



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Gillanders v Lexin Resources Ltd., 2023 ABLPRT 901260

Date: 2023-04-12

File No.: RCR2022.1690

Order No.: LPRT901260/2023

Municipality: Foothills County

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:

NW ¼ 24-20-27-W4M as described in Certificate of Title No. 001 107 205+6 (the “Land”), particularly the area granted for Alberta Energy Regulator (AER) Licence No. 0359129 and access road (the “Site”).

Between:

Lexin Resources Ltd.

Operator,

- and -

Andrew David Gillanders

Applicant.

Before: Ivan Weleschuk

DIRECTION TO PAY PURSUANT TO SECTION 36(6) OF THE ACT

The Tribunal directs the Minister to pay out of the General Revenue Fund the sum of THREE THOUSAND TWO HUNDRED FIFTY and 00/100 DOLLARS (\$3,250.00) (the “Compensation”) to Andrew David Gillanders of High River, in the Province of Alberta for compensation that became due in the year 2022.

DECISION AND REASONS

[1] On August 4, 2022, the Applicant filed a Returning Recovery of Compensation application under section 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement for the above Site dated June 19, 2006 (the “Right of Entry Instrument”). The Applicant claimed an annual amount of \$6,500.00 that was unpaid for the 2022 payment due date. The Application is signed by the Applicant indicating that the payment is owed and has not been paid, and that the Surface Lease has not been surrendered or rescinded and remains in effect.

[2] A copy of Tribunal Decision No. 2018/0503 and Direction to Pay Order No. 1632/2018 directed payment of the \$6,500.00 annual compensation for the 2016, 2017 and 2018 payment due dates. Direction to Pay Order Nos. 0030/2020, 2238/2020 and LPRT2409/2021 directed payments for the 2019, 2020 and 2021 payment due dates.

ISSUES

[3] The issues before the Panel are:

- (1) Who is an Operator for the purpose of section 36 of the *Act*?
- (2) Is there money past due and unpaid by the Operator to the Applicant under the Right of Entry Instrument?
- (3) Should the Tribunal direct the Minister to pay the Applicant any of the money past due under section 36(6) of the *Act*?

DECISION

[4] The Panel decides:

- (1) For the purposes of section 36 of the *Act*, the Operator is Lexin Resources Ltd.
- (2) The written evidence proves compensation in the amount of \$6,500.00 is payable to the Applicant by the Operator.
- (3) Without further notice, the Tribunal directs the Minister to pay the Applicant the Compensation in the amount of \$3,250.00 out of the General Revenue Fund.

ANALYSIS

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

[5] Section 36(1) and (2) expands the definition of *operator* so that it has a broader meaning than in the rest of the *Act*.

[6] The Panel finds that Lexin Resources Ltd. (“Lexin”) is the operator for the payment due date for the reasons discussed below.

Section 36(1)(c) – AER Licence Holder

[7] Under section 36(1)(c) the holder of a licence issued by the Alberta Energy Regulator (AER) and its successors, is an Operator. The Licences for the Site are in the name of Lexin.

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

[8] Under s. 36(1)(d) working interest participants and its successors are Operators. The AER Well Summary Report shows that Compton Petroleum Corporation holds a 100% working interest in the Licence. Compton Petroleum Corporation is a previous legal name of Lexin. The Panel finds that Lexin is the Operator.

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

[9] Under section 36(1)(e) the holder of the surface lease or right of entry order for the Site and its successors, is an Operator. Instrument No. 061 293 179 (dated July 20, 2006) on the Certificate of Title refers to a caveat regarding a lease interest under 20 acres with Lexin shown as the caveator.

2. *Is there money past due and unpaid by the Operator to the Applicant under a Right-of-Entry Instrument?*

[10] Direction to Pay Nos. 1634/2018, 0030/2020, 2238/2020 and LPRT2409/2021 were in evidence directing an annual payment of \$6,500.00 for the 2016 to 2021 payment due dates inclusive. This evidence supports the requested annual payment of \$6,500.00. The Applicant declared in writing that the Compensation has not been paid for the years claimed.

[11] The Panel is satisfied that compensation is owed to the Applicant for annual payments due under the Right-of-Entry Instrument. This amount is calculated as one payment of \$6,500.00 due for the 2022 payment due date. The Site has not been reclaimed and the Right-of-Entry Instrument remains in effect. The Panel finds that at the time compensation became due, the Operator was liable for the compensation due to the Applicant.

3. *Should the Tribunal direct the Minister to pay the Applicant any of the money past due out of the General Revenue Fund under section 36(6) of the Act?*

[12] In the Condition of Leased Area portion of the Application, the Applicant checked the “no” box indicating that the site was not fenced and there was no equipment or structures on the site. The Applicant checked the “yes” box indicating that the site was being visited by workers (including for reclamation work). The Application provided the following comments:

“The leased acres consist of field boundary access road and well site on dryland cultivation. The initial part of the access road is above grade and graveled and cannot be farmed over. As a culvert was not installed here, spring melt and heavy rains cause water to pool on the west side of the initial portion of the access road, resulting in an area which is unable to be farmed in some years. During the growing season rain water pools in this corner and in wet years, crop can be drowned. This initial developed portion of the access road also has black fabric underlay beneath it and pieces of it are becoming exposed by soil erosion. These pieces then tear off and blow into the unleased acres of the field and onto the neighbouring fields. The balance of the access road has been farmed over in past years however soil compaction limited crop growth. The OWA has recently removed the last of the equipment from the well site and the 2021 growing season was the first in which the entirety of the leased acres was farmed over. Crop production on the lease was meagre. The leased acres were again seeded to crop for the 2022 growing season. The OWA will require continuing access to the site in order to reclaim the initial portion of the access road as well as evaluate crop production and determine if additional soil reclamation (deep tilling, etc.) is required or if the lease meets the criteria to allow for an application for a Reclamation Certificate. In the meantime, the landowner’s farming of the site should assist with the reclamation of the soil. Payment of the full amount of the annual compensation is justified until a Reclamation Certificate has been issued for the leased acres.”

[13] The Applicants retained My Landman Group as their Representative, who in addition to the comments above included a 20 page argument as to why the Tribunal cannot legally use its discretion to reduce the annual compensation. The Panel is not persuaded by the argument put forth regarding the Tribunal’s discretion and notes that any decision of the Tribunal must be based on the evidence presented (must be fact based). The Applicant was paid the full amount for the 2021 payment due date.

[14] The AER Well Summary Reports dated February 13, 2023, for the Site indicate that the well was abandoned as of February 11, 2020.

[15] In *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 (“*Devon*”), the Court considered the Tribunal’s responsibility when considering an order under s. 36(5) and (6) and held at paragraph 29 that the function of s. 36(5) and 36(6) appears to provide the surface owner with assurance that they need not fear the operator will not pay them. Further:

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.

[16] According to *Devon*, the Panel’s decision to direct the Minister to pay out of the General Revenue Fund is discretionary. The Panel adopts the reasoning in *Praskach Farms Ltd. v Lexin Resources Ltd.*, 2020 ABSRB 85 where the Tribunal concisely summarized the scope of authority under section 36 of the *Act*, the factors to consider when directing the Minister to pay either the full amount of Compensation owing or a reduced amount if payment if the full amount is unjustified. The Tribunal held (at paragraph 10):

[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.

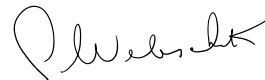
[17] The Panel finds that directing the Minister to pay the full amount to the Applicants would be unjustified. The well was abandoned and the equipment removed from the Site prior to the 2021 growing season. The Site was farmed across in the spring of 2022, therefore the Adverse Effects related to farming around the Site no longer existed in 2022. The Site is no longer active, therefore the Adverse Effects related to, nuisance, odour and dust associated with an operating Site are greatly reduced. The only activity is periodic visits from reclamation personnel. The Site is not reclaimed; therefore, some Loss of Use continues. The surface lease agreement remains in place. The Panel finds that for the 2022 payment due date, a rate of one half the previous annual rate (\$3,250.00) is a better reflection of the Loss of Use and Adverse Effects being experienced by the Applicant.

[18] The Operator remains responsible to pay the full amount owing. The Minister is directed to pay one payment of \$3,250.00 for the 2022 payment due date, for total Compensation of \$3,250.00 to the Applicant out of the General Revenue Fund under section 36(6) for 2022 payment due date.

[19] The *Act* provides for claims of damages or costs related to off Site matters. Section 36 only addresses the payment of compensation that is unpaid and has become due.

Dated at the City of Calgary in the Province of Alberta this 12th day of April 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL



Ivan Weleschuk, Member