



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Ember Resources Inc v 599055 Alberta Ltd, 2022 ABLPRT 913

Date: 2022-06-24
File No. BR2022.0027 (Ref File No. RC2021.0924)
Decision No. LPRT2022/SR0913
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:

NW ¼-10-032-24-W4M (LSD 14) as described in Certificate of Title No. 121 220 964 +1 (the “Land”) particularly the area granted for Well Licence No. 0379250 (the “Site”).

Between:

Ember Resources Inc.,

Applicant/Operator,

- and -

599055 Alberta Ltd.,

Landowner.

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 dated July 16, 2021. The Notice and Demand arise from an application by 599055 Alberta Ltd. under section 36 for recovery of unpaid compensation.

[2] The original application under section 36 with respect to missed payments in 2020 was received on March 15, 2021. The application form was signed March 12, 2021. The application was made by the landowner's representative Mr. Vasseur.

[3] Evidence in support of the original application included a letter dated September 12, 2014 from Encana Corporation indicating an increase in annual compensation to \$4,070.00 effective August 29, 2015. On May 25, 2020, Ember Resources wrote to the landowner referencing Ember File Number S10758 proposing a reduction in annual rental from \$4,070.00 to \$2,090.00. The letter clearly bears the notation by the landowner "I do NOT ACCEPT".

Notwithstanding, partial payment in the amount of \$2,090.00 was made as evidenced by a cheque stub dated August 4, 2020 referencing the file that is before the Panel today and four other properties. The amount outstanding based on partial payment is \$1,980.00.

Included in the application was a cheque in the amount of \$1,972.00 which suggested that a further payment had been received. However, upon closer examination of this cheque and cheque stub, this refers to another file altogether and must have been included in this application in error. The cheque stub references different file number (S10461), a different rental period (June 2, 2020 to June 1, 2021) and a different land description. (TWP 32 RGE 22 W4M NE 29).

As to evidence of the condition of the land, the applicant had checked off boxes on the form to indicate that the site was not fenced and that the land was being used for crops but that there was equipment on site and that the land was still being visited by workers.

In the area on the form where the Tribunal asks the applicant to describe losses being suffered, although the initial submissions included a 'standard' form response which does not provide evidence that assists the panel, there was a notation to this effect:

The lease and production equipment is still on site & producing.

Included in the materials was a claim for costs by the representative in the amount of \$656.25 referencing five separate files including the file that is before the panel today.

[4] The Well Summary Report and the OneStop report provided by the Alberta Energy Regulator indicates that Ember Resources Inc. is the sole working interest participant 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 Tribunal considers that it satisfactorily proves the non-payment, the Tribunal **shall** send a written notice to the operator demanding full payment. [Emphasis added]

[7] On July 16, 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. While the compensation rate is given as \$4,070.00 the total amount claimed was the amount that the agent had requested.

The document goes on to provide as follows:

THIS IS A DEMAND to the Operator to pay to the Applicant(s) the total amount of compensation outstanding and listed above. If this amount is not paid in full **within 30 days** the 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 judgement of the Court of Queen's Bench. [Emphasis in the original]

The Land and Property Right Tribunal (formerly Surface Rights 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. Operators are responsible for making payments under a surface lease or compensation order. A completed Application with a signed declaration is evidence the Tribunal accepts to satisfactorily prove non-payment. You can request a copy of the application or Tribunal searches by contacting Tribunal 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 Tribunal 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 August 9, 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 letter listed forty files including the matter that is before this Panel today. Counsel for EMBER did not use the standard form for re-consideration that the Tribunal has developed that requires the applicant to reference the Decision/Order No. Where there is an application form, Rule 14(2) of the Surface Rights Rules provides that “the application must include a completed form.”

[9] On November 3, 2021, the Tribunal received a request to amend the original application to include a claim for partial payment for 2020. Again, the information as to the condition of the land was very limited.

POSITION OF THE APPLICANT

[10] In its submissions, the Applicant began with this admission:

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

[11] EMBER then requested that the “Tribunal reconsider the decision to issue notices and demands for payment” relying upon Rule 37(3) (a) (b) and (c) in support of its application.

[12] Under the heading “Rule 37(3) (a) – Error Jurisdiction” EMBER suggests that it is an error of jurisdiction and a breach of the rules of natural justice to fail to provide notice prior to making a decision as to whether to not to issue the demand and that this deprived EMBER of the opportunity to make submissions or representations.

Under the heading “Rule 37(3) (c) – Unfair Process”, EMBER suggests that it did not have an opportunity to know the case against prior to issuing the demand and that a lack of notice constitutes an unfair process.

[13] Submissions under three additional headings were provided. It is not clear whether these were intended to be part of argument in support of the request for re-consideration or part of the relief sought.

Under the heading “Suspending Rights of Access”, EMBER requested an opportunity to make further submissions as to discretionary powers of the Tribunal under section 36(5) and 36(6) suggesting that there is a public interest component:

These sites contain producing wells, 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 right to enter 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 the

form of royalties on the minerals they produce.

Under the heading “Directing the Minister to Pay”, EMBER also requested an opportunity to make further submissions as to the discretion that the Tribunal has under section 36(6), suggesting that there is a public interest component. EMBER argued that:

... 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 landowners.

EMBER suggested that the landowner would:

...still have available to them the usual civil remedies for enforcing their lease as a commercial contract through the courts in order to recover any outstanding balance.

Under the heading “Duty to Mitigate”, EMBER suggested that the landowners “are required to demonstrate that they have mitigated losses to the extent possible” and that this should be taking into account in determining the amount of money directed to be paid.

Under the heading “Relief Requested”, EMBER asked that the Tribunal “rescind the Demands and that it hear more extensive submissions on the factors to be considered in exercising its discretion.”

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 July 16, 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 these circumstances.
3. In the alternative, EMBER has not established the basic requirements that would allow for re-consideration.

REASONS FOR THE DECISION

[14] 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]

[15] 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)?

[16] 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.)

[17] 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?

[18] 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?

[19] 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.

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

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

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

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

[23] Rule 23(2) provides that: “if the Tribunal is considering an application by way of written submissions, the 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 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 Tribunal considers necessary.

[24] 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 Tribunal.

Decisions of the Tribunal are also given decision numbers.

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

[26] The Notice and Demand 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?

[27] 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.

[28] 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. ABCA 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?

[29] 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)

[30] 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

[31] 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 prerequisites 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*.

[32] 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?

[33] 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.

[34] 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)

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

[36] 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.

[37] 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.

[38] 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.

[39] 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.

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

[41] 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.

[42] 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.

[43] 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)

[44] 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)

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

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

[47] 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.

[48] 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.

[49] 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?

[50] 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.

[51] 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).

[52] While EMBER suggested that it based its request for re-consideration subsections (a), (b) and (c), in its argument there is no reference to an error of fact.

Error in Jurisdiction

[53] It goes without saying that the Tribunal is a creature of statute and can only do that it is empowered to do under the legislation. The legislation establishes the process, if the Tribunal follows that process it cannot be said that it has exceeded its jurisdiction.

[54] The process begins with section 36(3): There are a number of pre-requisites:

- Is money payable?
- Is there an operator who is required to pay?
- Is that obligation to pay under a surface lease or compensation order?
- Has the money not been paid?
- Has the due date for payment passed?
- Is the Applicant the person entitled to receive the compensation?
- Has there been a written application?

The Application Form addresses each and every one of these elements and at the end requires that the Applicant acknowledge in writing that they understand that providing false and misleading evidence may result in the Tribunal taking action, including dismissing the claim, rescinding any order awarding compensation and being responsible for costs as well as confirmation that they have not provided incorrect information or false or misleading evidence.

[55] Upon a written application being received, section 36(4) then requires that the Tribunal make a finding with respect to the sufficiency of the evidence provided. The standard of proof is, of course, on a balance of probabilities. The test is whether the evidence “satisfactorily proves non-payment.” Like findings as to credibility, this is a ruling by the Tribunal as the sufficiency of the evidence and the weight to be attached. Section 36(4) does not include an “interim” requirement for notice to either the landowner or the potential operator.

As to the assessment as to what would constitute “satisfactory” proof, the Tribunal issues Guidelines that are publicly accessible to explain Tribunal processes. As Sara Blake notes in *Administrative Law in Canada 5th Edition*:

Many tribunals issue guidelines indicating the consideration by which they will be guided in the exercise of their discretion or explaining how they will interpret a particular statutory provision. The publication of policies and guidelines is a helpful practice. It give regulated persons advance knowledge of the tribunal’s opinion on various subjects so that they may govern their affairs accordingly. (Page 102)

Ms. Blake cautions that these guidelines ought not to be cast in stone or to use her word, “crystalized”:

The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria. In the circumstances of each individual case, the tribunal should consider whether it is appropriate to apply the policy (Page 102-103)

This Tribunal has published ABSRB Guideline 2020.1 which deals with the interpretation of section 36(4) of the *Act*. Consistent with Ms. Blake’s advice, the guideline stipulates that:

This Guidelines does not take away the Board’s [Tribunal’s] discretion of prevent the Board [Tribunal] from making whatever decision it believes it appropriate in each case. The Board [Tribunal] will still consider all the circumstance of a particular case when it makes a decision.

Guideline 2020.1 provides as follows:

When will the Board send the written notice demanding payment to the operator?

Board Administration can send the written notice to the operator(s) demanding full payment by or on behalf of the Board if the Application Form is complete with a signed declaration. [Emphasis in the original]

Accordingly, in this case, the Tribunal had evidence in support of each of the pre-requisites based on the application and its ruling as to the sufficiency of that evidence is consistent with the published Guidelines.

But there is another powerful factor in this case: as part of the Application, there is correspondence from EMBER pre-dating the application, in which EMBER admits to each and every element to be proven. EMBER in its correspondence of May 25, 2020 concedes that

- There is money payable for the year commencing August 29, 2020
- That EMBER is the responsible operator
- That there is a surface lease
- That the full amount has not been tendered
- That the due date is August 29th
- That the Applicant the person entitled to receive the compensation.

[56] The pre-requisites having been established, section 36(4) provides that the Tribunal “shall” send a written notice to the operator demanding full payment. It is difficult therefore to characterize the Demand as a “decision” of the Tribunal when the Tribunal has no choice.

[57] Nor does the Tribunal have a choice when it comes to identification of EMBER as a working interest participant and licensee. It is the Alberta Energy Regulator (AER), not the Tribunal that determines whether a corporation is a working interest participant or licensee. The Regulator makes the decision regarding the well, the licensee and the working interest participants.

Furthermore, the Tribunal is entitled to rely on the records of the AER. The Courts have made it very clear that the Tribunal’s jurisdiction is ancillary to the AER and the Tribunal is not expected to duplicate the work of the AER. (Windrift Ranches v. Alberta Surface Rights Board, 1986 ABCA 158 (CanLII) at para 5 and Togstad v. Alberta (Surface Rights Board), 2014 ABQB 485, 2015 ABCA 192 at Para 7)

The Tribunal relies on approvals from the Regulator to grant Right of Entry Orders under the *Act*. Similarly, the Tribunal is entitled to rely on the records for the AER to establish whether a corporation owns or controls all or part of a beneficial or legal undivided interest in a well.

In this particular case, the Applicant has admitted that it has the status as a working interest participant and licensee.

[58] Having established that EMBER is a working interest participant and licensee, again the Tribunal is bound by the legislation to conclude that EMBER is an operator.

[59] As the process by which the Demand was sent is prescribed in the legislation it cannot be said that the process is beyond the jurisdiction of the Tribunal. The legislation simply does not provide for the interim process that EMBER suggests would be required by the rules of natural justice. Without challenging the legislation itself, EMBER cannot establish a violation of the rules of Natural Justice.

Unfair Process

[60] As to the suggestion that EMBER did not “know the case to be met” the Notice itself sets

out the step-by-step process by which EMBER was named as a potential operator:

You are receiving this demand because you have been identified as a Licencee or Working Interest Participant by the Alberta Energy Regulator...

The Notice goes on to identify the legislation by which EMBER is classified as an operator:

...and are therefore an operator under section 36(2) of the Act.

The Notice provides:

Operators are responsible for making payments under a surface lease or compensation order...

The Notice also alerts EMBER as to the evidence that was received and the basis upon which the Tribunal accepts of that evidence:

A completed Application with a signed declaration is evidence the Tribunal accepts to satisfactorily prove non-payment.

Finally, the Notice also provides information as the opportunity that EMBER would have for disclosure:

You can request a copy of the application or Tribunal searches by contacting Tribunal Administration.

[61] The Notice itself identifies the evidence, the statutory authority, the reason why the Tribunal has accepted the evidence and ultimately the basis upon which the Demand was issued.

[62] Again, there is a more fundamental problem with this argument: the Applicant in correspondence prior to the application being brought by the Landowner has admitted to each and every element to be proven. To suggest that the application process could in any way “surprise” EMBER is not reasonable.

Remaining Issues

[63] The remaining issues deal with the Tribunal’s discretionary powers and are not responsive to the requirements of Rule 37. They will however be considered in connection with the section 36 application.

Relief Requested

[64] The difficulty is that the relief sought is internally inconsistent. If the Demand is rescinded, the process under section 36 comes to an end. The Landowner cannot obtain relief, there is no process by which further submissions could be made.

If on the other hand, the request for re-consideration is unsuccessful, the section 36 application will proceed in the normal course.

[65] EMBER was provided with notice of the application on July 16, 2021 and given an opportunity to respond. It did respond with submissions dated August 9, 2021. EMBER is a sophisticated operator represented by counsel. It chose to make the submissions that it did. The submissions of August 9, 2021 will be included in the materials provided to the panel dealing with the section 36 application.

[66] Accordingly, this Panel dismisses the application for reconsideration request.

Dated at the City of Edmonton in the Province of Alberta on June 24, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL



Susan McRory, Chair