



## LAND AND PROPERTY RIGHTS TRIBUNAL

**Citation:** Webster v Ember Resources Inc., 2023 ABLPRT 459

**Date:** 2023-08-18

**File No.:** BR2023.0075 (Ref. File RC2021.1989)

**Decision No.:** LPRT2023/SR0459

**Municipality:** County of Stettler No. 6

**In the matter of a proceeding commenced under** section 36 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:

NE1/4-34-34-20-W4M (LSD 10) as described in Certificate of Title No. 101 178 929 (the “Land”), particularly the area granted for a well site and access road, Alberta Energy Regulator Licence No. 0336414 (the “Site”).

**Between:**

Ember Resources Inc.  
and  
Journey Energy Inc.,

- and -

David Webster  
and  
Tammy Webster,

Operators,

Applicants.

**Before:** Romeo A. Rojas (the “Panel”).

Appearances by written submissions:

For the Applicants: Paul Vasseur, Agent

For the Operator Ember Resources Inc.: Tara M. Rout, Owen Law

Thunder Energy Inc. and Journey Energy Inc. made no submissions although notified of the application.

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**DEMAND FOR PAYMENT  
AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS**

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THE TRIBUNAL DEMANDS that the Operators Ember Resources Inc. and Journey Energy Inc., jointly, pay SIX THOUSAND THREE HUNDRED NINETY-SIX and 00/100 DOLLARS (\$6,396.00) (the “Compensation”) to the Applicants, jointly.

IT IS ORDERED that if the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicants, then without further notice the Operators’ right to enter the Site shall be suspended and terminated under section 36(5) of the *Act* at 4:30 p.m. on the dates below. This shall not affect any of the Operators’ obligations in regards to the Site, nor any other person’s rights against the Operators. The Surface Lease remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from September 1, 2023, lasting 15 days.
- Termination effective from September 18, 2023.

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**DECISION AND REASONS**

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[1] On July 13, 2021, the Applicants filed an application under section 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement for the above Site dated July 26, 2005 (the “Right-of-Entry Instrument”) for the 2020 anniversary date. The Applicants subsequently filed an updated application seeking unpaid compensation for the Right-of-Entry Instrument’s 2020 to 2022 due dates. The Panel will consider the two applications as one application (the “Application”). The Applicants acknowledge partial payment of the amounts due and seek a total of \$6,396.00 that they claim is outstanding under the Surface Lease (\$2,132.00 for each of the 2020 to 2022 anniversary dates).

[2] The Tribunal sent a Notice and Demand for Payment to Ember Resources Inc. (“Ember”) and Thunder Energy Inc. (“Thunder”) on or around August 13, 2021.

[3] Ember’s legal counsel delivered Ember’s response to the Tribunal on August 26, 2021 (the “Ember Response”). In the Ember Response, Ember requested that the Tribunal reconsider its Notice and Demand for Payment pursuant to section 29 of the *Act*. Ember did not use the prescribed form for applications under section 29 of the *Act*, but rather made its request by way of letter to the Tribunal. Ember requested that Tribunal rescind the Notice and Demand for Payment on the basis that it contained an error in jurisdiction because the Tribunal: (a) failed to give Ember notice of the Application prior to its decision to issue the Notice and Demand for Payment; (b) failed to base the Notice and Demand for Payment on a weighing of evidence and findings of fact; (c) fettered the discretion of the Tribunal; (d) improperly delegated its authority to Tribunal administration; and (e) issued the Notice and Demand based on an unfair process. The Ember Response also made submissions with respect to the Tribunal’s discretion under sections 36(6) and (7) of the *Act* and requested the opportunity to make further submissions on those subjects.

[4] Thunder did not make any submissions in response to the Notice and Demand for Payment. On May 24, 2023, the Tribunal sent a further Notice and Demand for Payment to Journey Energy Inc. (“Journey”), as successor to Thunder Energy Inc. The Tribunal did not receive any response to this further notice.

## ISSUES

[5] The preliminary matters before the Tribunal are:

- (1) Is a Notice and Demand for Payment a decision of the Tribunal to which section 29(1) of the *Act* applies?
- (2) If the Notice and Demand for Payment is a decision, is it an interlocutory or interim decision with a limited ability to be challenged?
- (3) If the Notice and Demand for Payment is a decision, has Ember established the basic requirements that would allow for reconsideration under the *Rules*?
- (4) Should Ember be afforded a further opportunity to make submissions on the merits of the Applicants' claims?

[6] The substantive issues before the Panel are:

- (1) Which corporations are Operators for the purposes of section 36 of the *Act*?
- (2) Is there money past due that has not been paid by the Operators to the Applicant under a surface lease or compensation order?
- (3) Should the Tribunal suspend and terminate the Operators' entry rights under section 36(5) of the *Act*?
- (4) Should the Tribunal direct the Minister to pay the Applicant any of the money past due that has not been paid by the Operators out of the General Revenue Fund under section 36(6) of the *Act*?
- (5) Should the Tribunal award the Applicants their costs under section 39 of the *Act*, and if so in what amount?

## DECISION

[7] The Panel decides in relation to the preliminary matters:

- (1) A Notice and Demand for Payment is not a decision of the Tribunal to which section 29(1) of the *Act* applies. Neither of its constituent parts reflects a final decision by the Tribunal. Both are issued in advance of a panel of the Tribunal considering and deciding the merits of the application.
- (2) In the alternative, if the Notice and Demand for Payment is a decision of the Tribunal, then the Panel finds it is at best 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 further alternative, if a Notice and Demand for Payment is a decision of the Tribunal, Ember has not established the basic requirements that would allow for re-consideration.

- (4) Ember had ample opportunity to respond to the substance of the Applicant's claims. It will not be granted an opportunity to make further submissions in response to the Application.

[8] The Panel decides in relation to the merits of the Applicants' claims:

- (1) For the purposes of section 36 of the *Act*, the Operators are Ember and Journey.
- (2) The Compensation is payable to the Applicants, jointly, by the Operators, jointly, and the written evidence satisfactorily proves that it has not been paid.
- (3) If the Operators have not complied with the Demand for Payment and paid the Compensation in full to the Applicants, Operator's entry rights shall be suspended and terminated on the dates in the attached Order.
- (4) If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant, then without further notice the Tribunal may direct the Minister to pay Compensation of \$6,396.00 out of the General Revenue Fund.
- (5) The Operators shall pay to the Applicants costs in the sum of ONE HUNDRED TWENTY-FIVE and 00/100 DOLLARS plus GST (\$125.00 plus GST of \$6.25).

## ANALYSIS

### Preliminary Matters

[9] Ember has asked the Tribunal to reconsider and rescind the issuance of the Notice and Demand for Payment under section 29(1) of the *Act*.

[10] Section 29(1) of the *Act* sets out the Tribunal's jurisdiction to review its decisions and orders. It states, in part:

- 29(1)** The Tribunal may
- (a) rehear and application before deciding it; [or]
  - (b) review, rescind, amend or replace a decision or order made by it [...]

[11] Section 37(3) of the *Rules* sets out when the Tribunal may exercise its discretion to review its decision or order. Section 37(3) of the *Rules* provides in part:

- (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;
  - (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;
  - (c) the decision or order was based on a process that was obviously unfair or unjust; [...]

[12] Ember submits that reconsideration is appropriate because the Notice and Demand for Payment is (a) a "decision", that (b) contains important errors of jurisdiction, and (c) was "decided" based on an unfair process.

[13] For the reasons that follow, the Panel finds that the Notice and Demand for Payment is not a decision of the Tribunal and is not subject to reconsideration under section 29(1) of the *Act*. In the alternative, if the Notice and Demand for Payment is a decision of the Tribunal, the Panel finds that the decision complained of was an interim one that did not adversely affect Ember's rights and was therefore not ripe for review. In the further alternative, the Panel finds that the Tribunal did not commit an obvious and important error of jurisdiction in issuing the Notice and Demand for Payment; nor did the Tribunal issue it as the result of an unfair process.

*1. Is a Notice and Demand for Payment a "decision" of the Tribunal?*

[14] Ember submits that a Notice and Demand for Payment is a decision of the Tribunal because "the Tribunal may not issue a demand for payment under s. 36(4) unless and until it concludes on the basis of the evidence before it that there has been a non-payment" and "[t]he only decision for the Tribunal to make after notice is issued is in respect of enforcement, not liability". Ember goes on to state that:

The Demands themselves are the decision on liability and the only means of altering that decision is through an application for reconsideration. The components of the Demands are not clerical issues that can be corrected after the fact. The identity of the operator, the amount of the debt, the existence of the lease as identified – these are fundamental findings of fact which underpin the Demands. If they have not been finally determined by the Tribunal, the Demands have no factual basis and cannot stand.

[15] Ember's characterization of a Notice and Demand for Payment as a "decision" of the Tribunal is important because section 29(1) of the *Act* only grants the Tribunal jurisdiction to review, rescind, amend, or replace "decisions" or "orders" of the Tribunal.

[16] Is a Notice and Demand for Payment a "decision" of the Tribunal and therefore subject to review under section 29(1) of the *Act*? The starting point for the Panel's 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" and "order" are not defined in the *Act*. One must therefore look to the scheme and context of the *Act* – and particularly section 36 of the *Act* – to ascertain their meaning.

[18] Section 36 of the *Act* creates a statutory remedy that would not otherwise exist. It does not change the contractual obligations of the parties; it provides relief to landowners if operators do not pay the required compensation to them. However, to access this relief the applicant landowner must take certain steps and satisfy certain conditions before the application can be advanced.

[19] First, section 36(3) of the *Act* requires that, when commencing an application, the applicant provide to the Tribunal written evidence that compensation has not been paid under a surface lease and that the due date has passed.

[20] Second, under section 36(4) of the *Act*, upon receiving the applicant's evidence, the Tribunal must "consider" whether the applicant's evidence "satisfactorily proves the non-payment". The language of section 36(4) is important. The Legislature has not used the word "decide" – it has instead used the word "consider". In addition, the Legislature has included the concept of "satisfactorily" proving non-payment. In the context of section 36(4), "consider" and "satisfactorily" suggest that the Tribunal is not finally determining the matter at this stage, but rather the Tribunal is considering whether the applicant has, on a *prima facie* basis, satisfied the evidentiary requirements for the Tribunal to proceed to the next stage of the scheme set out in section 36 – *i.e.*, the issuance of a Notice and Demand for Payment under section 36(4) of the *Act*.

[21] Once the applicant has established the existence of a claim on a *prima facie* basis, section 36(4) of the *Act* requires that the Tribunal issue a demand for payment to the operators: "[...] the Tribunal shall send a written notice to the operator demanding full payment". Again, the words are important: Written notice of the application is required, and the particulars of that written notice must include a demand for payment. The *Act* provides the Tribunal no discretion in this regard.

[22] Issuance of the Notice and Demand for Payment entails no immediate consequences for the recipient; it is the first step in a long-standing decision-making procedure that applies equally to all operators. Once the Notice and Demand for Payment is issued, section 36 of the *Act* clearly outlines the possible consequences to the operator of failing to respond to the Notice and Demand for Payment. These include the Tribunal suspending the operator's right to enter the site (section 36(5)(a)) and subsequently terminating the operator's rights under the surface lease (section 36(5)(b)) by written decision or order served on the operator. Additionally, under section 36(6) of the *Act* the Tribunal may direct the Minister to pay to the applicant out of the General Revenue fund the amount of money to which the applicant is entitled, after which the Minister can seek to recover the money from the operator as a debt to the Crown (section 36(9)).

[23] However, before any of these steps are taken, the *Rules* provide a procedure to ensure that due process has been provided. Decisions and orders finally determining an operator's liability and resulting remedies are not issued until the Tribunal has given the operators an opportunity to respond to the application and conducted a written or in-person hearing.

[24] The Alberta Courts have provided guidance on the object and purpose of section 36 of the *Act* and how the Tribunal's functions under it are to be carried out.

[25] 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)

[26] 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.

[27] The 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.

[28] Thus, considered in the context, object and purpose of section 36 of the *Act* as a whole, the Panel finds that a Notice and Demand for Payment does not reflect a decision of the Tribunal. Rather, in context, the Notice and Demand for Payment could be said to be akin to a commencement document.

[29] One can also look to the Tribunal’s *Rules* for direction on the proper characterization of a Notice and Demand for Payment. 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.

[30] 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 [Tribunal] to make a decision.” 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.

[31] Section 23(2) of the *Rules* 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. It 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.

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

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

[33] Decisions of the Tribunal are also assigned decision numbers.

[34] The Notice and Demand for Payment that was delivered to Ember was not signed by a member, nor did it indicate an effective date or bear a decision number. Under the *Rules*, it bears none of the hallmarks of a “decision” that the Tribunal issues after a hearing; it bears the hallmarks of a notice of hearing that the Tribunal issues prior to a hearing.

[35] Finally, assistance can be found in academic commentary. 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) [emphasis added]

[36] Ms. Blake also discusses what sorts of actions by a public official would not 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 opinion, **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) [emphasis added]

[37] In this context, the Panel finds that the Notice and Demand for Payment is not a reviewable decision, but rather a notice provided to Ember to alert it that it may need to take steps to protect its interests and warning it of the potential consequences of ignoring the Notice and Demand for Payment.

[38] In summary, the *Act* creates a unique statutory 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, it would make no sense to characterize notices issued pursuant to those statutory requirements as decisions or orders that would be capable of being reconsidered or reviewed under section 29(1) of the *Act*. It is a panel of the Tribunal that ultimately decides if the claims set out in the application have been proved, and it is the panel’s decision and orders in that regard that can be reconsidered or reviewed under section 29(1) of the *Act*.

[39] Accordingly, the Panel finds that the Notice and Demand for Payment in this matter is not a “decision” of the Tribunal and therefore section 29(1) of the *Act* does not apply.

2. *If the Notice and Demand for Payment could be characterized as a “decision” of the Tribunal, is it a final decision or an interim/interlocutory decision and what consequences flow from the characterization?*

[40] If this Panel is mistaken as to the characterization of the Notice and Demand for Payment, then it must determine whether the nature of the “decision” reflected in the Notice and Demand for Payment is one that should be capable of reconsideration.

[41] The authors of Macaulay, Sprague and Sossin’s *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)

[42] It is therefore arguable that by issuing a Notice and Demand for Payment the Tribunal decided to do something – it satisfied itself that there was *prima facie* evidence of nonpayment and decided to issue the Notice and Demand for Payment so that the application could proceed. But that is not the end of the analysis. The authors also point out that the courts are loathe to exercise their discretionary power to review what are variously described as interim, interlocutory or preliminary decisions – *i.e.*, decisions that are not finally determinative of the substantive issue in dispute. Examples include the following:

- (1) The Federal Court in *Black v. Canada (Attorney General)*, 2013 CarswellNat 3386, and Alberta's 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.
- (2) The Supreme Court of Canada in *Bell Canada v. Canadian Radio-Television and Telecommunications Commission*, 1989 CanLII 67 (SCC), [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 *Synchrude Canada Ltd. Alberta (Human Rights and Citizenship Commission)*, 2008 ABCA 217, and in *Encana Corporation v. Alberta (Energy & Utilities Board)*, 2004 CarswellAlta.
- (3) 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.

[43] But regardless of the nomenclature, the result is the same:

- (1) 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.
- (2) In *689799 Alberta Ltd.* the 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 “evince[ing] 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.
- (3) In *Synchrude*, 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).
- (4) 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).

- (5) In the *Wood Buffalo* case, Justice Martin stated: “The Alberta courts have adopted a strong policy against litigation in installments” (Para 26).

[44] While the above decisions were made in the context of courts being asked to judicially review tribunal decisions, the Panel considers that the courts’ logic applies equally in the context of a request for reconsideration under section 29(1) of the *Act*. If issuance of the Notice and Demand for Payment is a “decision” of the Tribunal, it is a decision of an interlocutory, interim, or preliminary nature, with which the courts are reluctant to interfere. Likewise, when considering whether to review a Tribunal decision or order under section 29 of the *Act*, the Panel is called upon to exercise discretion, as a review is not obligatory.

[45] The Panel concludes that if the Notice and Demand for Payment is a “decision”, it is an interim one, and to pursue multiple reviews on matters leading up to the final decision by the Tribunal would not, in the words of Sirrs J., be “pragmatic”, “inexpensive”, or “expeditious”, particularly when the option of reconsideration is discretionary. Therefore, if the Notice and Demand for Payment is an interim decision of the Tribunal, the Panel declines to exercise its discretion to review it.

3. *Has Ember established the basic requirements set out in Section 37(3) of the Rules that would allow for reconsideration?*

[46] Finally, if this Panel is mistaken and the Notice and Demand of Payment is a decision or interlocutory decision that it is appropriate to reconsider under the case law cited above, the Panel must still determine whether the *Rules*’ basic requirements for re-consideration have been met.

[47] The first requirement under the *Rules* is that the party seeking review of a decision or order deliver an application to the Tribunal. The application must be in writing, and it must contain, among other things, the “decision or order number” for which a review is being sought (*Rules*, section 37(2)(a)). Where there is an application form, section 14(2) of the *Rules* provides that “the application must include a completed form”. Ember did not use the Tribunal’s prescribed form for reconsideration and its letter application did not reference a decision or order number. It is therefore arguable that Ember’s reconsideration application should be dismissed for failure to comply with the *Rules*.

[48] However, setting aside these deficiencies of form, the Panel must decide whether reconsideration is appropriate in the circumstances. Section 37(3) of the *Rules* requires that the Tribunal carry out a two-step process when deciding whether to exercise its discretion to reconsider an order or decision. It states:

The [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;
- (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;
- (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.

[49] A party seeking reconsideration must first establish the pre-requisites for reconsideration on a balance of probabilities. Only once the Tribunal determines that the pre-requisites have been met does it go on to the next step to determine whether it should exercise its discretion to review the decision in the specific case before it (*Canadian Natural Resources Limited v. Main*, 2020 ABSRB 735).

[50] Ember bases its request for reconsideration on the following grounds:

- (1) The Tribunal allegedly made an error of jurisdiction and breached natural justice under section 37(3)(a) of the *Rules* by: (a) Failing to give Ember notice of the Application prior to making its decision to issue the Notice and Demand; (b) concluding that there was non-payment without an examination and weighing of the evidence, thereby fettering the Tribunal's discretion; and (c) improperly delegating its authority.
- (2) The Notice and Demand for Payment allegedly was issued as the result of an unfair process falling under section 37(c) of the *Rules* because Ember was not given notice of the application against it, did not have an opportunity to know the case against it or the opportunity make submissions before the decision was made to issue the Notice and Demand for Payment.

[51] The Panel notes that Ember has not alleged under Section 37(b) of the *Rules* that the Notice and Demand for Payment contained an important (or any) error of fact.

[52] The Panel will address each of Ember's submissions in turn and consider whether Ember has established the pre-requisites for a reconsideration under section 29 of *Act* and section 37(3) of the *Rules*.

Did the Tribunal make an obvious and important error in jurisdiction?

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

[54] The process for issuing a Notice and Demand for Payment begins in section 36(3) of the *Act*, which requires that the Tribunal be satisfied that the following questions are answered in the affirmative:

- 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?

[55] The prescribed application form addresses each of these elements and requires that the applicant acknowledge in writing that it understands that providing false and misleading evidence may result in the Tribunal taking action, including dismissing the claim, rescinding any order awarding compensation, or ordering costs against the applicant.

[56] Once the Tribunal is satisfied that these questions have been answered affirmatively, section 36(4) of the *Act* provides that the Tribunal “shall” send a written notice to the operator demanding full payment. It is therefore difficult to characterize the Notice and Demand for Payment as a “decision” of the Tribunal when the *Act* requires that the Tribunal issue it. As the process by which the Notice and Demand for Payment was sent is prescribed in the legislation it cannot be said that the process is beyond the jurisdiction of the Tribunal.

[57] In the following sections, the Panel addresses Ember’s specific jurisdictional arguments.

a) Did the Tribunal Breach Natural Justice?

[58] Ember argues that the Tribunal breached the rules of natural justice by failing to give Ember any notice of the application before issuing the Notice and Demand for Payment, thereby denying Ember any opportunity to make representations or submissions before its issuance. Ember says that this amounts to an error of jurisdiction within the scope of section 37(3)(a) of the *Rules*.

[59] As the Panel has previously noted above, section 36(4) of the *Act* requires that the Tribunal send a Notice and Demand for Payment to operators once it is satisfied that applicant has met the requirements to bring an application. The Tribunal’s issuance of a Notice and Demand for Payment is the start of the merits phase of proceedings under section 36 – not the end of it.

[60] Ember had the opportunity to respond to the applicant’s allegations upon receipt of the Notice and Demand for Payment. The Notice and Demand for Payment provided: “If you have paid the compensation claimed you must provide evidence to the Tribunal and **a written response within 30 days from the date of this demand**” [emphasis in original]. The fact that Ember provided the Ember Submission shows that it was aware that it had the opportunity to make submissions. The Panel does not find a breach of natural justice in circumstances where Ember not only had an opportunity to respond to the application, but also was aware of the opportunity to provide a response and, in fact, did so.

[61] Moreover, the legislation simply does not provide for 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, and the Panel finds that there was no violation.

b) Did the Tribunal Fail to Make Findings of Fact Prior to Issuing the Notice and Demand for Payment?

[62] Ember submits that the Tribunal exceeded its jurisdiction by issuing the Notice and Demand for Payment prior to concluding that there had been a non-payment based on an examination and weighing of the evidence. This argument is based on Ember’s assertion that in an application under section 36 of the *Act* the Tribunal exercises its fact-finding function under section 36(4) of the *Act* as part of its decision to issue a Notice and Demand for Payment. Ember further submits that the Notice and Demand for Payment is: “[A]kin to issuing an order and commencing a collections process. It depends on the facts found, on the basis of evidence weighed, by the Tribunal. It is not the beginning of evidence gathering.” Ember submits that the Notice and Demand for Payment contains no statements of fact or findings of the Tribunal – it was simply issued as a matter of course and, in Ember’s submission, is void and should be rescinded.

[63] As the Panel has previously noted, the Tribunal’s issuance of a Notice and Demand for Payment is a requirement of the *Act* to commence the process set out in section 36 of the *Act*. It takes place after the Tribunal has reviewed the application for completeness and considers that the applicant has shown on a *prima facie* basis that it has evidence to satisfy each of the pre-requisites to bringing an application in

section 36(3) of the *Act*. Section 36(4) of the *Act* does not require that the Tribunal make final and binding findings of fact prior to issuing a Notice and Demand for Payment, and the Tribunal does not do so.

[64] In this respect, the Panel further notes that Ember's assertion that in this case "[t]he Demand[]" [was] not accompanied by any statement of findings of fact, nor any indication that evidence was considered and weighed to come to the decision to issue the Demand[]" is incorrect. The Notice and Demand for Payment contains allegations of fact taken from the application and Tribunal searches, based on which the Tribunal was satisfied that it was appropriate to issue the Notice and Demand for Payment. Those statements of fact are:

- Applicant: David Lane Webster; Tammy Raye Webster
- Operators: Ember Resources Inc.; Thunder Energy Inc.
- Land Location: NE1/4-34-034-20-W4M LSD 10
- Date of Original Agreement: July 26, 2005
- Current Compensation Rate: \$4,350.00
- Payment Missed: 2020
- Total Amount Claimed: \$2,132.00
- The Land and Property Rights 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)....
- You are receiving this demand because you have been identified as a Licensee or Working Interest Participant by the Alberta Energy Regulator and are therefore an operator under section 36(1) of the Act.

[65] Section 36(5) of the *Act* goes on to state what the Tribunal may do by way of subsequent written decision or order served on the operator if the operator does not comply with the Demand for Payment. These potential remedies are also set out in the Notice and Demand for Payment.

[66] However, between the steps set out in sections 36(4) and 36(5) of the *Act* the Tribunal conducts an in-person or written hearing procedure in accordance with the *Rules*. It is only at this stage that a Panel of the Tribunal weighs the applicant and operator's evidence, makes findings of fact, determines the validity of the applicant's claims and issues a decision setting out its findings of fact and issuing orders or authorizing future orders.

[67] In the context of the statutory scheme of section 36 and the Tribunal's rules and practices, the Panel finds that the Notice and Demand for Payment is not "akin to issuing an order and commencing a collections process". The Tribunal has separate processes for issuing decisions, orders and directions, which are set out in sections 36(5), (6) and (7) of the *Act* and Sections 33 to 35 of the *Rules*, which processes only take place after a hearing has been conducted as described in the preceding paragraph.

[68] The Panel therefore finds that the Notice and Demand for Payment does not need to be based on definitive findings of fact or weighing of evidence by a Panel of the Tribunal to be validly issued.

c) Did the Tribunal Fetter its Discretion, thereby committing an error in jurisdiction?

[69] Ember argues that “If the Tribunal routinely issues a notice and demand for payment for every s. 36 application it receives, Ember submits it is fettering its discretion and failing to comply with its obligation under the Act to consider the evidence before it makes a finding as to liability”.

[70] The Panel finds that issuance of a Notice and Demand for Payment based on the materials contained in a completed sworn application does not fetter the discretion of the Tribunal. First, as noted above, issuance of a Notice and Demand for Payment is not discretionary; under section 36(4) of the *Act*, the Tribunal must issue the Notice and Demand for Payment on receipt of a complete application.

[71] Second, it is incorrect to suggest that the Tribunal automatically issues a Notice and Demand for Payment for each application it receives. Tribunal Administration has the discretion to – and does – return applications to the applicant as incomplete if they do not contain the information prescribed by section 36(3) of the *Act* or required by the form, or if they have not been signed by the correct party, among other reasons. This discretion is found in Section 15(1) of the *Rules*, which provides:

**15. Board Administrator Review of Applications**

(1) When an application is submitted for filing, a [Tribunal] Administrator shall review the application and may, by notice to the applicant(s), refuse or suspend processing the application based on any of the following:

- (a) failure to submit the information and documentation required with the application;
- (b) failure to comply with these rules;
- (c) failure to comply with the requirements of the Act; or
- (d) the application was received later than the applicable deadline or limitation.

[72] Third, the facts contained in the Notice and Demand for Payment do not fetter the discretion of the Panel that ultimately decides whether compensation is owing. Panels conduct their own independent reviews of the application and supporting evidence, as well as operators’ submissions and evidence, to make findings of fact prior to issuing a decision or order. It is not uncommon for a Panel to reject an application because, on a detailed review of the evidence, an applicant had not established a right to compensation, or to find that an operator identified by the AER was not, in fact, an operator at the relevant time. A panel’s retention of discretion and powers in this regard are set out in section 16 of the *Rules*, which provides:

**16. Acceptance of an Application**

(1) When an application has been reviewed and is considered complete, a [Tribunal] Administrator will notify the applicant that the application is accepted within a reasonable time.

(2) Although a [Tribunal] Administrator will review applications, it is always the applicant’s responsibility to ensure that their application is complete, accurate and in compliance with the requirements of the [Tribunal] and the statutory requirements.

(3) **Ultimately, it will be up to the [Tribunal] panel hearing the application to decide whether or not the application is valid.** [emphasis added]

[73] The Panel therefore finds that the Tribunal Administration’s issuance of a Notice and Demand for Payment and the statements of fact contained therein do not fetter the discretion of the Panel that ultimately hears the application.

d) Did the Tribunal Improperly Delegate its Authority?

[74] Ember submits that the Tribunal may not delegate its authority to issue a notice and demand for payment to an administrator or employee of the Tribunal; it must be a panel of the Tribunal that makes that “decision”. It notes that Notices and Demands for Payment are not signed by a member of the Tribunal or a panel of the Tribunal; they merely indicate that they are issued by the Land and Property Rights Tribunal Administration. Ember therefore submits that an administrator of the Tribunal must have accepted the section 36 applications and improperly executed the authority of the Tribunal by issuing a Notice and Demand for Payment, thereby committing an error of jurisdiction because “there is no section of the Act which gives the Tribunal authority to delegate the decision-making process on a section 36 application”. Ember points to section 1(p.1) of the *Act*, which defines “Tribunal” as “the Land and Property Rights Tribunal established under the Land and Property Rights Tribunal Act”.

[75] The Panel finds that while an administrator of the Tribunal issued the Notice and Demand for Payment, this did not constitute an improper delegation of the Tribunal’s authority or an error in jurisdiction.

[76] To begin, Ember is correct that section 1(p.1) of the *Act* defines “Tribunal” as “the Land and Property Rights Tribunal established under the Land and Property Rights Tribunal Act”. It is also correct that section 36(4) of the *Act* empowers the “Tribunal” to send a written notice to the operator demanding full payment if it considers that an application satisfactorily proves non-payment. Ember notes that the definition of “Tribunal” in the *Act* does not include administrators or employees of the Tribunal, and therefore concludes that there is no authority to delegate issuance of a Notice and Demand for Payment to a Tribunal administrator.

[77] In support of this position, Ember cites Sara Blake’s *Administrative Law in Canada*, which states that “[a] tribunal may not delegate its decision-making powers to one of its members or employees” except where it is given express statutory authority to do so.

[78] However, just as the *Act*’s definition of “Tribunal” does not include administrators or employees, it similarly does not include individual members or panels of members. Thus, on Ember’s argument a member or panel would similarly not have jurisdiction to issue a Notice and Demand for Payment, even though Ember asserts that a member or panel needs to sign the Notice and Demand for Payment.

[79] One must look further for guidance as to what delegation of the Tribunal’s authority, if any, is allowed.

[80] The *Land and Property Rights Tribunal Act*’s (the “LPRT Act”) definitions section does not provide much guidance. It defines “Tribunal” as “the Land and Property Rights Tribunal established under section 2”. However, section 3(4) of the LPRT Act does provide clarity on the chair’s powers of delegation. It provides:

Subject to the regulations, the chair may delegate any power given to the chair under this Act.

[81] Part of the chair’s powers include the power to designate a member or panel of members to deal with a matter or class or group of matters. Those members or panels perform the functions of the Tribunal in respect of those matters and have all the powers and jurisdiction of the Tribunal when performing those functions.

[82] Section 6 of the LPRT Act also clarifies the powers of the Tribunal. Section 6(1) states:

In addition to the powers and duties given under the existing legislation, the Tribunal shall have the power to make rules respecting its practice and procedures and to regulate its own process.

[83] In addition, Section 7 of the LPRT Act states:

There may be appointed, in accordance with the Public Service Act, as many directors, case managers, inspectors, land examiners, legal counsel, officers and other staff as may be required to carry out the business of the Tribunal.

[84] The Tribunal has promulgated the *Rules* to regulate its own process, as it is authorized to do under section 6 of the LPRT Act. It has also appointed staff to carry out the business of the Tribunal. Section 6 of the LPRT Act grants the Tribunal broad power to make rules respecting its practice and procedures, and to regulate its own process. This includes the procedures and process by which section 36 applications are received and processed by the Tribunal – which includes staff appointed under section 7 of the LPRT Act to carry out the business of the Tribunal – prior to being assigned by the chair to a member or panel of the Tribunal to issue a decision and orders with respect to the application.

[85] The Panel finds that the powers granted to the Tribunal under section 6 of the LPRT Act to create rules to govern its procedures and process are broad enough to include the power to delegate certain administrative functions – such as processing applications and issuance of commencement documents such as the Notice and Demand for Payment – to the Tribunal’s administrative personnel. It follows that permitting Tribunal Administration to carry out this process under the *Rules* is not an improper delegation of the Tribunal’s jurisdiction, as it is authorized by sections 6 and 7 of the LPRT Act. The Tribunal chair and members/panels assigned by the chair retain the Tribunal’s core decision-making powers to issue binding decisions and orders with respect to those applications.

[86] For all the reasons set out above, the Panel finds that the Tribunal did not commit an error in jurisdiction, much less an “obvious and important” error of jurisdiction; nor did it breach the rules of natural justice. As such, the Panel finds that Ember has not established that the basic requirement for review in section 37(3)(a) of the *Rules* has been met.

Was the Notice and Demand for Payment Issued as the Result of an Unfair Process?

[87] Ember submits that the Tribunal’s “decision” to issue the Notice and Demand for Payment was based on an unfair process because Ember did not have the opportunity to know the case against it or make submissions before the “decision” was made to issue the Notice and Demand for Payment. Ember asserts that this constitutes an unfair process pursuant to section 37(3)(c) of the *Rules* and that, as a result, the Notice and Demand for Payment should be rescinded.

[88] The Panel notes that the threshold for review is that the process used to arrive at a decision was “obviously” unfair or unjust, which Ember has not alleged. Regardless, even on the lesser standard submitted by Ember, the Panel does not find that the process by which the Tribunal issued the Notice and Demand for Payment was unfair or unjust.

[89] The Panel has previously found in this decision that the Notice and Demand is not a “decision” to which section 37(3) of the *Rules* applies. It is analogous to a commencement document in court proceedings in that it does not determine a party’s rights, but rather gives the respondent notice that an application has been made against it and the facts alleged in the application. It also notifies the respondent of how to get

further information and when any submissions that they may wish to make are due. Respondents' rights are not affected until they have been given a chance to respond and a panel of the Tribunal issues a decision and orders after having considered all parties' submissions.

[90] The Panel finds that Ember did not need to know the case against it or be given a chance to respond to the case against it prior to the Tribunal's issuance of the Notice and Demand for Payment. Ember was given the opportunity to know the case against it *by the Notice and Demand for Payment*. The Notice and Demand for Payment also gave Ember the opportunity to make submissions before a panel of the Tribunal issued a decision or orders affecting Ember's rights. Ember did so by providing the Ember Response to the Tribunal.

[91] For the reasons set out above, the Panel finds that Ember has not established the basic requirement to conduct a review under section 37(3)(c) of the *Rules*.

[92] The Panel therefore finds that Ember has not established the basic requirements that are necessary before a panel can exercise its discretion whether to conduct a review under section 29 of the *Act*. As such, the Panel declines to conduct such a review.

Does issuance of a notice under section 36(4) of the *Act* have a significant adverse effect on Ember?

[93] Ember alleges that the Notice and Demand for Payment has a significant adverse effect on it:

The decision to issue a notice under s.36(4) of the Act has a significant adverse effect on the operator. Not only can the money allegedly owing automatically become a debt to the Crown, but the right to operate the facilities located within the leased premises may be terminated. This, we submit, is a severe outcome for an operator. Therefore, we submit, the operator must have a right to be heard before a decision is reached and a notice issued.

[94] Providing an explanation of how the party seeking a review is adversely affected by the decision or order is a requirement of section 37(2)(c) of the *Rules*. However, for the purposes of deciding whether the Applicant has met the basis requirements to bring an application under section 37(3) of the *Rules*, adverse effect is not a consideration. As the Panel has declined to grant a review of the Notice and Demand for Payment, it is not necessary to address these submissions in detail.

[95] However, if the Panel is wrong and Ember has satisfied the basic requirements in section 37(3) of the *Rules*, the Panel finds that issuance of the Notice and Demand for Payment did not cause any adverse effect to Ember. The Notice and Demand for Payment does not allow for immediate suspension or termination of Ember's rights of access. It also does not allow for money that may eventually be found owing to automatically become a debt to the Crown. As described above, after the Tribunal issues a Notice and Demand for Payment the respondents are provided an opportunity to provide evidence and submissions in response, and an in-person or paper hearing is conducted. Only after these steps are taken does the Tribunal issue a decision and orders that may have an adverse effect on a party.

[96] In short, the Notice and Demand for Payment is just the first step in the section 36 application process and does not have any effect on operators *per se*, other than inviting them to defend the claim if they elect to do so.

#### 4. *Should the Tribunal Provide Ember a Further Opportunity to Make Submissions?*

[97] While the Panel considered whether to issue a decision solely on Ember's request for reconsideration and provide Ember another opportunity to make submissions on the merits, it decided not to do so for the following reasons:

- Ember had every opportunity to request a copy of the application and supporting evidence from the Tribunal and make submissions on the merits within the period provided in the Notice and Demand for Payment. The Ember Response contains submissions in relation to the Tribunal's exercise of its discretion under section 36(6) and (7) of the *Act*. It was open to Ember to make more detailed submissions in relation to these sections – or any other matters it wished to make submissions on – within the 30-day period provided. Ember elected not to do so.
- A ground for reviewing a decision under section 37(3) of the *Rules* is that a “decision or order shows an important error of fact [...] that affects the decision or order”. Ember did not raise an important error of fact as one of its grounds for review of this “decision”, thereby tacitly acknowledging the accuracy of factual allegations set out in the Notice and Demand for Payment.
- The Notice and Demand for Payment was delivered to Ember on August 13, 2021. Ember provided the Ember Response less than two weeks later, on August 26, 2021. It is now 2023. There is no reason to delay the Applicant's receipt of compensation further (if so ordered) by granting Ember an opportunity to make additional submissions that it could have made in August 2021.

[98] The Panel now turns to consider the merits of the Applicants' claims.

#### **Merits of the Application**

##### 1. *Who is an operator for the purpose of section 36 of the Act?*

[99] For the purpose of recovery of compensation applications, the definition of the word *operator* is set by section 36(1) and (2) of the *Act*. Specifically, sections 36(1) and (2) of the *Act* expand the definition of *operator* so that it has a broader meaning than in the rest of the *Act*.

##### Section 36(1)(c) – AER Licence Holder

[100] Under section 36(1)(c) the holder of a licence issued by the Alberta Energy Regulator (“AER”) is an *operator*. This includes the person who held the licence on the due date and successors to the licence. AER Well Licence No. 0336414 for the Site is in the name of Ember and has been since 2015. The Panel finds that Ember is an *operator* under section 36(1)(c) on the 2020, 2021 and 2022 due dates.

##### Section 36(1)(d) – Working Interest Participants

[101] Under s. 36(1)(d) working interest participants are *operators*. The Panel finds that Ember and Thunder are *operators* under section 36(1)(d) on the 2020, 2021 and 2022 due dates, as an AER Well Summary Report dated February 10, 2023, for AER Well Licence No. 0336414 shows that Ember and Thunder have been working interest participants in the Site since 2015, with a forty percent (40 %) and sixty (60%) interest, respectively.

[102] With respect to Thunder, Alberta corporate searches show that Thunder amalgamated with 832033 Alberta Inc. on June 26, 2007, to form Sword Energy Inc. (“Sword”). Sword, in turn, changed its name to

Journey Energy Inc. on July 1, 2012, and subsequently amalgamated with 1317139 Alberta Ltd., keeping the name Journey Energy Inc.

[103] The Panel therefore finds that Ember and Journey (formerly Thunder) were Operators under section 36(1)(d) of the *Act* on the 2020, 2021 and 2022 due dates.

Section 36(1)(e) – Holder of a surface lease or right of entry order

[104] Under section 36(1)(e) the holder of the Surface Lease or Right of Entry Order for the Site is an *operator*. This includes persons who held the surface lease at the time of non-payment and their successors. The Panel finds Ember is an *operator* for the purpose of section 36(1)(e) on the 2020, 2021 and 2022 due dates because, while a copy of the Right-of-Entry Instrument has not been provided:

- a. Registration No. 051 312 921 on the current Certificate of Title for the Land is a caveat for a surface lease under 20 acres. Ember is the caveator. The caveat itself relates to an agreement dated July 26, 2005 – the date of the Right-of-Entry Instrument.
- b. The Applicants have provided a copy of a letter from Ember to the Applicants dated May 4, 2020, which acknowledges the Right-of-Entry Instrument and the annual rate of compensation (\$4,350.00), which the letter seeks the Applicants' agreement to reduce to \$2,218.00 (the "Ember Letter").

[105] The Panel therefore finds that Ember and Journey were *operators* for the purposes of section 36(1) of the *Act* for the 2020, 2021 and 2022 due dates.

2. *Is there money past due and unpaid by the Operators to the Applicant under a surface lease or compensation order?*

[106] The Certificate of Title shows that the Applicants were the landowners at the relevant times. The Applicants have established the existence of the Right-of-Entry Instrument and the annual compensation payable thereunder of \$4,350.00.

[107] In the Ember Letter, Ember sought to reduce the annual compensation to \$2,218.00 effective July 26, 2020. There is no evidence before the Panel that the Applicants agreed to this proposal; nor is there any evidence that the annual compensation was reduced by way of an application and order under section 27 of the *Act*. The Applicants have provided a solemn declaration that for the 2020, 2021, and 2022 due dates Ember has paid only \$2,218.00 per year. The Applicants seek the difference between the agreed compensation of \$4,350.00 per year and the \$2,218.00 per year that Ember paid for 2020, 2021 and 2022 – *i.e.*, \$6,396.00 (the "Compensation").

[108] The Compensation is supported by the Application and supporting documentation. The Applicants have declared in writing that the Compensation has not been paid.

[109] The Panel is satisfied that the Compensation is owed by the Operators, jointly, to the Applicants, jointly, for the unpaid portion of the 2020, 2021 and 2022 annual payments due under the Surface Lease. This amount is calculated as three payments of \$2,132.00 due on July 26 for the years 2020, 2021 and 2022. The Site has not been reclaimed, and the Surface Lease remains in effect.

[110] At the time the Compensation became due, Ember and Journey (formerly Thunder) were Operators. Past Tribunal decisions with multiple operators have found the operators to be concurrently responsible to pay compensation. *Dobish v Terra Energy Corp*, 2019 ABSRB 737 held at Para 14: "... nothing in the *Act* limits the liability of any one of the operators, including s.36(4) and working interest participants. If the

Act meant to limit the liability of a working interest participant to the percentage of its working interest, it would have explicitly said so. Rather, s.36(4) of the Act instructs the Board to demand “full payment’ from an operator if evidence satisfactorily proves non-payment.” Section 36 (2) of the Act directs that the words and expressions in s.36(1) shall be construed in accordance with the *Environmental Protection and Enhancement Act*. The Court of Appeal in *Sarg Oils Ltd. v. Environmental Appeal Board*, 2007 ABCA 215 considered operator liability for reclamation and found that it was not patently unreasonable for the Environmental Appeals Board (EAB) to conclude that Sarg Oils was responsible for clean-up of the well sites, even if there might be other operators who were concurrently responsible.

[111] The Panel accepts this reasoning and finds the Compensation is payable to the Applicant by the Operators, jointly, and the evidence satisfactorily proves non-payment.

3. *Should the Tribunal suspend and terminate the Operator’s entry rights under section 36(5) of the Act?*

[112] The Tribunal’s authority to suspend and terminate an operator’s entry rights is found in section 36(5) of the *Act*:

**36(5)** If the notice under subsection (4) is not complied with, the Board may, by written order served on the operator:

- (a) Suspend the operator’s right to enter the site affected by the compensation order or lease, and
- (b) after giving the operator written notice of its intention to do so, terminate all the operator’s rights under the right of entry order or lease relating to the site that is subject to the claim under this section,

without affecting any of the operator’s obligations in regard to the site, including those under this section, or any other person’s rights against the operator, and on the basis that the lease or compensation order remains in place for purposes of shutting-in, suspension, abandonment and reclamation of the site.

[113] The Ember Response asserts that the Tribunal must exercise its discretion under section 36(5) of the *Act* considering the public interest and all relevant factors. According to the Ember Submission, these factors include that:

These sites contain producing wells, income from which enables the operator to make payment 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 the [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.

[114] The Application before the Panel is under section 36, which is not a compensation review application under section 27 of the Act. Furthermore, a decision under section 36 does not amend the Right-of-Entry Instrument or affect the compensation payable under the Right-of-Entry Instrument, as is the case under a section 27 application.

[115] Section 36 requires the Tribunal to determine whether non-payment has occurred, and if so, to issue a decision and demand for payment. Only if the operator does not comply with the notice demanding payment does the Tribunal then have the ability to suspend or terminate an operator's entry rights under section 36(5) of the *Act*.

[116] Section 36(5) must be read in the context of section 36(4), which states: "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."

[117] The Panel notes that section 36(5) allows the Tribunal to suspend and terminate an operator's right to enter the site affected by the lease only if the operator has failed to comply with the notice demanding full payment under section 26(4). It is true that this is a discretionary authority, however Ember has not satisfied the Panel that its authority shouldn't be exercised in this case. The operator has not provided any evidence that the amount demanded was not owed, or that there was an error. The Panel is not satisfied that the Right-of-Entry Instrument has been amended. Even if the operator had sought a review of the rate of compensation under section 27, it would not be entitled to pay less than the contractual amount until it obtained a new compensation order from the Tribunal.

[118] When the operator does not comply with a demand notice under section 36(4) of the *Act*, section 36(5) allows the Tribunal to suspend and terminate the operator's rights under the surface lease. This is the authority allowed under the *Act* to enforce the notice for demand of payment where the Tribunal finds evidence of non-payment. The Panel finds such a consequence reasonable when the operator has ceased (for whatever reason) to pay compensation as required under a surface lease. If the operator is not complying with the terms of the surface lease as negotiated between the parties, then the operator should no longer have the right to access that site and benefit from its production.

[119] Section 36 provides a remedy in the case where an operator has ceased making payments as required under a surface lease agreement, a contract between two parties. This position is supported by *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 ("*Devon*"). The Tribunal merely enforces this agreement under section 36. Sections 36(4) and (5) do not introduce any other factors, such as public interest, but simply require a determination of whether non-payment under a surface lease has occurred.

[120] Ember argues, without providing any supporting evidence, that suspension and termination will increase the risk that the well on the Site will become an "orphan". The Ember Submission also makes unsupported statements about Ember's ongoing ability to meet its obligations. The Panel finds that Ember is an active corporation, is operating a producing well on the Site, and is benefitting from that operation. Ember has not provided evidence that the amount claimed is not payable; rather, it is asking the Tribunal to decline to enforce a debt that is outstanding. Ember has not satisfied the Panel that it should not exercise its authority to suspend and terminate Ember's access to the Site if Ember does not comply with the demand for payment. As previously noted by the Panel, Ember had a remedy available to it under section 27 of the *Act* if it is paying more compensation than it believes is reasonable.

[121] Ember has been notified of this proceeding and has had time to make the payment. Ember will have yet another opportunity following this decision to pay the Compensation, failing which a suspension order will issue. If Ember continues to refuse to make the payment a termination order will come into effect.

4. *Should the Tribunal direct the Minister to pay the Applicants any of the money past due that has not been paid by the operator(s) out of the General Revenue Fund under section 36(6) of the Act?*

[122] Section 36(6) of the *Act* provides:

(6) If, within 30 days of the Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction that full payment has been made, the Tribunal may direct the Minister to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled.

[123] The Ember Submission asserts that when exercising its discretion under section 36(6) of the *Act* 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) of the *Act* is not to enforce payment under a surface lease, but rather to ensure that the landowner is fairly compensated for any loss, as payment beyond this would engage the public interest and result in the lessor being "unjustly enriched at the expense of the taxpayer". Ember claims that the rental payments that it has made under the Surface Lease (*i.e.*, the \$2,218.00 per year that it proposed in the Rental Review Letter, and subsequently paid, but which the Panel has found was not accepted by the Applicant) represents fair compensation for the actual loss of use and adverse effect on the Landowner. Additionally, Ember submits that the Applicant has a duty to mitigate its losses to the extent possible in the circumstances and demonstrate such mitigation to the Tribunal so that the Panel can take this into consideration when exercising its discretion to direct payments from the Minister under section 36(6) of the *Act*. Ember asserts such an approach would not be prejudicial to the Applicant, which will still have available to it the usual civil remedies for enforcing the Surface Lease as a commercial contract through the courts to recover any outstanding balance.

[124] In *Devon*, the Court of Queen's Bench considered the Tribunal's responsibility when considering an order under s. 36(5) and (6) and held at paragraph 29:

... the function of sections 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 prove the existence of a lease and that rent has not been paid. Upon proof of such, in most cases, the province would then pay the rent and the operator would then face the province, seeking reimbursement from the operator.

... if the ... owner's claim is unjustified, is patently absurd, or provides an unjust enrichment, the Board should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears.

[125] According to *Devon*, the Panel's decision to direct the Minister to pay out of the General Revenue Fund is discretionary. This was confirmed by the Alberta Court of Queen's Bench in *Provident Energy Ltd v Alberta (Surface Rights Board)*, 2004 ABQB 650.

[126] Section 36(9) of the *Act* speaks to what occurs if the Minister is directed to pay:

(9) Where the Minister pays money under subsection (6) or (7),

(a) the amount paid and any expenses incurred, whether by the Crown or by a private agency, in collecting or attempting to collect the money owing, constitute a debt owing by the operator to the Crown, and

(b) a written certificate issued by or on behalf of the Minister certifying the payment of the amounts referred to in clause (a), including expenses, may be entered as a judgment of the Court of Queen's Bench for those amounts and enforced according to the ordinary procedure for enforcement of a judgment and that Court.

[127] In *Praskach Farms v Lexin*, 2020 ABSRB 85 ("*Praskach*"), the Tribunal concisely summarizes the scope of authority under section 36 of the Act and the factors to consider when directing the Minister to pay either the full amount of Compensation owing or a reduced amount if payment of the full amount is unjustified. The Tribunal held (at paragraph 10):

There are two factors particularly important for considering annual compensation and whether directing the Minister to pay the full amount owing is unjustified. ... this is not a review of compensation under section 27, however, the loss of use and adverse effect are components of fair compensation which the Board can consider when determining if directing the Minister to pay the full amount owing is justified.

[128] This Panel adopts and applies the reasoning in *Devon* and *Praskach*.

[129] There is a producing well on the Site. The Applicant has indicated that the Site consists of a wellsite and roadway, is fenced, and contains equipment or structures. It is still being visited by workers and has not been reclaimed. The Land is being used for crops. The Applicant further submitted that its loss of use and adverse effects that it experiences from the Site have not changed since Ember started making partial payment under the Surface Lease – Ember employees are still accessing the site – sometimes with heavy truck that damage crops – and the Applicants are spraying to control weeds. The Panel accepts the Applicants' evidence on the condition of the leased area.

[130] There is no evidence to convince the Panel that payment of the full Compensation is unjustified, patently absurd or would result in overpayment to the Applicant. The Ember Submission does not address the quantum of the compensation in any detail, other than to opine that it is excessive. It was open to Ember to provide submissions more specific to the Site but it chose not to do so. Even if Ember succeeded in convincing the Panel that it should not direct the Minister to pay the full amount owed under the Surface Lease, this finding would not absolve Ember of its obligation to pay the full amount under the surface lease agreement.

[131] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, then according to the preceding order the Tribunal may direct the Minister to pay the Compensation, being a total of \$6,396.00 for the 2020, 2021 and 2022 due dates. As with the Suspension and Termination orders, the Direction to the Minister to pay will only issue if Ember fails to pay the amount owing as outlined above.

5. *Should the Tribunal award costs under section 39 of the Act, and if so in what amount?*

[132] The Applicants filed an invoice for costs in the sum of \$656.25 covering both this Application and other unrelated applications. Section 39(1) of the Act puts costs of and incidental to proceedings under the Act in the discretion of the Tribunal. Rule 31(2) of the *Surface Rights Rules* provides guidance as to the factors the Tribunal may consider when awarding costs.

[133] In *Bear Canyon Farms Holdings Ltd. v Apex Energy (Canada) Inc.* 2018 ABSRB 64 (CanLII) ("*Bear Canyon*"), the Tribunal held at paragraphs 17 and 20:

...s.36 application costs tend to be on low side as the applications are only 2 pages, not complex and most of the info comes from applicants. The board administration performs all necessary searches and prepares the statutory declaration and [they] are decided generally without an in-person hearing...

In the opinion of the panel, an experienced professional should be able to file a s.36 application within one hour or less. (Emphasis added)

[134] This Panel applies the reasoning in *Bear Canyon* to the costs claimed by the Applicant(s). The Panel finds the application is not complex and the Applicant's representative is "an experienced professional" and "should be able to file a section 36 application within one hour or less". The Applicants' agent has invoiced them for five hours at \$125.00/hour for "services to develop seven applications" related to five sites, one of which is the Site. The Panel considers that it is reasonable to divide the fee equally between the five sites, rather than among seven applications. The Panel therefore awards costs for one hour of professional assistance at a rate of \$125/hour plus 5% GST (\$131.25).

[135] Costs in the amount of \$131.25 are payable by the Operators to the Applicants

Dated at the City of Calgary in the Province of Alberta this 18th day of August, 2023.

**LAND AND PROPERTY RIGHTS TRIBUNAL**



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Romeo A. Rojas, Member