LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Jones v Ember Resources Inc, 2024 ABLPRT 903590

Date: 2024-07-26
File No: RC2021.1562
Order No.: LPRT903590/2024
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:

NW ¼-2-32-23-W4M as described in Certificate of Title No. 191 245 772 +8 (the "Land"), particularly the area granted for Alberta Energy Regulator Licence No. 0361884 (the "Licence"), collectively (the "Site").

Between:

Ember Resources Inc.,

Operator,

- and -

Dorothy Jean Jones,

Applicant.

Before: Miles Weatherall ("the Panel")

Appearances by written submissions:

For the Applicant: Paul Vasseur, Land Agent

For the Operator:

Ember Resources Inc. Tara Rout, Owen Law

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 ONE THOUSAND TWO HUNDRED SIXTY-NINE and 00/100 DOLLARS ($1,269.00) (the "Compensation") to Dorothy Jean Jones, of Three Hills, in the Province of Alberta, for compensation that became due in the year 2021.

DECISION AND REASONS

[1] The Applicant filed an application dated May 25, 2021, 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 $3,169.00 annually, less a payment of $1,900.00 for a total amount of $1,269.00 under the Application for the year 2021.

[2] Documentation on file includes a May 8, 2024, Notice and Demand for Payment sent to Ember Resources Inc. ("Ember") by the Tribunal in respect of the Application.

[3] Documentation on file included an August 9, 2021, response from Ember's legal counsel delivered to the Tribunal (the "Ember Response").

[4] 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 respond to the merits of the Applicant's claim. 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.

[5] The Panel acknowledges the Operator's December 10, 2020, rental review request related to the Surface Lease for a decrease in the compensation rate from $3,169.00 to $1,900.00; an annual decrease of $1,269.00. 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."*

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

ISSUES

[7] 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 Applicant's claims?

[8] The substantive issues before the Panel are:

1. Which corporation is an Operator for the purposes of section 36 of the Act?

2. Is there money past due that has not been paid by the Operator to the Applicant under a surface lease or compensation order?

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 entry rights under section 36(5) of the *Act?*

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

DECISION

[9] 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 determining the merits of the application. Ember has not been prejudiced in that it has had since August 9, 2021, to provide submissions in response to the Notice and Demand for Payment.

(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 that the Tribunal may review under section 29(1) of the *Act*, Ember has not established the basic requirements set out in Rule 37(3) that would allow for re-consideration.

(4) Ember had ample opportunity to respond to the substance of the Applicants' claims and has elected not to do so. It will not be granted an opportunity to make further submissions in response to the Applications before the Panel determines the substance of the Applicant's claims.

[10] The Panel decides in relation to the merits of the Applicant's substantive claims:

1. For the purposes of section 36 of the *Act*, the Operator is Ember.

2. The Compensation is payable to the Applicant by the Operator and the written evidence satisfactorily proves that it has not been paid.

3. Without further notice, the Tribunal directs the Minister to pay the Applicant Compensation in the amount of $1,269.00 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

Preliminary Matters

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

[12] 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 […]

[13] Section 37(3) if the *Rules* sets out when the Tribunal will exercise its discretion to review its decision or order. Rule 37(3) 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; […]

[14] 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. It submits that the standard of review is correctness.

[15] 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, and that, in any event, the Tribunal did not exceed its jurisdiction or otherwise commit an error of jurisdiction in issuing the Notice and Demand for Payment, or issue it as the result of an unfair process.

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

[16] Ember submits that a Notice and Demand for Payment is a decision of the Tribunal. 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.

[17] 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.)

[18] 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.

[19] 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.

[20] 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.

[21] 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 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*.

[22] 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.

[23] 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)).

[24] 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.

[25] 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.

[26] 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)

[27] 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. 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 landowner shows sufficient evidence that a lease exists, the Board is not bound to order compensation. If the Board was bound to do so, this would amount to a fettering of its discretion.

[28] 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.

[29] 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 such as a Statement of Claim or Originating Application in a civil court setting.

[30] 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.

[31] The *Rules* define "proceeding" in terms of a pre-hearing dispute resolution conference or hearing. "Hearing" is defined as "a hearing by the Board [Tribunal] under the Act or other legislation authorizing the Board to make a decision." There is a separate definition for "Notice of Hearing" defined as:

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

[32] Rule 23(2) provides that: "if the Board [Tribunal] is considering an application by way of written submissions, the Board [Tribunal] may issue a notice to the parties". Subsections (a) through (f) list the requirements for notice. 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 Board [Tribunal] may grant the application or issue a decision if there are no submissions objecting to the application.

e) indicate that copies of the application and other documents filed in support of the application are available upon request; and

f) contain any other information that the Board [Tribunal] considers necessary.

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

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

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

[35] 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.

[36] 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]

[37] 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]

[38] 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.

[39] 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*.

[40] 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?

[41] 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.

[42] 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)

[43] It is therefore arguable that by issuing a Notice and Demand for Payment the Tribunal has 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 *Syncrude 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.

[44] 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 *Syncrude*, although the Court was dealing with what was clearly characterized as an "order", the Court did not intervene: "The Act does not contemplate multiple appeals. The legislative scheme must be read to further the goal of speedy and inexpensive resolution of human rights complaints" (Para 13).

(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).

[45] 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.

[46] Although there may in some cases be extenuating circumstances that justify reconsideration of the issuance of a Notice and Demand for Payment, Ember in this case has provided no basis on which this Panel could come to that conclusion. 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. The Panel therefore declines to exercise its discretion to review the Notice and Demand for Payment.

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

[47] 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.

[48] 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 (Rule 37(2)(a)). Where there is an application form, Rule *14(2)* 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*.

[49] However, setting aside these deficiencies of form, the Panel must decide whether reconsideration is appropriate in the circumstances. *Rule 37(3)* 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 Board [Tribunal] may only decide to review a decision or order if one of the following requirements for review are met:
>
> (a) the decision or order shows an **obvious and important** error of law or jurisdiction.
>
> (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. [bold added]

[50] 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).

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

(1) The Tribunal allegedly made an error of jurisdiction falling under Rule 37(3)(a) by issuing the Notice and Demand for Payment.
(2) The Tribunal allegedly used an unfair process falling under Rule 37(3)(c) and, by not giving notice of the application to Ember, the decision to issue the Notice and Demand for Payment was based on an unfair process.

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

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

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

[54] 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.

[55] 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?

[56] The application form that the applicant is required to complete 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.

[57] 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 difficult therefore 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.

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

[58] 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 based on 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.

[59] 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.

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

[61] 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 weights the applicant and operators' 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.

[62] 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 Rules 33 to 35, which processes only take place after a hearing has been conducted as described in the preceding paragraph.

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

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

[65] 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.

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

[66] 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:

- A ground for reviewing a decision under Rule 37(3) 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 Application was filed, and the Ember Response was dated August 9, 2021. There is no need to delay the Applicant's receipt of compensation further (if so ordered) by granting Ember an opportunity to make additional submissions that it could and should have made in 2021.

[67] The Panel now turns to consider the merits of the Applicant's claim.

The Panel's Findings on the Merits of the Application

1. Which corporations are Operators for the purposes of section 36 of the Act?

[68] 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

[69] Under section 36(1)(c) the holder of a licence issued by the AER is an Operator. This includes the person who held the licence on the due date and successors to the license. The November 21, 2023, AER Well Summary Report for License No. 0399075 shows that the license was transferred to Trident on January 25, 2012. The Panel finds that Trident is an Operator, under section 36(1)(c) for the year 2019.

[70] The license for the Site is in the name of Ember as of December 30, 2019; therefore, the Panel finds Ember to be an Operator, as a successor, under section 36(1)(c) for the year 2019.

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

[71] 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 year 2021 because the AER Well Summary Report dated May 8, 2024, for the Licence shows it was a working interest participant on the Site as of September 24, 2015.

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

[72] The Certificate of Title confirms the Applicant holds a life estate title; therefore, the Panel finds the Applicant is entitled to receive the money. The Applicant provided evidence of a Right-of-Entry Instrument and the compensation is supported by the Application and supporting documentation. The Applicant declared in writing that the Compensation has not been paid in full for the year claimed.

[73] The Panel is satisfied that compensation is owed to the Applicant for annual payment due under the Right-of-Entry Instrument. This amount is calculated as $3,169.00 for the year 2021, less the payment of $1,900.00 for a total amount of $1,269.00. 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 Applicant.

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*?

[74] The Ember Response stated:

> "…that for purposes of s.36(6), the Board must assess what proper compensation would be under the Lease, and this should be the limit which the treasury should be ordered to pay to the Lessor.

> Ember submits that the Board's function under s.36(6) is not to enforce payment under the Lease, but to ensure that the landowner is fairly compensated for any loss. Payment beyond this would constitute unjust enrichment at the expense of the taxpayer. Ember submits that the amount paid each year constitutes fair compensation for the landowners' actual losses.
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> Given that the funds paid under this section are taken from the public purse, Ember submits that the public interest is also engaged in this analysis, and that the Board must consider this in its reasoning.
>
> Ember submits this does not prejudice the Lessor as they still have available to them the usual civil remedies for enforce the Lease as a commercial contract through the courts in order to recover any outstanding balance."

[75] While acknowledging Ember's submission, *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 $1,269.00 from the General Revenue Fund.

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

[76] The Ember Response asserted the authority of the Tribunal to suspend the operator's rights is discretionary and must be considered in light of the public interest as well as all relevant factors. Ember asked the Tribunal to hear further submissions on this point before proceeding to make any order suspending the operator's rights under these Lease.

[77] While acknowledging Ember's submissions, the Panel understands the Tribunal's authority to suspend and terminate an operator's rights to access the Site when appropriate. However, in this case, 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*?

[78] The Applicant filed an invoice for costs in the sum of $525.00. 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.

[79] 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. Most 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 most 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 panel, an experienced professional should usually be able to file a section 36 application within one hour or less.

[80] 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).

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

COSTS ORDER

[82] 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 26th day of July, 2024.

LAND AND PROPERTY RIGHTS TRIBUNAL

Miles Weatherall, Member