rate specified in the ROW Agreement.

[148] The evidence satisfies me that Ms. Hart has received compensation since February 2013 at the rate of $552.00 per tower for each of the two towers on the Lands. Compensation was paid at this rate despite the fact that the two towers were on "improved pasture" and despite the fact that ATCO was committed by the terms of the ROW Agreement to pay compensation for "improved pasture" at the rate specified for "Cultivated Lands."

[149] ATCO tendered no evidence to explain why compensation was paid to Ms. Hart at the lower rate. No explanation was provided in argument. Instead, ATCO asserted that this was irrelevant to the issues on this appeal. While I do accept that there may potentially be a satisfactory explanation, none is apparent to me in the face of the clear language of the ROW Agreement.

[150] Because the SRB Decision was based on palpable and overriding error, and pursuant to s 26(7)(c)(ii) of the *Act*, I direct that the SRB compensation order be varied in accordance with these Reasons to reflect the compensation payable to Ms. Hart in the amount of $1,380.00 for each of the two towers on the Lands, effective February 14, 2018.

[151] I make no ruling in relation to the compensation payable to Ms. Hart during the period February 13, 2013 to February 13, 2018. That is an issue solely within the first instance jurisdiction of the SRB.

[152] Pursuant to s 26(9)(b)(i), costs are payable by ATCO to Ms. Hart on the basis of the lawyer's charges to the client.

Heard on the 17th and 18th days of December, 2020.
Written Submissions Received on January 22, 2021, February 5, 2021 and February 17, 2021.
**Dated** at the City of Edmonton, Alberta this 2nd day of March, 2021.

**John T. Henderson**
**J.C.Q.B.A.**

**Appearances:**

Debbie Bishop
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Tim Myers and Laura M. Gill
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No Appearance
for the Alberta Surface Rights Board