LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Hutterian Brethren of Summerland v Houston Oil & Gas Ltd, 2023 ABLPRT 904573

Date: 2023-07-13
File No. RCR2022.1806
Order No. LPRT904573/2023
Municipality: Vulcan 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:
SE ¼-2-15-23-W4M as described in Certificate of Title 161 282 880 +1 (the "Land"), particularly the area granted for Alberta Energy Licence No. 0217204 (the "Site").

Between:

Houston Oil & Gas Ltd.,
Operator

- and -

Hutterian Brethren of Summerland,
Applicant.

Before: Lana Yakimchuk
Barbara A. Samuels (the "Panel").

Appearances by written submissions:

For the Applicant: Kris Bower, Welltraxx Ltd.

For the Operator: None from the Operator

DIRECTION TO PAY PURSUANT TO SECTION 36(7) OF THE ACT

The Tribunal directs the Minister to pay out of the General Revenue Fund the sum of ONE THOUSAND FOUR HUNDRED and 00/100 DOLLARS ($1,400.00) (the "Compensation") to the Applicant, Hutterian Brethren of Summerland of Vulcan County, in the Province of Alberta, for the Compensation that became due in the year 2022.

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DECISION AND REASONS

BACKROUND

[1] The Applicant filed a repeat application dated September 6, 2022, under s. 36 of the *Act* seeking recovery of unpaid compensation for the 2022 due date under a surface lease agreement for a wellsite located at SE ¼-2-15-23-W4M (L.S.8).

[2] The Application contained a Repeat Confirmation that declared the Applicant had been paid by the Minister for non-payment of compensation by the Operator. In evidence were three Direction to Pay documents directing the Minister to pay out $2,800.00 from the General Revenue Fund to compensate the Applicant for each of the years 2018, 2019, 2020, and 2021.

ISSUES

(1) Who is the operator for the purposes of section 36?

(2) Is there money past due and unpaid by the Operator to the Applicant?

(3) Should the Tribunal direct the Minister to pay the Applicant any of the money past due under section 36 of the *Act*?

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

DECISION

(1) Houston Oil & Gas Ltd. (HOUSTON) is the Operator.

(2) The written evidence proves compensation in the amount of $2,800.00 is payable to the Applicant by the Operator.

(3) Without further notice, the Tribunal directs the Minister to pay the Applicant Compensation in the amount of $1,400.00 from the General Revenue Fund.

(4) This issue has already been addressed in Order 3274/2020 issued November 5, 2020.

ANALYSIS

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

[3] The Tribunal previously determined the identity of the Operator, the validity of the Right of Entry Instrument, the rate of annual compensation, and the Applicant's entitlement to the money.

[4] Title to the Site is in the name of Hutterian Brethren of Summerland.

[5] The AER One Stop Report as of February 10, 2020, lists HOUSTON as the Operator for the well Licence No. 0217204. The AER Well Summary Report generated on December 9, 2022, shows that HOUSTON was a 100% Working Interest Participant as of September 8, 2016. Records obtained through the Government of Canada's Bankruptcy and Insolvency Records confirm that as of October 29, 2019, HOUSTON was listed as in receivership.

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[6] The Applicant declared in writing that the Compensation has not been paid for the August 20, 2022, anniversary due date. Three Direction to Pay documents directing the Minister to pay out $2,800.00 from the General Revenue Fund to compensate the Applicant for each of the years 2018, 2019, 2020, and 2021 were in evidence.

[7] The Panel is satisfied that the Compensation is owed by HOUSTON to the Applicant for the 2022 annual payment due under the Surface Lease.

2. Is there money past due and unpaid by the Operator to the Applicant?

[8] This is a repeat s. 36 application. The Minister previously paid the Applicant for money due and not paid by the Operator. The Panel is satisfied that compensation is owed to the Applicant as one payment of $2,800.00 for 2022. The Site has not been 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 of the *Act*?

[9] The Panel reviewed the repeat Application, in particular the comments made describing the condition of the land area. As stated in Rule 14 (2) of the Surface Rights Rules, the Condition of Leased Area (COLA) is required to be completed within the application. The requirement is mandatory. Rule 7 outlines the effect of noncompliance with the rules which may include an order dismissing the application or deeming the application to be withdrawn.

[10] The Panel notes that the COLA portion of the Application explains why the Tribunal requires COLA information:

> WHY IS THE TRIBUNAL ASKING THIS? When a landowner applies for recovery of unpaid compensation, the Tribunal must decide whether to direct the Minister to pay the full amount claimed, a lesser amount, or to not direct any payment. The Tribunal may choose to direct the Minister to pay a reduced amount if payment of the full rentals would over-compensate the landowner. One of the factors the Tribunal can use to make this decision is the condition of the leased area, how you are using it, how it is affecting the rest of your land, and what losses you are suffering because of it.

[11] Further, the COLA portion of the Application asks Applicants to describe the condition of the leased area and any facts about the land that are important for the Tribunal to know; describe the loses being suffered because of the existence of the lease itself or because of activities on the leased area (including reclamation work); and provide any arguments about whether payment of the full rental is still justified.

[12] The Applicant provided the following information in response to the four questions posed in the COLA section of the Application.

(1) Is the site fenced? Applicant response: NO
(2) Is there is equipment or structures on the site, such as a wellhead? Applicant response: YES
(3) Is the site is still being visited by the workers (including for reclamation work? Applicant response: YES
(4) How is the land used? Applicant response: Crops

[13] The Applicant used the box in the COLA section of the Application to describe the condition of the leased area.

[14] When considering the adverse effects and loss of use of the Site, a Panel is required to examine the condition of the Site. In this case, the Applicant provided a generic description of the leased area, that could be applied to many sites, and added minor additions to the standard text. The Panel found the minor additions to the condition of the Site description provided insufficient detail and lacked evidence necessary to convince the Panel that the full rental amount is still justified. In particular:

a) In the COLA section of the Application the Panel found the box used to describe the condition of the leased area and any facts about the land that are important for the Tribunal to know provided limited information regarding the losses suffered because of the existence of the lease itself or because of activities on the leased area. Rather, the opportunity for description was used to state, without evidence, that the "losses and impacts of this well site are the same as when the energy company was in operation." The Panel was given insufficient evidence as to the current activity on the Site and was unable to verify the claim that "the impacts have not reduced since the company has stopped paying" which occurred in 2018. There were no arguments provided, about whether payment of the full rental amount is still justified.

b) The Applicant states that the Site is not fenced and that there are concerns about visiting crews leaving gates open. The Panel was left confused as to which gates might be affected since the Site has been declared on the Application, as not fenced. There were also no comments, nor evidence about what adverse effect an open gate would cause, nor any comment on the nature of these "crews accessing the land" and their regularity visiting the Site or what could be causing noise, inconvenience, and nuisance.

c) Due to HOUSTON's insolvency, there has been no Operator since 2018 and the Minister has been directed to pay the compensation. 2022 would be year five for compensation from the General Revenue Fund. Disclosure of the current activity and adverse effects on the Site, would have been helpful for the Panel in determining justification for full payment. As well, justification for full payment could have been supplied by describing any adverse effects due to reclamation work that may be occurring since it was stated that a reclamation certificate has not been issued.

d) The Application declares that there is equipment or structures on the Site, such as a wellhead and that there are concerns regarding soil erosion around the wellhead as well as continuing adverse effects and liabilities farming around the well site. The Applicant also states that there is additional loss of use from compaction on the access road.

e) The Application declares that the land is being used for crops and "some acres are being used for agriculture….production on these acres is not as high as the non-impacted lands away from the well." According to the Applicant, the Site is now partially farmed over however, it is unclear to the Panel, what portion of the Site is now partially farmed over, whether this is resulting in additional income, and what that additional income would be, or whether farming over is done for weed control, or to assist in reducing the space requirements when farming around the Site. In any case, if the loss (or gain) of use could be quantified it would assist the Panel in deciding if full payment is justified.

f) Although the Applicant raised the issue of weed control, there was no evidence that weed control affected the Site for the 2020 crop. The updated Application declares that "weeds continue to be a problem." No evidence was provided regarding the extent of the weed problem, whether it was on the trails, on the entire well site, affecting crops,

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or where the affected areas were located, to convince the Panel that the full rental amount is still justified.

g) The Site is now partially being farmed over and there is no evidence that the Site is being visited by workers as it was when the well was in production and the past adverse effects such as nuisance, inconvenience and noise were more tangible. The Panel was left wondering that if the Applicant's statement regarding "losses being the same as when the energy company was in operation" had been verified with evidence, the Panel's knowledge and understanding of the degree of loss and adverse effects being suffered currently would have contributed to justifying full payment.

[15] In Devon Canada Corporation v Alberta (Surface Rights Board), 2003 ABQB 7, 337 AR 135 the Court of King's Bench considered the Tribunal's responsibility when considering an order under s. 36(5) and (6) and held at paragraph 29:

> … the function of sections 36(5) and 36(6) appears to me to provide the surface owner with some assurance that if they cooperate with providing the oil industry access to their lands, they need not fear the operator will not pay them.
>
> The sections provide a pragmatic solution whereby the surface owner need only prove the existence of a lease and that rent has not been paid. Upon proof of such, in most cases, the province would then pay the rent and the operator would then face the province, seeking reimbursement from the operator.
>
> … if the … owner's claim is unjustified, is patently absurd, or provides an unjust enrichment, the Board should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears.

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

[17] In Praskach Farms Ltd v Lexin Resources Ltd, 2020 ABSRB 85 the Tribunal concisely summarizes the scope of authority under s. 36 of the Act, the factors to consider to direct 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.

This Panel adopts and applies the reasoning from Praskach.

[18] The purpose of annual compensation under the Act is to compensate the owner for loss of use and adverse effect arising from the surface lease and the operations of the operator. Some compelling factors relevant to loss of use and adverse effect include facilities, fencing, and equipment remaining on the site; operator activity on the site; the condition of the land within the site including compaction, foreign materials, and changes of elevation; how the remaining land is used and how the conditions of the site impacts this use; if and to what extent the owner is using the site for production, including cropping and grazing; and the existence and extent of nuisance, inconvenience, and noise.

[19] The Panel notes that s. 36 is designed to favour the landowner. In Devon the Court clearly found that the wording of s. 36(6) entitles the Surface Rights Board to exercise statutory discretion. Justice D.A. Sirrs stated that the function of s. 36 to intentionally favour the surface owner, however, that must be considered in the context of the entire decision. The Court found at paragraph 28 that to read s. 36 as providing a blanket guarantee is to permit the Board to overcompensate in certain circumstances and went on to say at paragraph 29:

> The function of the sections intentionally favour the surface owner; In most cases, the Board will direct the province to pay the back rent to the surface owner; however, section 36(6) seems to me to leave the Board with some discretion in this regard. In my opinion, if the operator satisfies the Board that the surface 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.
>
> To ensure the function of these sections of providing a pragmatic, inexpensive solution to the surface owner when rent under a surface lease is not paid, the Board should be afforded much deference.

[20] The Tribunal must go beyond simply directing payment and find a factual basis for directing payment. In APF Energy Inc. v. Alberta (Surface Rights Board), 2005 ABCA 346 the Court of Appeal concluded that the Board properly exercised their discretion in accordance with Devon.

[21] Following Devon, there are numerous Surface Rights Board decisions, and the Court of King's Bench has considered the Tribunal's discretion under s. 36(6) and whether an owner's claim is unjustified, absurd or provides an unjust enrichment. Although the circumstances vary with each case, the underlying principle remains fundamentally the same. Devon was followed in Provident Energy Ltd. v. Alberta (Surface Rights Board), 2004 ABQB 650 (CanLII) where the Court found that the Board was reasonable in exercising its discretion to reduce the payments due to the owners in an amount reflecting the loss incurred. Provident confirms that the exercise of the Tribunal's discretion to pay what the actual loss to the landowner was during the period, rather than the full amount, is a reasonable approach supported by the evidence.

[22] The Tribunal has authority to exercise discretion when directing the Minister to pay out taxpayer dollars, the Tribunal must be reasonable and fair when it exercises discretion. It is for that reason that the Tribunal requires the COLA form, properly filled out, to be submitted with s. 36 applications.

[23] The Panel considered previous decisions of the Tribunal:

- Randle Farms Ltd et al v Lexin Resources Ltd, 2020 ABSRB 1015
- Hutterian Brethren of Armada v Houston Oil & Gas Ltd., 2021 ABLPRT 557

[24] The Panel follows the reasoning in Praskach applied in the Surface Rights Board decision, Wildeboer v Goldenrod Resources Inc., 2019 ABRSB 639, in which the Panel found the site was farmed over but the owner experienced some loss of use and adverse effect, so reduced compensation payable by the Minister by 75 percent.

[25] The Panel finds that directing the Minister to pay the full amount of unpaid rental out of public money to the Applicant would be unjustified based on the Applicant's COLA submission information and would cause unjust enrichment. The well is abandoned, there is no fencing, and the Site is being partially farmed over and producing crops, albeit at a lower level. While there is there is an admission that a portion of the Site has been farmed over, there is no quantification of the new production and the diminishing loss

of use. Adverse effects are unsupported and undocumented regarding nuisance, inconvenience or noise caused by crews visiting the Site. The Panel found little justification for the Applicant's declaration that the "losses and impacts of this well site are the same as when the energy company was in operation."

[26] In this case, the Panel determines a reduction in the amount due and directs the Minister to pay $1,400.00 thereby reducing the annual compensation for 2022 by 50 percent to reflect a decrease in the loss of use and adverse effect from reduced activity, but recognizing road compaction, well head erosion, continued farming around the well, and weed issues.

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

[27] This decision was reserved in the original order of November 5, 2020. If the Operator attempts to access the Site but still does not pay compensation, the Tribunal may issue a suspension/termination order.

Dated at the City of Calgary in the Province of Alberta this 13th day of July, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL

Barbara Samuels

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Barbara A. Samuels, Member

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