



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Ember Resources Inc. v Haller, 2021 ABLPRT 864

Date: 2021-12-13
File No. BR2021.0128 (Ref File No. RC2019.0841)
Decision No. LPRT2021/SR0864
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:

SW ¼-7-33-22-W4M as described in Certificate of Title No. 991 270 203 (the “Land”) particularly the area granted for Well Licence No. 0355252 (the “Site”).

Between:

Ember Resources Inc.

Applicant/Operator,

- and -

Kevin Wade Haller
Elvin Deloy Haller
and
Dorothy Haller

Landowners.

Before: Susan McRory
(the “Panel”)

DECISION

BACKGROUND/OVERVIEW:

[1] This is an application under section 29 of the *Surface Rights Act* to review a notice and demand for payment on three separate files. This particular file deals with an application by the Hallers under section 36 for recovery of unpaid compensation for 2019. The landowners had indicated that the full amount of annual compensation was \$1200.00 but that partial payment in

the amount of \$600.00 had been received leaving a shortfall of \$600.00.

[2] The original application was received on May 7, 2019. Attached to the application was a copy of the caveat, the most recent cheque stub and correspondence from the operator. The date of the original agreement was March 22, 2006. The date upon which payment for 2019 was due was March 22, 2019.

[3] The file also includes a signed statutory declaration dated October 19, 2019 indicating that \$600.00 remains unpaid.

[4] The Well Summary Report and the One Stop report provided by the Alberta Energy Regulator indicates that Ember Resources Inc. is the sole working interest participant effective March 26, 2020 and is the current licensee.

[5] Section 36(1) of the *Act* defines “operator” as follows:

...means any person who, at the time of non-payment under a surface lease...became liable to pay the money in question because that person

(c) was the holder of a licence...

(d) was a working interest participant

and includes a successor...of a person referred to in clause...(c) (d)

[6] Following receipt of a completed application form with satisfactory evidence of non-payment of the compensation, the Tribunal is required to provide notice to the operator(s). Section 36(4) of the *Surface Rights Act* provides as follows:

On receiving the evidence, if the Board considers that it satisfactorily proves the non-payment, the Board **shall** send a written notice to the operator demanding full payment.
[Emphasis added]

It is important to note that the Demand was sent after the statutory declaration.

[7] On January 21, 2021 Notice was sent to EMBER. The document is titled:

NOTICE AND DEMAND FOR PAYMENT UNDER SECTION 36(4) SURFACE RIGHTS ACT

[Emphasis in the original]

Following the title, particulars of the Demand were provided in the form of chart: identifying the applicants, the licence operator, in this case, EMBER, the land description, the date of the original document, the current compensation, and the payments missed and the total amount claimed. The Notice very clearly states that the missed payment for 2019 is 50% of the current rate and specifically provides that the total amount claimed is \$600.00.

The document goes on to provide as follows:

THIS IS A DEMAND to the Operators to pay to the Applicants the total amount of compensation outstanding and listed on the attached schedule. If this amount is not paid

in full **within 30 days** the Board [Tribunal] may suspend and terminate the operator(s) access rights and direct the Minister to pay the unpaid amounts to the Applicants for the years claimed. Any payment made by the Minister will be a debt owing to the Crown and can be entered by the Crown against the operator(s) as a judgment of the Court of Queen's Bench. [Emphasis in the original]

The Board has received a completed application for unpaid compensation under section 36 of the *Surface Rights Act (SRA)* from the Applicant(s), and the details of the lands and the claim are listed in the Schedule attached.

You are receiving this demand because you have been identified as a Licencee or Working Interest Participant by the Alberta Energy Regulator and are therefore an operator under section 36 (1) of the Act....A completed Application with a signed declaration is evidence the Board accepts to satisfactorily prove non-payment. You can request a copy of the application or board searches by contacting Board Administration.

The next paragraph begins as follows:

NOTICE: If any future compensation becomes due for this site is not paid, it may be considered by the Board together with this Application **without further notice to you.** You may also be ordered to pay costs to the Applicant pursuant to section 39 of the Surface Rights Act. If you have paid the compensation claimed you must provide evidence to the Board and **a written response within 30 days from the date of this demand.**
[Emphasis in the original]

[8] On February 25, 2021, the Tribunal received a letter from EMBER requesting that the Tribunal "re-consider its decision to issue a notice and demand for payment" under section 29(1) of the *Act*. The application did not use the standard form that the Tribunal has developed that requires the applicant to reference the Decision /Order No. Tribunal Administration contacted EMBER to indicate that this submission would be provided to the Panel hearing the application and inquiring as to whether they wanted to file a re-consideration form under section 29 but EMBER declined.

POSITION OF THE APPLICANT

[9] The Applicant began with this statement:

We are counsel for Ember Resources Inc. ("Ember") who is an operator in respect to the above matters.

EMBER requested that the "Board reconsider its decision to issue a notice and demand for payment" alleging an important error of fact.

First, EMBER alleges that it was not the operator at the time of non-payment as EMBER acquired its interest in the well that is the subject matter of these proceedings in November of 2019 and the date of alleged non-payment predated its participation in the enterprise. Second, EMBER suggests that partial payment has been made so that full amount is not owing.

[10] EMBER suggests that it is adversely affected in that if it does not comply with the demand “Ember will owe an unjust debt to the crown and have its access terminated despite its having complied with its obligations under each respective lease.” EMBER requests that the Notice and Demand be rescinded or in the alternative, the amount of the demand reflect payments made to the landowners by others.

PRELIMINARY ISSUE

1. Does section 29(1) apply to a Notice and Demand for Payment?
2. In the alternative is the Demand an interlocutory or interim decision with a limited ability to be challenged?
3. In the alternative, has EMBER established the basic requirements that would allow for re-consideration?

DECISION ON THE PRELIMINARY ISSUE

1. Section 29 (1) does not apply to a Notice and Demand for Payment. Neither reflect a final decision by the Tribunal, both are issued in advance of the merits of the application being considered. EMBER is not prejudiced in that it has had since January 21, 2021 to provide submissions in response to the demand and that there will be full consideration of all submissions received at a written hearing.
2. In the alternative if the Notice and Demand for Payment could be characterized as a “decision” of the Tribunal, then it would be an interlocutory or interim decision and that the test provided for in 689799 Alberta v. Edmonton (City) 2018 ABCA 212 (CanLII) which would allow for a review has not been established. As a section 29 application is a discretionary remedy, this Panel would not consider a review in this circumstances.
3. In the alternative, EMBER has not established the basic requirements that would allow for re-consideration.

REASONS FOR THE DECISION

[11] Section 29 of the *Surface Rights Act* gives the Tribunal the discretion to rehear an application, or review, rescind, amend or replace a decision or order made. 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. It is not sufficient that the party simply disagrees with a decision. Nor is the purpose of the reconsideration process for a party to simply repeat its arguments or bolster the portions

of its case which did not persuade the original panel. [Emphasis added]

[12] There are three different approaches to the question of whether section 29 should apply to a Notice and Demand. All three led to the same result that the application for re-consideration be dismissed.

Is the Notice and Demand for Payment a “decision” or “order” within the terms of Section 29(1)(b)?

[13] The starting point for analysis is the oft quoted “modern” rule of statutory interpretation:

Today there is only one principle or approach; namely 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.
Construction of Statutes, 2nd ed. (1982) Elmer Driedger p. 87 Rizzo & Rizzo Shoes Ltd., Re. 1998 (S.C.C.), Bell Express Vu Ltd. Partnership v. Rex. 2002 (S.C.C.)

[14] The terms “decision” or “order” are not defined in the *Act*. I turn then to consider the scheme of the *Act*.

What is the scheme provided for in Section 36?

[15] Section 36 creates a statutory remedy that does not otherwise exist. It does not change the contractual obligations of the parties, it proves relief to landowners in the event that operators do not pay. But the statutory regime prescribes certain steps that must be taken before an application can be heard at all.

First, the person entitled to receive money payable by an operator under a surface lease may submit to the Tribunal written evidence of the non-payment. Without written evidence, the application will be dismissed.

Second, upon receiving evidence, only if the Tribunal “**considers** that it satisfactorily proves the non-payment” is the Tribunal required to send a written notice to the operator demanding full payment.” The language is important, the job of the Tribunal is to “consider” whether the evidence provided satisfactorily proves the non-payment. The Legislature has not used the word “decide”.

The “next step” is that the Tribunal shall send “written notice to the operator demanding full payment.” Again the words are important, written notice is required and the particulars of that written notice must include a demand for payment. There is no discretion in this regard.

However, issuance of the demand is the trigger for other actions to follow so no immediate consequences flow. Issuing the demand to the Operator is a step in the procedure that is long standing and equally applicable to all operators. Section 36 provides a scheme of due process and clearly outlines the possible consequences. If the notice is not complied with, the Tribunal may by written order served on the operator take steps to suspend the operator’s right to enter the site. Only after suspension and “after giving the operator written notice of its intention to do so”, is termination an option. The Operator has a further 30 days after the demand to prove to the Tribunal that full payment has been made (See section 36(6)).

Do the Rules provide any direction?

[16] Section 8(2) of the *Act* gives the Tribunal the power to establish its own rules governing practice and procedure. While there is no definition of “decision” or “order” in the Rules, there is direction with respect to what constitutes a “hearing” and what “notice” entails.

[17] The Rules define “proceeding” in terms of a pre-hearing dispute resolution conference or hearing. “Hearing” is defined as “a hearing by the Board [Tribunal] under the *Act* or other legislation authorizing the Board to make a decision.”

[18] There is a separate definition for “Notice of Hearing” defined as:

...a notice from the Board [Tribunal] stating the date, time and place that the Board [Tribunal] will hold a hearing and giving reasonable particulars of the matter in respect of which the hearing will be held.

[19] On a plain reading of the rules, notice of a hearing would seem to be a different “thing” than the hearing itself.

[20] Rule 23(2) provides that: “if the Board [Tribunal] is considering an application by way of written submissions, the Board [Tribunal] may issue a notice to the parties”. Subsections (a) through (f) list the requirements for notice that must:

- (a) be in writing
- (b) briefly describe the subject matter of the application;
- (c) indicate the date by which a written submission must be filed;
- (d) state that the Board [Tribunal] may grant the application or issue a decision if there are no submissions objecting to the application;
- (e) indicate that copies of the application and other documents filed in support of the application are available upon request; and
- (f) contain any other information that the Board [Tribunal] considers necessary.

[21] The Rules also provide direction as to what is required to be included in the decision. Rule 33 specifies that the decision “must be signed on behalf of the panel by a Member of that panel”. Decisions also must specify an effective date. Rule 34 requires:

The decision of a panel of the Board [Tribunal] is the official decision of the Board [Tribunal] effective on and after the date the decision is signed, unless otherwise specified by the Board [Tribunal].

Decisions of the Tribunal are also given decision numbers.

[22] The Notice that was provided to EMBER was not signed by a member nor indicated an effective date and bears no decision number.

[23] The Notice that was provided to EMBER bears none the hallmarks of a decision and all of the hallmarks of a Notice of hearing.

What is the object or purpose of section 36?

[24] Justice Sirrs in Devon Canada Corp. v. Surface Rights Board 2003 ABQB 7 (CanLII) reflected upon the purpose of section 36:

...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)

Justice Erb in Provident Energy Ltd. v. Alberta (Surface Rights Board) 2004 ABQB 2004 ABQB 650 (CanLII) expanded on Justice Sirrs comments:

In my opinion, the purpose of Section 36 of the *Act* is obvious. It is to provide a mechanism by which the surface owner is guaranteed payment of the compensation to which he is entitled whether the compensation has been fixed by an agreement or not. In order to carry out its duties in some sensible fashion, the Board would have to determine whether the lease was valid and whether compensation was payable to any party and by whom. As Sirrs J. held in the *Devon* case, the application of Section 36 is discretionary and even if a land owner shows sufficient evidence that a lease exists, the Board is not bound to order compensation. If the Board was bound to do so, this would amount to a fettering of its discretion.

[25] Our Court of Appeal has described the process undertaken by the Tribunal to determine compensation as intended to be “an expeditious yet fair method.” (Imperial Oil Resources Ltd. v. 826167 Alberta Inc. ABQA 131 at Para 16) That same language was used by the Court of Queen’s Bench in Husky Oil Operations v. Scriber 2013 ABQB 74 at Para 11.

Is there any assistance to be found in academic commentary and the case law?

[26] Sara Blake in her definitive text *Administrative Law in Canada* 5th Edition, provides this direction:

Before a decision is made, notice must be given to all person who may be affected by it (except in cases of emergency). Failure to give notice will likely be fatal to any decision. **The purpose of notice is to alert persons whose interests may be affected so that they may take steps to protect their interests.** (Page 29-30)

Ms. Blake also discusses what sorts of actions by a public official would give rise to judicial review:

Not everything that a public official does is reviewable. A court may decline to review a communication that does not involve the exercise of authority, such as a letter expressing an option, **warning the recipient to comply with requirements**, proposing a meeting or refusing a request to do something in the absence of an obligation to do it. (Page 177)

[27] In an interesting case from Nova Scotia, the Court held that warning that certain consequences would flow would not constitute a “decision in an administrative law sense” (para 19) but the Court went on to consider the alternative argument as well. (See Ranger v. Nova Scotia Association of Social Workers 2000 NSSC 85)

Conclusion

[28] Based on the scheme created in the legislation, Notice and Demand are statutory prerequisites to having the matter put before a panel. Ultimately the panel hearing the matter may determine that the evidence establishing non-payment or identifying the operator is not sufficient. The Notice and Demand do not result in a decision that impacts the rights of the parties, they are part of the legislated process required to be followed in advance of a decision that will affect the rights of the parties.

At least according to the Rules, there is a distinction between a hearing as the place where the decision will be made and a Notice of Hearing which outlines the process that will follow including the process for requesting a copy of the file and a warning that proof of payment and a written response are required within 30 days of the date of the Demand.

Based on the object or purpose of the legislation, the *Act* creates a unique remedy but one that can only be accessed if certain statutory requirements are met. Given that the purpose of the *Act* is to provide a “pragmatic” and “expeditious” process would it make no sense to characterize those pre-requisites as decisions or orders that would be capable of being re-considered or reviewed. While the word “decision” may apply in everyday situations, we are dealing with a decision in an administrative law context.

There is some support in the case law and academic commentary to suggest that a warning as to what might happen next is not a decision *per se*.

[29] Accordingly, this Panel concludes that the Notice is not a “decision” to which section 29 would apply.

In the alternative, could it be argued that the statement in the notice to the effect that the “Board considers that it satisfactorily proves the non-payment” is itself a decision?

[30] Following the lead of Chief Justice MacDonald in Ranger, if this Panel is mistaken as to the characterization of the Notice, then the question arises as to whether it is a decision that should be re-considered.

[31] The authors of Macaulay, Sprague and Sossin in *Practice and Procedure Before Administrative Tribunals* make this observation:

Every time an agency elects to do something (or to do nothing), it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing. (Page 22-1)

[32] Arguable then, the Tribunal has decided to do something – it satisfied itself that there was evidence of nonpayment and issued the demand.

[33] But that is by no means the end of the discussion. Macaulay, Sprague and Sossin notes that the Courts are loathe to exercise their discretionary power to review what are variously described as interim or interlocutory or preliminary decisions.

[34] The Federal Court in Black v. Canada (Attorney General) 2013 CarswellNat 3386 and our Court of Appeal in 689799 Alberta Ltd. v. Edmonton (City) 2018 ABCA 212 have used the term “interlocutory” to describe a decision that is not determinative of the substantive issue.

[35] The Supreme Court of Canada in Bell Canada v. Canadian Radio-Television and Telecommunications Commission [1989] 1 S.C.R. 1722 described a decision that does not affect the merits of the case as an interim order. That same term was used by the Court of Appeal in Syncrude Canada Ltd. Alberta (Human Rights and Citizenship Commission) 2008 ABCA 217 and in Encana Corporation v. Alberta (Energy & Utilities Board), 2004 CarswellAlta.

[36] In the context of a designated industrial property assessment, Justice Martin in Canadian Natural Resources Limited v. Wood Buffalo (Regional Municipality) 2011 ABQB 220 used the term “preliminary” decision.

[37] But regardless of the nomenclature, the result is the same.

[38] In Black, the Court refused to interfere with a decision by an adjudicative board in determining whether notice had been provided “forthwith”. Interestingly, there was no challenge to the issuance of the notice itself, only its timeliness.

[39] In 689799 Alberta Ltd. our Court of Appeal reviewed the case law and the underlying rationale of the rule. The first consideration is that the court typically gives deference to the administrative decision-maker. The second relates to efficiency, cost and the preservation of the administrative regime.

Dealing specifically with the language in the *Expropriation Act*, which provides for an appeal to the Court of Appeal of “any determination or order” the Court focused on the context in the legislation as “evinces the goal of expedience resolution” that “does not support a legislative intention to provide for multiple appeals.” The Court held that matters such as rulings on undertakings, disclosure of information, and production of financial information should be left to the Tribunal.

[40] In Syncrude, although the Court was dealing with what was clearly characterized as an “order”, the Court did not intervene.

The Act does not contemplate multiple appeals. The legislative scheme must be read to

further the goal of speedy and inexpensive resolution of human rights complaints (Para 13)

[41] In Encana at para. 25 the Court ruled:

...appeals of interim decisions, particularly where the appeal will not resolve any final or significant issues, are generally to be discouraged. In addition to delay, there are many pragmatic reasons not to hear such appeals including added cost, waste of judicial resources and the need to discourage other premature applications. (Para 25)

[42] In the Wood Buffalo case, Justice Martin was very blunt: “The Alberta courts have adopted a strong policy against litigation in installments”. (Para 26)

[43] However, in each case, the Courts have recognized that there may be “rare and exceptional circumstances” which would justify a review.

[44] How does this direction from the Court assist this Panel in exercising its discretion whether to not to permit a re-consideration? This Panel recognizes that this is not a request for judicial review but as this is a discretionary remedy it would be inappropriate to disregard the logic of the superior courts.

[45] There is no doubt that the “decision” as to the sufficiency of evidence is an interim, interlocutory or preliminary decision. There is no doubt that the courts are, to use the words from Macaulay & Sprague, “generally reluctant” to interfere.

[46] Although there may extenuating circumstances which would justify re-consideration, the Applicant in this case has provided no basis upon which this Panel could come to that conclusion. This Panel also concludes that to pursue multiple reviews on matters leading up to the final decision by the Tribunal would not in the words of Justice Sirrs and our Court of Appeal be “pragmatic,” “inexpensive” or “expeditious,” especially given that the option of reconsideration is a discretionary one.

In the alternative, have the basic requirements for reconsideration been met?

[47] If this Panel is mistaken and that re-consideration of an interim or interlocutory decision is appropriate has the Applicant established that the basic requirements for reconsideration have been met?

Re-consideration is a two-step process. An applicant must first establish the pre-requisites for re-consideration on a balance of probabilities. (Canadian Natural Resources Limited v. Main 2020 ABSRB 735) Rule 37(3) provides as follows:

The Board [Tribunal] may only decide to review a decision or order if one of the following requirements for review are met:

- (a) the decision or order shows an obvious and important error of law or jurisdiction; or
- (b) the decision or order shows an important error of fact, or an error of mixed

- fact and law, in the decision or order that affects the decision or order; or
- (c) the decision or order was based on a process that was obviously unfair or unjust;
- (d) the decision or order is inconsistent with an earlier Board decision or order, binding judicial authority, or provision of the legislation, regulation or rules; or
- (e) there was evidence at the time of the hearing that was not presented because it was unavailable to the party asking for review, and which is likely to make a substantial difference to the outcome of the decision or order.

[48] EMBER bases the request for re-consideration solely on an error of fact:

The Notice was predicated on a finding that Ember owed money under the leases for the years claimed, and it did not. This is an error of fact which Ember submits affects the Notice, because the demand for payment was for money that was not actually owing. There, the Notices were made in error and we submit should be rescinded.

[49] The language again is important, it is an error that is both important and one that affects the decision or order that justifies reconsideration. Ms. Blake goes so far as to suggest that the error must be “fatal” (Page 137).

[50] However, the issues raised by the Operator are by no means certain. The definition of “operator” under section 36(1) includes “successors” to working interest partners and licence holders. There is also the unresolved matter as to whether EMBER would be considered the Operator for balance of the year for which payment is owed.

[51] As to an amendment to reflect the actual amount owing, the notice already reflects a difference between the current rate of compensation and the total amount claimed.

[52] There is also the matter of fairness. If the Notice is considered to be a decision, decisions are to be based on evidence and submissions by both parties. The effect of the relief sought by EMBER would be to deprive the landowner of an opportunity to respond.

[53] Accordingly this Panel dismisses the application for reconsideration request and the matter will proceed in the normal course. EMBER received the Notice almost a year ago in January of 2021 and since then has had the opportunity of furnishing relevant evidence or argument in response to the notice for the panel hearing the matter to consider. The Notice of Proceedings and Demand and the *Act* clearly outline the procedural steps leading up to a possible termination or its right or direction for the Minister to make payment.

Dated at the City of Edmonton in the Province of Alberta on December 13, 2021.

LAND AND PROPERTY RIGHTS TRIBUNAL



Susan McRory, Chair