



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Christie v Ember Resources Inc, 2023 ABLPRT 904446

Date: 2023-07-10

File No: RC2021.2284

Order No.: LPRT904446/2023

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 ¼-5-34-24-W4M as described in Certificate of Title No. 101 222 712 (the “*Land*”), particularly the area granted for Alberta Energy Regulator Licence No. 0411127 (the “*Licence*”), collectively (the “*Site*”).

Between:

Ember Resources Inc.

Operator,

- and -

James Andrew Christie

Applicant.

Before: Romeo Rojas, Chair
Gary Newcombe
(the “*Panel*”)

Appearances by written submissions:

For the Applicant: Paul Vasseur, Land Agent

For the Operator: Tara M. Rout, Owen Law

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

[43] 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.

[44] 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?*

[45] 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.

[46] 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*.

[47] 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]

[48] 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).

[49] 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 (a) in breach of natural justice, and (b) without making findings of fact, thereby (c) fettering its direction, (d) improperly delegating its authority, and (e) failing to comply with the *Administrative Procedures and Jurisdiction Act*; and
- (2) The Notice and Demand for Payment allegedly was issued as the result of an unfair process falling under Rule 37(c) 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.

[50] 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.

[51] 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 Rule 37(3).

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

[52] 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.

[53] 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?

[54] 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.

[55] 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.

[56] In the following sections, the Panel addresses Ember's specific jurisdictional arguments.

a) Did the Tribunal Breach Natural Justice?

[57] 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 issuance of the Notice and Demand for Payment, which Ember says amounts to an error of jurisdiction within the scope of Rule 37(3)(a).

[58] 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.

[59] 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]. Ember's subsequent correspondence with the Tribunal shows that it was aware that it had the opportunity to make submissions. In fact, in an email to the Tribunal dated November 1, 2021, Ember asked the Tribunal for a 60-day extension "*to provided responses to the Notices*", which the Tribunal granted. 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 was aware of the opportunity to provide a response and was granted additional time to do so.

[60] 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?

[61] 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.

[62] 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.

[63] In this respect, the Panel further notes that Ember’s assertion that “[t]he Demands in this case contain no statement of facts, no findings by the Tribunal” is incorrect. The Notice and Demand for Payment contains allegations of fact taken from the application and Tribunal searches, based on which the Tribunal issued the Notice and Demand for Payment. Those statements of fact are:

- Applicant: James Andrew Christie
- Operator: Ember Resources Inc.
- Land Location: SW ¼ 5–34–24–W4
- Date of Original Agreement: August 16, 2005
- Current Compensation Rate: \$4,900.00
- Payment Missed: 2020
- Total Amount Claimed: \$2,234.00
- 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.

[64] 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.

[65] 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.

[66] 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.

[67] 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.

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

[68] Ember argues that the Tribunal’s directive “Interpretation of Section 36(4) of the Surface Rights ACT ABSRB Guideline 2020” (the “Directive”) fetters the Tribunal’s discretion by directing that a Notice and Demand for Payment be issued on every section 36 application it receives, so long as the application is

sworn. Ember speculates that: “On the face of the Demands, this is what was done in this case.” It further asserts that “The Directive fetters the discretion of the Tribunal by prescribing a result without consideration for the evidence. This, we submit, is an error of jurisdiction which voids the decisions.”

[69] 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 that establishes a claim on a *prima facie* basis.

[70] Second, it is incorrect to suggest that the Tribunal automatically issues a Notice and Demand for Payment for each application it receives so long as it is sworn. 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 Rule 15(1), which provides:

15. Board Administrator Review of Applications

(1) When an application is submitted for filing, a Board 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.

[71] 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 powers in this regard are set out in Rule 16, which provides:

16. Acceptance of an Application

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

(2) Although a Board 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 Board and the statutory requirements.

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

[72] 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?

[73] 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”.

[74] 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.

[75] 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.

[76] 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 or its members or employees” except where it is given express statutory authority to do so.

[77] 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.

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

[79] 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.

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

[81] 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.

[82] 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.

[83] 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.

[84] 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 appointed by the chair retain the Tribunal’s core decision-making powers to issue binding decisions and orders with respect to those applications.

e) Did the Tribunal Fail to Comply with the Administrative Procedures and Jurisdiction Act?

[85] Ember submits that the Tribunal exceeded its jurisdiction by breaching the *Administrative Procedures and Jurisdiction Act* (“AJPA”) by “failing to provide Ember with any notice of the applications until after the [d]emands were issued”. Ember relies on section 3 of the AJPA, which provides:

Notice to parties

3 When

- (a) an application is made to an authority, or
- (b) an authority on its own initiative proposes

to exercise a statutory power, the authority shall give to all parties adequate notice of the application that it has before it or of the power that it intends to exercise.

[86] Ember also submits that by issuing the Notice and Demand for Payment the Tribunal failed to give Ember notice of the application before making a “decision” or “order” on its liability, thereby denying Ember the opportunity to know the case against it and furnish relevant evidence. Ember argues that this violated section 4 of the AJPA, which provides:

Evidence and representations

4 Before an authority, in the exercise of a statutory power, refuses the application of or makes a decision or order adversely affecting the rights of a party, the authority

- (a) shall give the party a reasonable opportunity of furnishing relevant evidence to the authority,

- (b) shall inform the party of the facts in its possession or the allegations made to it contrary to the interests of the party in sufficient detail
 - (i) to permit the party to understand the facts or allegations, and
 - (ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations, and
- (c) shall give the party an adequate opportunity of making representations by way of argument to the authority.

[87] Finally, Ember submits that the Notice and Demand for Payment violated section 7 of the *AJPA* because it constituted a “decision” on liability and attached consequences for failure to comply – thereby adversely affecting Ember – yet it did not set out the findings of fact on which the “decision” was based or the reasons for the decision. Section 7 of the *AJPA*, which addresses written decisions, provides:

Written decision with reasons

- 7 When an authority exercises a statutory power so as to adversely affect the rights of a party, the authority shall furnish to each party a written statement of its decision setting out
- (a) the findings of fact on which it based its decision, and
 - (b) the reasons for the decision.

[88] The Tribunal’s jurisdiction and powers are proscribed by statute. In particular, the *LPRT Act* provides:

Jurisdiction

5 The Tribunal has jurisdiction

- (a) to hold hearings, proceedings and inquiries, hear complaints and appeals and determine disputes
 - (i) with respect to expropriations under and referred to in the Expropriation Act;
 - (ii) under Part 12 of the Municipal Government Act;
 - (iii) under Part 5 of the New Home Buyer Protection Act, and
 - (iv) with respect to any matter under or referred to in the Surface Rights Act, and
- (b) with respect to any other matter in respect of which the Tribunal has jurisdiction under this or any other Act.

Powers

- 6 (1) 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.
- (2) The Tribunal has all the powers of a commissioner appointed under the *Public Inquiries Act*.

[89] Ember has not explained in the Ember Submission how this Panel of the Tribunal has jurisdiction to determine whether the Tribunal has violated the *AJPA*. On the Panel’s review of the *AJPA* it has found no indication that the Legislature intended the Tribunal to have jurisdiction over the *AJPA*. The Panel therefore declines to make any findings on Ember’s submissions with respect to the *AJPA*. To the extent that the requirements of the *AJPA* may overlap with requirements found in the *Act* or the *Rules*, Ember’s arguments have been addressed elsewhere in this decision.

[90] For all the reasons set out above, the Panel finds that the Tribunal did not commit an error in jurisdiction, much less a “obvious and important” error of jurisdiction. As such, the Panel finds that Ember has not established that the basic requirement for review in Rule 37(3)(a) has been met.

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

[91] 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 Rule 37(3)(c) and that, as a result, the Notice and Demand for Payment should be rescinded.

[92] 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.

[93] The Panel has previously found in this Decision that the Notice and Demand is not a "decision" to which Rule 37(3) 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.

[94] 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 knew this, and specifically asked the Tribunal for an extension to its time to respond to the Notice and Demand for Payment.

[95] 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).

[96] 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?

[97] 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.

[98] Inclusion of an explanation of how the party seeking a review is adversely affected by the decision or order is a requirement of Rule 37(2)(c). However, for the purposes of deciding whether the Applicant has met the basis requirements to bring an application under Rule 37(3), 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.

[99] However, if the Panel is wrong and Ember has satisfied the basic requirements in Rule 37(3), the Panel finds that issuance of the Notice and Demand for Payment did not cause any adverse effect on Ember. The Notice and Demand for Payment does not allow for immediate suspension or termination of Ember's rights of access. 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.

[100] 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 requiring them to defend the claim if they elect to do so.

4. *Did the Applicant Breach the Rules?*

[101] Ember submits that it was entitled to be copied on the landowner's applications, which would have been another source of notice to Ember that the application was happening. It asserts that because it was not copied by the Applicant, Ember was further denied the required notice.

[102] Ember asserts that the Applicant's obligation to copy Ember when it filed its application with the Tribunal arises from Rule 12(4), which states: "A party must deliver a copy of any communication filed with the Board to the other parties". Ember submits that "any communication" includes filing of the application. It requests unspecified costs in any event of the cause arising from the landowner's alleged non-compliance with Rule 12(4).

[103] The Panel finds that the Applicant did not breach Rule 12(4). This rule must be read in the context of the *Act* and the *Rules* as a whole, and Tribunal practice.

[104] To begin, the *Rules* themselves state at section 3 that if any of the rules are inconsistent with an act or regulation, those statutory instruments prevail to the extent of a conflict or inconsistency. Section 36 of the *Act* imposes no requirement on the applicant to deliver its application or supporting evidence to Ember; it places the obligation to communicate the application to the respondents on the Tribunal:

(3) Where any money payable by an operator under a compensation order or surface lease has not been paid and the due date for its payment has passed, the person entitled to receive the money may **submit to the Tribunal** written evidence of the non-payment.

(4) 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.**

[105] Sections 36(3) and (4) of the *Act* are clear: Applicants submit their applications to the Tribunal and if the Tribunal considers on a *prima facie* basis that there is evidence to support the claim, it is the Tribunal that commences the proceedings by delivering a Notice and Demand for Payment to the operators. Section 12(4) of the *Rules* cannot override this clear statutory direction to the Tribunal and Applicant on how section 36 applications are to be commenced.

[106] Second, even if Rule 12(4) did require applicants to copy operators on their applications, Rule 17(2) provides a straight-forward remedy: "If a person required to deliver a submission or other document fails to do so, the Board may deliver a copy of the submission or other document on the party." The Panel notes that Ember itself did not follow Rule 12(4) when it filed the Ember Submission; rather, it sought to avail

DEMAND FOR PAYMENT
AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS

The Tribunal demands that the Operator pay TWO THOUSAND TWO HUNDRED THIRTY-FOUR and 00/100 DOLLARS (\$2,234.00) (“the Compensation”) to the Applicant within THIRTY (30) DAYS from the date of this decision.

IT IS ORDERED that if the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant, then without further notice, Ember’s 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 does not affect any of the Operator’s obligations, nor any other person’s rights against the Operator. The Right-of-Entry Instrument remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective 15 days from the date of this decision.
- Termination effective 30 days from the date of this decision.

DECISION AND REASONS

[1] The Applicant filed an application under section 36 of the *Act* (the “Application”) seeking recovery of unpaid compensation due under a surface lease agreement, dated August 16, 2005, for the above Site (the “Right-of-Entry Instrument”). The Applicant claims \$2,234.00 owing under the Application for the 2020 anniversary date.

[2] On October 27, 2021, the Tribunal sent a Notice and Demand for Payment to Ember Resources Inc. (“Ember”) in respect of this Application. On November 1, 2021, Ember advised the Tribunal that it had retained Owen Law as its legal counsel and requested 60 days from that date to provide its response to the Notice and Demand for Payment. The Tribunal granted Ember’s request. Owen Law delivered Ember’s response to the Tribunal on November 10, 2021 (the “Ember Response”).

[3] 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, and that the Applicant be ordered to pay Ember’s costs in any event of the cause because of the Applicant’s alleged breach of the Surface Rights Board Rules (the “*Rules*”).

ISSUES

[4] 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*?

itself of the mechanism in Rule 17(2). In the covering email from Ember's counsel dated November 10, 2021, by which it transmitted the Ember Submission to the Tribunal it stated:

We do not have the contact information for the landowners/applicants of these files. Could you please forward the contact information for the landowners/applicants or confirm that the Tribunal will pass our reply on?

[107] Finally, there is the matter of Tribunal practice. Applicants are not expected to be versed in the *Act* or the *Rules*. The Tribunal has therefore prepared application forms for applicants to use to commence section 36 applications (among applications under other sections of the *Act*) to assist with compliance with the *Act* and *Rules*. In the case of section 36 forms, applicants can complete a paper copy of the form, or complete the form on-line. The on-line form is submitted to Tribunal Administration; although the applicant is asked to identify the operator, it is not asked to provide contact details for that operator so that the on-line form can automatically forward the application to the operator. In the case of the paper application form, the form provides delivery information for the Tribunal; it does not instruct the applicant to send the application to the operator. Even if copying Ember on the application were required by the *Rules*, the Panel finds that it would be inappropriate to penalize the Applicant for complying with the directions provided in the Tribunal's forms.

[108] The Panel therefore finds that the Applicant has not breached Rule 12(4) and, even if he had, the Tribunal would decline to award costs for that alleged breach.

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

[109] 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 specifically asked the Tribunal for an extension to the deadline to make submissions, which was granted. Ember and its counsel had every opportunity to request the application and supporting evidence from the Tribunal and make submissions on the merits within that extended period. They elected not to do so and accepted the risk of not doing so.
- 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 Notice and Demand for Payment was served on Ember in October 2021. Ember requested and was granted 60 days from November 1, 2021 (i.e., until December 31, 2021) to make its submissions – a total of 65 days. It is now 2023. 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.

[110] The Panel now turns to consider the merits of the Applicant's claims.

The Panel's Findings on the Merits of the Application

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

[111] 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

[112] 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 licence. The Licence for the Site is in the name of Ember as of January 26, 2015; therefore the Panel finds Ember to be an Operator under section 36(1)(c) for the year 2020.

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

[113] Under s. 36(1)(d) working interest participants and successors are Operators. In addition to being the Licensee, the AER Well Summary Report for the Licence shows Ember as the sole working interest participant on the Site since January 26, 2015.

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

[114] The Certificate of Title confirms the Applicant is the owner; 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.

[115] The Applicant provided a copy of correspondence from Ember, dated May 25, 2020 stating that; the compensation for the surface lease in question was up for review in 2020; that Ember proposed to adjust the annual compensation from \$4,900.00 to \$2,666.00 effective with the August 2020 payment; that the adjusted compensation offer could be accepted by the landowner dating, signing, and returning the duplicate copy of the offer; and that receipt of payment of the adjusted compensation would not be construed as acceptance of the offer. The Applicant also provided evidence of payment of the adjusted compensation of \$2,666.00 for the August 2020 anniversary.

[116] No evidence was provided indicating an acceptance by the Applicant of the proposed compensation adjustment. No evidence was provided of any subsequent communication or negotiation between the Applicant or Ember respecting the proposed compensation adjustment, nor is this Panel aware of any application to review and set the compensation under section 27(8) of the *Act*.

[117] 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 \$4,900.00 less the partial payment of \$2,666.00 for a residual amount owing of \$2,234.00 for the year 2020. The Site is not reclaimed, the well is in production, 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*?

[118] The Applicant described the condition of the land as used for crops. The Site itself is described as unfenced with production equipment in place.

[119] 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.

[120] According to *Devon*, the Panel's decision to direct the Minister to pay from 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):

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.

[121] The Panel finds that payment of the full amount owing would not result in overpayment to the Applicant. The Operator is solvent, and this is not a review of compensation under section 27 of the *Act*. Unless the Tribunal receives 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 the Applicant the Compensation of \$2,234.00 from the General Revenue Fund.

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

[122] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, the entry rights of Ember shall be suspended and terminated under section 36(5) of the *Act* on the dates in the attached Order.

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

[123] The Applicant filed an invoice for costs in the sum of \$1,968.75, representing one (1) hour of professional services, at a rate of \$125.00/hour plus GST, provided for each of fifteen (15) separate applications. The Tribunal sent this to Ember on March 24, 2023, with an invitation to provide a response by April 25, 2023. No response was received. 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) provides guidance as to the factors the Tribunal may consider when awarding costs.

[124] 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.

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

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

COSTS ORDER

[127] 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 City of Calgary in the Province of Alberta this 10th day of July, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL

Gary
Newcombe

Digitally signed by Gary
Newcombe
Date: 2023.07.10
14:34:17 -06'00'

Gary Newcombe, Member

- (4) Has the Applicant breached the *Rules* and should it be required to pay costs as a result?
- (5) Should Ember be afforded a further opportunity to make submissions on the merits of the Applicant's claims?

[5] 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 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

[6] 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 October 27, 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) The Applicant has not breached the *Rules* and no costs are payable by the Applicant.
- (5) Ember had ample opportunity to respond to the substance of the Applicant's claims and has elected not to do so. It will not be granted an opportunity to make further submissions in response to the Application before the Panel determines the substance of the Applicant's claims.

[7] 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. Unless the Tribunal receives 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 the Applicant the Compensation of \$2,234.00 from the General Revenue Fund.
4. Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, the entry rights of Ember shall be suspended and terminated on the dates in the attached Order.
5. The Operator shall pay costs to the Applicant in the sum of \$131.25 including GST.

ANALYSIS

Preliminary Matters

[8] 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, and order costs against the Applicant.

[9] 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 [...]

[10] Section 37(3) of 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; [...]

[11] 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.

[12] 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?

[13] 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 section 36(4) unless and until it concludes on the basis of the evidence before it that there has been a non-payment” and “there is no opportunity for weighing of evidence and determining whether the money is owing after the notice is issued”. Ember goes on to state that:

The only decision for the Tribunal to make after a notice and demand for payment is issued is in respect of enforcement, not liability. 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, and which can only be altered by amending or reversing the decision on reconsideration.

[14] 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.

[15] 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.)

[16] 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.

[17] 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.

[18] 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.

[19] 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*.

[20] 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.

[21] 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)).

[22] 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.

[23] 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.

[24] 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)

[25] 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.

[26] 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 King’s Bench in *Husky Oil Operations v. Scriber*, 2013 ABQB 74 at Para 11.

[27] 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.

[28] 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.

[29] 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.

[30] 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.

[31] The *Rules* also provide direction as to what is required to be included in a decision. Rule 33 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. 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].

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

[33] 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.

[34] 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]

[35] 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]

[36] 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.

[37] 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*.

[38] 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?*

[39] 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.

[40] 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)

[41] 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 *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.

[42] 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).