LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Sandau v Ember Resources Inc., 2022 ABLPRT 570

Date: 2022-05-03
File No.: RC2020.0014
Decision No.: LPRT2022/SR0570
Municipality: Wheatland County

The Surface Rights Board ("SRB") is continued under the name Land and Property Rights Tribunal ("Tribunal"), and any reference to Surface Rights Board or Board is a reference to the Tribunal.

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:
NE ¼-25-27-24-W4M as described in Certificate of Title No. 971 043 014 (the "Land"), particularly the area granted for a well site and access road, Alberta Energy Regulator Licence No. W 0327689 (the "Site").

Between:

Ember Resources Inc.

Operator,

- and -

Sandau Farms Ltd.

Applicant.

Before: Glenn Selland
(the "Panel")

Appearances by written submissions:
For the Applicant: Paul Vasseur, Representative

The Operator did not make a submission although notified of the Hearing.

DEMAND FOR PAYMENT AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS

THE TRIBUNAL DEMANDS that Ember Resources Inc. pay ONE THOUSAND SEVEN HUNDRED EIGHT and 00/100 DOLLARS ($1,708.00) (the "Compensation") to the Applicant within THIRTY (30) DAYS from date of this decision. If the Operator does not prove to the Tribunal's satisfaction that the Compensation has been paid in full to the Applicants, then without further notice the Tribunal may direct the Minister to pay Compensation of $1,708.00 to the Applicant out of the General Revenue Fund.

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 Resources Inc.'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 shall not affect Ember Resources Inc.'s obligations regarding the Site, nor any person's rights against Ember Resources Inc. The right of entry instrument remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from May 18, 2022, lasting 15 days.
- Termination effective from June 2, 2022.

DECISION AND REASONS

[1] The Applicant filed an application on January 15th, 2020, under section 36 of the *Act* seeking recovery of unpaid compensation due January 6th, 2020 under a surface lease agreement dated January 6th, 2005 (the "Surface Lease"). On January 12th, 2022, the Applicant submitted a Request to Amend seeking compensation due and owing January 6th, 2021. The Applicant claims a total amount of $3,416.00 is due and owing under the amended Application.

ISSUE

[2] The issues before the Panel are:

(1) Which corporations are Operator(s) for the purposes of section 36 of the Act?

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

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

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

DECISION

[3] The Panel decides:

(1) For the purposes of section 36 of the *Act*, the Operator is Ember Resources Inc.

(2) The Compensation is payable to the Applicant by the Operator for the 2020 and 2021 compensation years and the written evidence satisfactorily proves that it has not been paid.

(3) If the Operator has not complied with the Demand Notice and paid the Compensation in full to the Applicant, then Ember Resources Inc.'s entry rights shall be suspended and terminated on the dates in the attached Order.

(4) If the Tribunal does not receive 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 Compensation of $3,416.00 out of the General Revenue Fund.

ANALYSIS

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

[4] 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

[5] Under section 36(1)(c), the holder of a licence issued by the Alberta Energy Regulator (AER) is an *operator*. This includes the person who held the licence on the due date and successors to the license. AER Well License No. W0327689 for the Site is in the name of Ember Resources Inc. ("Ember"). The Panel finds that Ember is an *operator* under section 36(1)(c) on the January 6th, 2020 and January 6th, 2021 due dates.

2. Is there money past due and unpaid by the Operator(s) to the Applicants under a surface lease or compensation order?

[6] The current Certificate of Title confirms the Applicant is the owner of the Land and was the owner when the rentals became due. A copy of a Caveat (Registration No. 051 083 105) was submitted by the Applicant indicating Ember registered an interest in a surface lease under 20 acres on the Land effective March 12th, 2005. The amount of annual compensation payable under the surface lease is $3,800.00 and is supported by the application and submitted documentation. The Applicant declared in writing that $3,416.00 of the Compensation due January 6th, 2020 and January 6th, 2021 has not been paid.

[7] The evidence presented confirms that on January 13th, 2020, Ember paid $2.092.00 for the rental period of January 6th, 2020 to January 5th, 2021, and on January 6th, 2022 paid $2,092.00 for the rental period of January 6th, 2021 to January 5th, 2022. The Applicant submits that Ember did not provide an explanation as to why the full amount due under the surface lease was not paid. The Panel is guided by *Karve Energy Inc. v Drylander Ranch Ltd.*, 2019 ABQB 298, where the Court confirmed there are only two ways that the annual compensation can be varied under a surface lease: either by agreement by the parties in an amending agreement or under an order under s. 27 of the *Act*. The Court also stated at paragraph 45 *"Under s. 36 the Board is only entitled to determine whether compensation is owed under the lease."*.

[8] The Panel finds there was not an amending agreement nor is there an order under s. 27 of the *Act* varying the amount of annual compensation presented in evidence. The Panel decides that it can only determine if money is due and owing under the surface lease. The evidence before the Panel satisfactorily proves Ember did not pay the full amount owing under the surface lease and the amount not paid is Compensation payable to the Applicant by the Operator.

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

[9] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, Ember's entry rights shall be suspended and terminated according to the preceding Order.

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

[10] In Devon Canada Corporation v Alberta (Surface Rights Board), 2003 ABQB 7 ("Devon"), the Court of Queen'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.*

[11] 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 Queen's Bench in *Provident Energy Ltd v Alberta (Surface Rights Board)*, 2004 ABQB 650.

[12] In a recent decision, *Praskach Farms v Lexin*, 2020 ABSRB 85 ("Praskach"), the Tribunal concisely summarizes the scope of authority under section 36 of the *Act*, the factors to consider 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".*

The Panel concurs with the reasoning in *Praskach*.

[13] There is no evidence to convince the Panel that payment of the full Compensation would result in overpayment to the Applicant. The AER OneStop report indicates the Site is an operating coal-bed methane well and the Site is located on land that is in crop production. The Panel finds on the balance of probabilities loss of use and adverse effect was associated with this operating well during the period compensation is being claimed.

[14] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, then according to the preceding Order the Tribunal may direct the Minister to pay. The award is calculated as $3,416.00 payable to the Applicant for the 2020 and 2021 compensation years.

[15] The Panel is satisfied that all prerequisites to directing the Minister to pay under section 36(6) have been met and that the Operator demand for payment and notice meets the requirements of the *Act* pursuant to the *Notice to Operator Guidelines*, ABSRB 2020-1.

Dated at the City of Edmonton in the Province of Alberta this 3rd day of May, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Glenn Selland, Member