LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Ember Resources v. L. F. L. Farms Ltd., 2021 ABLPRT 835

Date: 2021-12-07
File No. BR2021.0094 (Ref File No. RC2021.0973)
Decision No. LPRT2021/SR0835
Municipality: Kneehill County

The Surface Rights Board ("SRB") is continued under the name Land and Property Rights Tribunal ("Tribunal"), and any reference to Surface Rights Board or Board is a reference to the Tribunal.

In the matter of a proceeding commenced under section 29 of the *Surface Rights Act*, RSA 2000, c S-24 (the "*Act*")

And in the matter of land in the Province of Alberta within the:

SE ¼-12-032-24-W4M (LSD 02) as described in Certificate of Title No. 971 206 199 (the "Land")
particularly the area granted for Well Licence No. 0330188 (the "Site").

Between:

EMBER RESOURCES INC.

Applicant,

- and -

L.F.L. FARMS LTD.

Landowner.

Before: Susan McRory
(the "Panel")

DECISION

APPEARANCES BY WAY OF WRITTEN SUBMISSIONS:
Ember Resources Inc. - Thomas R. Owen, OWEN LAW

BACKGROUND/OVERVIEW:

[1] This is an application under section 29 of the *Surface Rights Act* to review Decision No. LPRT2021/SR0296 (the original decision) of the Tribunal dated September 8, 2021. The panel hearing the original matter was dealing with an application under section 36 for the recovery of unpaid compensation for 2020 and orders demanding payment, suspension and termination upon a failure to make payment and a direction to the Minister to pay were included in the decision.

[2] A document entitled "**NOTICE OF PROCEEDINGS"** [Emphasis in the original] dated May 19, 2021 was sent to EMBER RESOURCES INC. at 3700-400 3 Ave SW Calgary AB T2P 4H2. An e-mail version of that notice was sent on June 14, 2021.

[3] The notice of proceedings provides a summary of the particulars of the application, including the name of the Applicant, the name of the Operator, the land location, the date of the original agreement, the current compensation rate, the payments missed and the total amount claimed. The notice goes on to indicate:

> We have received an application for assistance under section 36 of the *Surface Rights Act* (SRA) from the above names Applicant(s) and the details of that claim are listed in the table above. You have been identified as an operator defined in section 36(1) of the SRA and as an operator that may be responsible for making payments under the Agreement. If you would like to request a copy of the application, please contact Board Administration.
>
> **Please Note**: If another year's compensation goes unpaid, the Applicant(s) is eligible to request an amendment to the application to include any subsequent missed payment. If the Applicant(s) amend the application to add further missed payments, we will not provide you with additional notice. The Board will consider **all the outstanding compensation** requested to date.
>
> The application is currently in the queue for processing. If you wish to respond to this notice, a **written response must be submitted within 30 days from the date of this letter.** After the deadline, the application, supporting evidence and any responses we receive will be reviewed and forwarded to a Panel of the Board for a decision. [Emphasis in the original]

The notice goes on to inform EMBER that they will be notified in writing once a decision is issued, what their responsibilities are in advising the Tribunal as to changes that may affect the application and how to correspond with the Tribunal.

No response was provided by EMBER within the time line provided.

[4] On July 22, 2021 EMBER wrote to the Tribunal referencing sixty files, including another file with the same landowners. A second letter also dated July 22, 2021 was provided dealing with this particular file and two others. Both documents contain the same submissions. Under heading "**Facts**" EMBER made the following admission:

> Ember is the operator in respect of each surface lease (the "Leases") which is the subject matter of the Application

Counsel on behalf of the Applicant then requested an opportunity to "make further submissions regarding the exercise of the Tribunal's discretion under section 36(5) and 36(6) of the Act."

With respect to the power of the tribunal to suspend and terminate the entry rights of operators should they fail to pay annual compensation under section 36(5) Counsel argued that because the authority to do so is discretionary that the Tribunal should consider the public interest:

> This site contains producing well, income from which enable the operator to make payments on the Leases and continues to contribute to the liquidity of the operator and its ongoing ability to meet its obligations. Suspending the Leases on these sites increases the risk of the wells becoming orphan wells and an ongoing burden on the taxpayer.
>
> Furthermore, if the sites are suspended, this will mean an end to production by the wells that they contain, which in turn will reduce the income to public funds in form of royalties on the minerals they produce.

With respect to the power of the Tribunal to direct the Minister to pay funds out of General Revenue under section 36(6) Counsel argued as follows:

> …the Tribunal must assess what proper compensation would be under the Leases, and that this should be the limit which the treasury should be ordered to pay to the Lessors.
>
> Ember submits that the Tribunal's function under section 36(6) is not to enforce payments under a Lease, but to ensure that the landowner is fairly compensated for any loss. Payment beyond this would constitute unjust enrichment at the expense of the taxpayer.
>
> Ember submits that the rental payments is has made under these Leases represents fair compensation for the actual loss of the use and adverse effect on the Landowner.
>
> Given that the funds paid under this section are taken from the public purse, Ember submits that the public interest is also engaged in this analysis, and that the Tribunal must consider this in its reasoning.

The letter goes on to suggest that Lessors still have available to them civil remedies of enforcement and although in the civil context, there is a duty to mitigate, this too is a matter that should be taken into consideration by the Tribunal in the section 36 analysis.

The letter closes with this request:

> Ember asks that the Tribunal hear more extensive submissions on the factors to be considered in exercising its discretion under these two sub-sections.

[5] According to the electronic file system that the Tribunal maintains, the letter of July 22, 2021 that relates to this file and the sixty others was not provided to the original panel.

[6] Based on the evidence that was before the panel at that time, the panel concluded that EMBER was the operator at the time of the non-payment: "The well licence is registered in the name of the Operator." (Para 6)

[7] On September 21, 2021, EMBER brought an application under section 29. In the submissions in support of that application, EMBER admits to receiving the Notice of Proceedings on May 19, 2021 but raised a number of issues:

> That the demand that was issued was invalid
> That the decision failed to reference the letter of July 22, 2021
> That given the "severe" outcome for an operator, that there is right to be heard before a decision is issued.

The relief sought was that the decision should be rescinded.

[8] In the e-mail by which the request for re-consideration was provided indicate that the Applicant did not have contact information for the other party and asked that Tribunal provide that contract information or forward the materials to the other party "for us".

POSITION OF THE APPLICANT

[9] The submissions in support the request for re-consideration suggest that the demand that was issued was invalid because the Notice did not indicate that it was a demand, nor did it indicate that this was a decision or order made by a member of the Tribunal:

> This was merely an administrative and procedural notice provided to Ember as the operator upon the Tribunal's receipt of an application.

[10] As to the failure of original panel to consider the letter of July 22, 2021, it is clear that letter was not available to the original panel.

[11] As to the consequences that should flow from the failure to consider the letter of July 22, Counsel suggests that only option would be to rescind the decision in its entirety.

ISSUE

As a preliminary matter, has the Applicant established the pre-requisites that would allow the Tribunal to re-consider the original decision and orders of September 8, 2021?

DECISION

As a preliminary matter, the Applicant has established the pre-requisites that would allow the Tribunal to re-consider the original decision and orders of September 8, 2021. Pursuant to Rule 37(5), the parties will be provided an opportunity to make submissions.

REASONS FOR DECISION

[12] Section 8(2) of the *Act* gives the Tribunal the power to make rules governing the procedure and practice for proceedings. Rule 37 governs the process for reconsideration. Re-consideration is a two-step process. An applicant must first establish that the pre-requisites for re-consideration have been met. Only at that point is the Tribunal in a position to order a re-hearing or any other

process. The relevant excerpts from Rule 37 are as follows:

> (3) The Board may only decide to review a decision or order if one of the following basic requirements for review are met…
>
> (a) the decision or order shows an obvious and important error of law or jurisdiction;
>
> (c) the decision or order was based on a process that was obviously unfair or unjust...

This is a discretionary remedy, not a right to appeal as the Court of Queen's Bench is the appropriate forum for an appeal or judicial review. In a series of cases including McAllister v Long Run Exploration Ltd, 2018 ABSRB 603 the Board has described the process in these terms:

> A reconsideration threshold is not an appeal, but rather a further review of a decision where the Board decides whether to reconsider its original decision due to extenuating circumstances**.** The threshold which must be met in the reconsideration process requires the Board to be satisfied that the original decision should be reopened.

Accordingly it is only "obvious and important" errors of law or jurisdiction, or processes that are "obviously" unfair that would justify the discretionary remedy of re-consideration. So this panel is required to consider the specific allegations made.

Error of Law or Jurisdiction

[13] The process that was in effect at the time of this application did not include a demand for payment in the notice itself. The word "demand" appears nowhere in the document.

Instead reference should be made to the original decision that was issued. The decision begins with this directive:

> **DEMAND FOR PAYMENT**
> **AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS**
>
> IT IS DEMANDED the Operator pay…
>
> IT IS ORDERED that if the Tribunal does not received satisfactory evidence that he Compensation has been paid in full to the Applicant, then without further notice the Operator's right to entry the Site shall be suspended and terminated….

The decision first demands payment, suspension or termination are conditional and occur only in the event of a non-payment at dates in the future. The direction to pay is also conditional upon no payment being made. The original decision has a clear finding of satisfactory evidence (See paragraphs 4-6)

Returning to the Notice, it does provide clear direction as the legislative authority, details of the claim and specifies the "total amount claimed" which reflects the partial payment. The notice also provides a timeline for submissions and information as to the consequences that will flow from a failure to respond. It bears repeating that the Notice also provided the Operator with time to respond:

> The application is currently in the queue for processing. If you wish to respond to this notice, **a written response must be submitted within 30 days from the date of this letter.** After the deadline, the application, supporting evidence and any responses we receive will be reviewed and forwarded to a Panel of the Board [Tribunal] for a decision [Emphasis in the original].

As Sara Blake notes in *Administrative Law in Canada 5th edition:*

> The purpose of notice is to alert persons whose interests may be affected so that they may take steps to protect their interests. It also information affected persons, as well as the decision maker, of the matters in issue and the proposed action to be taken. (Page 29-30)

[14] As to suggestion that only a member of the Tribunal would be entitled to issue the notice is contrary to the legislation and the Rules. It is Board [now the Tribunal] which sets an application down for a hearing and it the Board that issues the notice. (See Rule 23 and 24) The actions of the Tribunal unless specifically identified as falling to a Member or the Chair are the actions of the whole of the Tribunal. By virtue of section 4 of the *Land and Property Rights Tribunal Act* SA 2020, c-L2.3 the Chair appoints the panel and decisions of the panel are decisions of the Tribunal.

[15] On that basis this Panel concludes that the Applicant has not established an important and obvious error in law or jurisdiction.

Unfair Process

[16] In ordinary circumstances, a failure to provide submissions to the panel would constitute an obviously unfair process. However, there are fundamental issues as to fairness and relevance which call into question whether the letter of July 22, 2021 should have been put to the original panel:

> Violation of the Rules
> The letter had not been copied to the other parties in any of the applications. Rule 12(4) of the Surface Rights Rules provides:
>
> > A party must deliver a copy of any communication filed with the Board to the other parties.
>
> Rule 7 governs the effect of non-compliance with the Rules:
>
> > If a party refuses or fails without reasonable excuse to comply with these rules….the Board may make any decision, order, or direction it considers

> appropriate in the circumstance, including one or more of the following:
> (a) an order limiting the participation of a party in the proceedings or limiting the evidence which may be presented by a party in the proceedings.

It is no excuse for the Applicant to say "I don't have their contact information." EMBER admits to making a partial payment to the Landowner; that would not have been accomplished without some way of contacting the landowner. Furthermore, the notice indicated that the Tribunal would provide EMBER with a copy of the original application upon request.

It is within the discretion of the Tribunal to exclude evidence that does not comply with the Rules.

Relevance

As Sara Blake notes in *Administrative Law in Canada 5th edition: "*Relevance is the essential criterion. Irrelevant information need not be disclosed." (Page 37)

There are a number of issues that arise with respect to relevance.

First, the letter of July 22, 2021 deals with matters of policy. The Tribunal is a creature of statute and has no powers beyond that provided for in the legislation. The letter invites the Tribunal to consider the economic consequences of it decisions. That is a matter for the legislature, not for the Tribunal.

Second, the letter invites the Tribunal to exceed the statutory jurisdiction that it has. There is no question that Tribunal is not to vary the amount of annual compensation to be paid in a section 36 application. That amount is either agreed upon by the parties or set by the Tribunal either under section 23 or in the context of a section 27 review. To suggest that "for the purposes of s. 36(6), the Tribunal must assess what proper compensation **would** be" or to suggest that the partial payment made "represents fair compensation" is to embark on a section 23 or 27 review.

Third, the letter suggests that the Tribunal import notions from the civil context. As Justice Sirrs noted in Devon Canada Corp. v. Surface Rights Board 2003 ABQB 7 (CanLII):

> …the function of section 36(5) and 36(6) appears to me to provide the surface owner with some assurance that if they cooperate with providing the oil industry access to their lands, they need not fear the operator will not pay them.
>
> The sections provide a pragmatic solution whereby the surface owner need only provide that existence of a lease and that rent has not been paid….(Para 29)

This is a statutory remedy that exists independently of the civil process. The pre-requisites are established in the legislation.

Finally the letter of July 22, 2021 does not speak to the merits or the statutory

> requirements which allow a section 36 application to proceed. The only issues raised relate to the exercise of discretion.

[17] Perhaps most fundamentally, is that the letter of July 22, 2021 is a request for further and more extensive submissions. This is, in effect, a request for adjournment on sixty-three separate files. Given that the submissions contained in the July 22, 2021 speak to matters outside the jurisdiction of the Tribunal, it would make no sense to allow for further submissions. As the Court of Appeal and Justices Erb and Sirrs have noted the process under the Surface Rights Act is intended to provide an "an expeditious yet fair method." (Imperial Oil Resources Ltd. v. 826167 Alberta Inc. ABCA 131 at Para 16, Husky Oil Operations v. Scriber 2013 ABQB 74 at Para 11.

It would not be pragmatic or expeditious to allow for further submissions on issues of policy that do not address the merits in sixty-three separate files.

[18] However, that does not dispose of the issue: while this Panel is required to wrestle with these issues at this point in the proceedings, should the determination as to whether there was a failure to comply with the Rules and what remedy would flow and whether the letter of July 22, 2021 was relevant and therefore admissible have been made by the original panel hearing the matter?

[19] According to section 4 of the *Administrative Powers and Procedure Act* dealing with evidence and representations:

> Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority
>
> (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,
>
> (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
>
> (i) to permit the party to understand the facts or allegations, and
>
> (ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations,
>
> and
>
> (c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

The important word in the context of this case is "before". The original decision did affect the rights of the Operator and it was the original panel who should have been in a position to determine issues of compliance with the Rules and relevance.

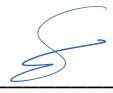
[20] It is on that basis that this Panel concludes that a failure to provide the original panel with the letter of July 22, 2021 constitutes an unfair process.

[21] As to the suggestion that the only remedy that arises would be to rescind the original decision, that is not correct. The options available to the Tribunal are to rescind, amend or replace but prior to making a determination as to the appropriate course of action, Rule 37(5) requires that the Tribunal not grant a request for review without providing all parties with an opportunity to make submissions. The schedule for exchange of submissions will be as follows:

- On or before January 18, 2022 – The Landowner may provide submissions in response to the Operator's application;
- On or before February 1, 2022 – Ember may reply to the Landowner's submission.

Dated at the City of Edmonton in the Province of Alberta on December 7, 2021.

LAND AND PROPERTY RIGHTS TRIBUNAL



Susan McRory, Chair