



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Poffenroth v Ember Resources Inc., 2023 ABLPRT «Decision No. w/o zeros»

Date: 2023-08-02

File No.: RC2019.1563

Order No.: LPRT904641/2023

Municipality: Camrose 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 ¼-27-42-21-W4M as described in Certificate of Title No. 832 060 565 A (the “Land”), particularly the area granted for a portion of a pipeline right of way located at SE¼-27-42-21-W4M, Alberta Energy Regulator Licence No. 61430, Segment No. 12 (the “Site”).

Between:

Trident Exploration (Alberta) Corp.

and

Ember Resources Inc.,

Operators,

- and -

Gerald Edward Poffenroth

and

Valerie Doreen Poffenroth,

Landowners/Applicants.

Before: Jerry Zezulka, Chair
Tamara M. Bews
(the “Panel”).

Appearances by written submissions:

For the Applicants:

Gerald Edward Poffenroth and Valerie Doreen Poffenroth

For the Operators:

Ember Resources Inc.

None

Trident Exploration (Alberta) Corp.

None

SECTION 36(6) DIRECTION TO PAY

The Tribunal directs the Minister to pay out of the General Revenue Fund the sum of THREE HUNDRED FIFTY-TWO and 00/100 DOLLARS (\$352.00) (the “Compensation”) to Gerald Edward Poffenroth and Valerie Doreen Poffenroth, jointly, of Bashaw in the Province of Alberta for compensation that became due in the year 2019.

DECISION AND REASONS

[1] On September 17, 2019, the Applicants applied under section 36 of the *Act* seeking recovery of unpaid compensation due under a right of way agreement dated June 29, 1982 for the Site. The Applicants submit that Trident Exploration (Alberta) Corp. did not pay the annual compensation of \$352.00 due May 31, 2019. The Applicants claim \$352.00 is outstanding for the 2019 right of way agreement year.

[2] During the Tribunal’s routine searches of records maintained by the Alberta Energy Regulator (AER), Alberta Corporate Registry, and Alberta Land Titles, the Tribunal found more than one party that might be an “operator” of the Site for the purposes of section 36.

[3] By letter dated December 7, 2022, the Tribunal issued a Notice and Demand for Payment to Ember Resources Inc. By letter dated March 14, 2023, the Tribunal issued a Notice and Demand for Payment to Ember Resources Inc. (Ember) and Trident Exploration (Alberta) Corp. (Trident). No responses were received from Ember or Trident.

ISSUES

[4] The issues before the Panel are:

- (1) Who is an Operator under section 36 of the Act?
- (2) Is there money past due that has not been paid by the Operators to the Applicants under the right of way agreement?
- (3) Should the Tribunal suspend and terminate the Operator’s entry rights under section 36(5) of the Act?
- (4) Should the Tribunal direct the Minister to pay the Applicants any of the money past due that has not been paid by the Operators out of the General Revenue Fund under section 36(6) of the Act?

DECISION

[5] The Panel decides:

- (1) The Operators are Trident Exploration (Alberta) Corp. and Ember Resources Inc.
- (2) Compensation of \$352.00 payable to the Applicants by the Operators, jointly, and the written evidence satisfactorily proves that it has not been paid.
- (3) There is no reason to delay the application further by issuing orders of suspension and termination because the compensation has been outstanding for over three years. However, if the Operators in the future attempt to access the Site but still have not paid the compensation, the Tribunal may reconsider its decision and issue an Order.

- (4) There is no evidence to convince the Panel that payment of \$352.00 would result in overpayment to the Applicants. In the Panel's view, there is no purpose in delaying the issuance of the Direction to Pay given the compensation has been outstanding for over three years and the Operators did not respond to the March 14, 2023 Notice and Demand for Payment. Therefore, the Direction to Pay will issue immediately.

ANALYSIS

1. *Who is the operator under section 36 of the Act?*

[6] For the purpose of recovery of compensation applications, the definition of the word *operator* is set by section 36(1) and (2) of the *Act*. Specifically, 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) – AER Licence Holder

[7] 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. AER Licence No. 61430, Segment No. 12 for the Site is in the name of Ember. The Panel finds that Ember is an operator under section 36(1)(c) on the Right of Way 2019 due date.

Section 36(1)(e) – Holder of the Right of Way Agreement

[8] Under section 36(1)(e), the holder of the right of way agreement for the Site is an *operator*. This includes persons who held the right of way agreement at the time of non-payment and their successors.

[9] Land Title Registration No. 832 136 342 registered on the Current Certificate of Title shows that Trident was the holder of the right of way agreement for the Site on the 2019 due date. On that basis, the Panel finds Trident is an *operator* under section 36(1)(e).

2. *Is there money past due and unpaid by the Operators to the Applicant under the Surface Lease?*

[10] Certificate of Title No. 832 060 565 A confirms that Gerald Edward Poffenroth and Valerie Doreen Poffenroth have jointly owned the Land since March 15, 1983. Accordingly, the Panel finds that Gerald Edward Poffenroth and Valerie Doreen Poffenroth were the owners of the Land when the right of way agreement annual compensation was due in 2019.

[11] In support of their application and Applicants' declaration, the Applicants provided:

- (1) a copy of right of way agreement dated June 29, 1982 for the Site (see Land Title Registration No. 832 136 342).
- (2) a copy of an October 16, 2018 notice of assignment from Canlin Resources Partnership to Trident which includes the Right of Way and Site. This notice of assignment shows that the annual compensation for the Site was \$352.00.
- (3) a copy of an April 16, 2018 Canlin Resources Partnership cheque remittance to the applicants which shows that the annual compensation for the Site was \$352.00.

[12] AER records for Licence No. 61430, Segment No. 12 shows that the pipeline associated with the Site is an operating natural gas pipeline. Given that AER records show the pipeline on the Site as operating, and not reclaimed, the Panel finds that the the Right of Way remains in effect.

[13] Therefore, the Panel finds that \$352.00 is owed by the Operators to the applicants for the 2019 Right of Way Agreement year.

3. *Should the Tribunal suspend and terminate the Operator's entry rights under section 36(5) of the Act?*

[14] Under section 36(5) of the *Act*, the Tribunal can suspend and terminate an Operator's rights to access the Site when appropriate. There is no reason to delay the application further by issuing orders of suspension and termination because the compensation has been outstanding for over three years. However, if the Operators in the future attempt to access the Site but still have not paid the compensation, the Tribunal may reconsider its decision and issue an Order.

4. *Should the Tribunal direct the Minister to pay the Applicants any of the money past due that has not been paid by the Operators out of the General Revenue Fund under section 36(6) of the Act?*

[15] Concerning the condition of the Site, the Applicants submitted, among other things, that:

- (1) the Site is not fenced.
- (2) there are no equipment or structures on the Site.
- (3) the Site is not being visited by workers.
- (4) the soil was never returned to its original state and does not produce the same as the undisturbed soil.
- (5) there are dips in areas along the pipeline they deal with when working, seeding and harvesting their crop.

[16] In *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 (*Devon*), 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.

[17] 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.

[18] In *Praskach Farms Ltd v Lexin Resources Ltd*, 2020 ABSRB 85 (*Praskach*), the Tribunal concisely summarizes the scope of authority under section 36 of the *Act*, as well as the kind of evidence needed to support a decision to order the Minister to pay either the full amount of Compensation owing or a reduced amount of 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.

[19] The Panel accepts the evidence of the condition of the Site and applies the reasoning from *Praskach*.

[20] There is no evidence to convince the Panel that payment of the remaining compensation of \$352.00 would result in overpayment to the Applicants. The Panel finds that loss of use and adverse effects from the Site have continued to occur.

[21] The statutory pre-requisites for issuance of the Direction to Pay are that a written demand of the operator has been made under section 36(4) and that the operator has not proven to the Tribunal's satisfaction that full payment has been made. Here, a Notice and Demand for Payment under section 36(4) of the Act was made of the named operators, Ember Resources Inc. and Trident Exploration (Alberta) Corp., on March 14, 2023. No responses were received from Ember Resources Inc. or Trident Exploration (Alberta) Corp. to the Notice and Demand for Payment regarding the \$352.00 amount claimed.

[22] As noted above, the Panel found compensation of \$352.00 is owed by the named operators to the Applicants for the 2019 Right of Way Agreement year. In the Panel's view, there is no purpose in delaying the issuance of the Direction to Pay given the compensation have been outstanding for over three years.

[23] Accordingly, the Direction to Pay will issue immediately.

Dated at the Calgary in the Province of Alberta this 2nd day of August 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL



Tamara M. Bews, Member