



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Toews v Ember Resources Inc., 2024 ABLPRT 902356

Date: 2024-06-13

File No: RC2023.0619

Order No.: LPRT902356/2024

Municipality: Kneehill 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:

SW 1/4-15-30-25-W4M as described in Certificate of Title No. 041 226 472 +2 (the “Land”), particularly the area granted for Alberta Energy Regulator Licence No. 0419931 (the “Licence”), collectively (the “Site”).

Between:

Ember Resources Inc.,

Operator,

- and -

Harvey M Toews

and

Susan Joyce Toews,

Applicants.

Before: Miles Weatherall (“the Panel”)

Appearances by written submissions:

For the Applicant: Paul Vasseur

For the Operator: No written submissions

**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 SIXTY and 00/100 DOLLARS (\$3,260.00) (the

“Compensation”) jointly to Harvey M. Toews and Susan Joyce Toews of Linden in the Province of Alberta for compensation that became due in the years 2020, 2021, 2022 and 2023.

DECISION AND REASONS

[1] The Applicant filed an application dated June 8, 2023, under section 36 of the *Act* (the Application) seeking recovery of unpaid compensation due under a surface lease agreement, consent of occupant agreement, or Compensation Order for the above Site (the “Right-of-Entry Instrument”). The Applicant claims \$815.00 annually, for a total amount of \$3,260.00 under the Application for 2020, 2021, 2022 and 2023.

[2] The Panel acknowledges the Operator’s March 27, 2020, rental review request related to the Surface Lease for a decrease in the compensation rate from \$2,843.00 to \$2,028.00; an annual decrease of \$815.00. The Panel is guided by the Court of Queen’s Bench decision in *Karve Energy Inc v Drylander Ranch Ltd*, 2019 ABQB 298 – Justice Dilts. That decision held:

[47] “Under s. 36, the Board is only entitled to determine whether compensation is owed under the Lease. It is not authorized to review the rate of compensation or to intervene in or alter the parties’ agreement regarding compensation.”

[3] The Panel finds it cannot consider a variance in the rate of compensation established in the right of entry instrument.

[4] The Panel understands from the Application that the amount being claimed on an annual basis is the difference between the agreed upon annual compensation rate of \$2,843.00 and the amount of the Operator’s March 27, 2020, rental review request of \$2,028.00/year which is \$815.00. The Panel will proceed to consider the Applicant’s request as an annual compensation rate of \$815.00 for 2020, 2021, 2022, and 2023, for a total of \$3,260.00.

ISSUES

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 a 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*?
4. Should the Tribunal suspend and terminate the Operator’s rights?
5. Should the Tribunal award costs under section 39 of the *Act*?

DECISION

1. For the purposes of section 36 of the *Act*, the Operator is Ember Resources Inc. (EMBER).
2. The written evidence proves compensation in the amount of \$3,260.00 is payable to the Applicant by the Operator.

3. Without further notice, the Tribunal directs the Minister to pay the Applicant Compensation in the amount of \$3,260.00 from the General Revenue Fund.
4. The decision to suspend or terminate the Operator's rights is reserved.
5. The Operator shall pay costs to the Applicant in the sum of \$131.25 including GST.

ANALYSIS

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

[5] The Tribunal gave notice pursuant to s. 36(4) to EMBER and the Panel is satisfied that the demand for payment and notice meets the requirements of the *Act* pursuant to s. 36(4) and the Interpretation of Section 36(4) *Surface Rights Act* Guideline, ABSRB 2020-1.

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

Section 36(1)(c) – Alberta Energy Regulator (“AER”) Licence Holder

[7] Under section 36(1)(c) the holder of a licence issued by the AER and its successors, is an Operator. The Licence for the Site is in the name of EMBER as of February 9, 2015; therefore, the Panel finds this party is an Operator under section 36(1)(c) for the years 2020, 2021, 2022 and 2023.

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

[8] Under s. 36(1)(d) working interest participants and successors are Operators. The Panel finds that EMBER is an Operator under section 36(1)(d) for the years 2020, 2021, 2022 and 2023 because the AER Well Summary Report dated August 4, 2023, for the Licence shows it was a working interest participant on the Site as of February 9, 2015.

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. The Panel finds EMBER is an Operator for the purpose of section 36(1)(e) on the due dates in 2020, 2021, 2022 and 2023 because it is the Operator named on the Right of Entry Instrument, registration on the Certificate of Title, correspondence, amending agreement or assignment for the Site.

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

[10] The Certificate of Title confirms the Applicants are the owners, therefore, the Panel finds the Applicants are entitled to receive the money. The Applicants provided evidence of a Right-of-Entry Instrument and the compensation is supported by the Application and supporting documentation. The Applicants 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 Applicants for annual payment due under the Right-of-Entry Instrument. This amount is calculated as four payments of \$815.00 due for 2020, 2021, 2022 and 2023 for a total amount owing of \$3,260.00. The Site is not reclaimed, and the Right-of-Entry Instrument remains in effect. The Panel finds that at the time the Compensation became due, the Operator is liable for the Compensation due to the Applicants.

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

[12] *Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640 specified that under s. 36 of the *Act*, the Applicant need only prove there is a Right of Entry Instrument and there is default on the payment, therefore, the Panel directs the Minister to pay the full amount owing. The Panel determined there is a right of entry instrument and money is owing, accordingly the Minister is directed to pay the Applicant \$3,260.00 from the General Revenue Fund.

4. Should the Tribunal suspend and terminate the Operator's rights?

[13] The Tribunal can suspend and terminate an operator's rights to access the Site when appropriate. The Panel reserves its decision to suspend and terminate at this time to avoid delay in payment to the Applicant, however, if the Operator attempts to access the Site but still does not pay compensation, the Tribunal may issue a suspension/termination order.

5. Should the Tribunal award costs under section 39 of the *Act*?

[14] The Applicant filed an invoice for costs in the sum of \$131.25. 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) the *Surface Rights Board Rules* provides guidance as to the factors the Tribunal may consider when awarding costs.

[15] In *Bear Canyon Farms Holdings Ltd v Apex Energy (Canada) Inc*, 2018 ABSRB 64, ("*Bear Canyon*") the Tribunal held:

[17] A factor weighing towards a lower costs award is the low complexity of the proceedings. Board administration provides a reasonably short application form (2 pages) for section 36 applications and drafts the required statutory declaration for applicants. The vast majority of the information requested on the form, such as Applicant's name, land description, rate of annual compensation, and year(s) claimed for unpaid compensation are generally within the knowledge of applicants. The proceedings are entirely by writing and are usually unopposed by the Operator. In the majority of these kinds of straightforward section 36 applications, applicants are able to file all paperwork by themselves and do so correctly.

[18] Board administration performs all necessary searches, including searches for the responsible operator and its insolvency status; Board administration prepares a statutory declaration which the Applicant is requested to swear before commissioner of oaths; and the Board convenes a Panel to make a determination, generally without an in-person hearing."...

[20] ...in the opinion of the [p]anel, an experienced professional should usually be able to file a section 36 application within one hour or less.

[16] This Panel applies the reasoning in *Bear Canyon* and awards costs for one hour of professional assistance at a rate of \$125.00 per hour plus 5 percent GST \$6.25, for a total cost award of (\$131.25).

[17] Costs in the amount of \$131.25 are payable by the Operator to the Applicant.

COSTS ORDER

[18] IT IS ORDERED that costs in the amount of ONE HUNDRED THIRTY-ONE and 25/100 DOLLARS (\$131.25) are payable by the Operator to the Applicant.

Dated at the City of Medicine Hat in the Province of Alberta this 13 day of June, 2024.

LAND AND PROPERTY RIGHTS TRIBUNAL

Miles Weatherall

Miles Weatherall, Member