



LAND AND PROPERTY RIGHTS

Citation: Dau Farms Ltd v Ember Resources Inc, 2022 ABLPRT 754

Date: 2022-06-07
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Decision No.: LPRT2022/SR0754
Municipality: Kneehill 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:

NW ¼-18-30-23-W4M as described in Certificate of Title 051 114 626, particularly the area granted for a well site and access road, Alberta Energy Regulator Licence No. 0336465 (the “Site”).

Between:

Ember Resources Inc.
and
Bumper Development Corporation Ltd.

Operator,

- and -

Dau Farms Ltd.,

Applicant.

Before: Lana Yakimchuk
(the “Panel”)

Appearances by written submissions:

For the Applicants: Paul Vasseur, Representative
Dau Farms Ltd., Owner

For the Operator: Tara Rout, Owen Law, Counsel for Ember Resources Inc.

**DEMAND FOR PAYMENT
AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS**

THE TRIBUNAL DEMANDS that the Operator pay TWO THOUSAND NINE HUNDRED and 00/100 DOLLARS (\$2,900.00) (the “Compensation”) to the Applicant.

IT IS ORDERED that if the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant(s), 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 any of the Operator’s obligations in regards to the Site, nor any other person’s rights against the Operator(s). The Surface Lease or Tribunal Right-of-Entry Order remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from June 22, 2022, lasting 15 days.
- Termination effective from July 7, 2022.

DECISION AND REASONS

BACKGROUND

[1] On April 28, 2021 the Applicant filed an application under s. 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement dated April 28, 2005. The Applicant claims \$2,900.00 unpaid compensation due on April 8, 2020 and 2021.

[2] As evidence of rental rate, the Applicant submitted a March 27, 2020 offer letter from Ember Resources Inc. The letter confirmed the annual rate of \$3,350.00 per year.

[3] The offer was not signed by the Applicant.

[4] Cheques for \$1,900.00 compensation for the subject well site were sent to the Applicant by Ember Resources Inc. on March 30, 2020 and April 6, 2021.

[5] Notices of proceedings were sent by the Tribunal to Ember Resources Inc. and to Bumper Development Corp. on June 6, 2021.

[6] On July 22, 2021 Ember Resources Inc. asked that the Tribunal hear more extensive submissions on the factors to be considered in exercising its discretion under subsections 36(5) and 36(6) of the *Surface Rights Act*.

ISSUES

[7] The issues before the Panel are:

- (1) Which corporations are Operator(s) for the purposes of s. 36 of the *Act*?
- (2) Is there money past due that has not been paid by the Operator(s) to the Applicant(s) 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(s) 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*?
- (5) Should the Tribunal award costs under section 39 of the *Act*, and if so in what amount?

DECISION

[8] The Panel decides:

- (1) For the purposes of s. 36 of the *Act*, the Operators are Ember Resources Inc. and Bumper Development Corporation Inc.
- (2) The Compensation is payable to the Applicant by the Operators and the written evidence satisfactorily proves that it has not been paid.
- (3) If the Operators have not complied with the Demand Notice and paid the Compensation in full to the Applicant, Ember Resources Inc.'s and Bumper Development Corporation Ltd.'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 Applicants, then without further notice the Tribunal may direct the Minister to pay Compensation of \$2,900.00 out of the General Revenue Fund.
- (5) The Operator shall pay to the Applicant costs in the sum of ONE HUNDRED THIRTY ONE and 25/100 DOLLARS plus GST (\$125.00 plus GST of \$6.25).

ANALYSIS

[9] In making this decision, the Panel agreed with the analyses in the following decisions, and referred to them in writing the support for this decision:

Poffenroth v Ember Resources Inc., 2022 ABLPRT 30 (CanLII), <<https://canlii.ca/t/jlmq0>>, J & D Land Ltd. v Ember Resources Inc., 2022 ABLPRT 135 (CanLII), <<https://canlii.ca/t/jlw4t>> George v Ember Resources Inc., 2022 ABLPRT 106 (CanLII), <<https://canlii.ca/t/jlr8d>>

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

[10] For the purpose of recovery of compensation applications, the definition of the word *operator* is set by s. 36(1) and (2) of the *Act*. Specifically, s. 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

[11] Under s. 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 license on the due date and successors to the license. AER Well Licence No. 0336465 for the Site is in the name of Ember Resources Inc. The Panel finds that Ember Resources Inc. is an *operator* under s. 36(1)(c) on April 28, 2020 and 2021.

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

[12] Under s. 36(1)(d) working interest participants are *operators*. The Panel finds that Ember Resources Inc. and Bumper Development Corporation Ltd. are *operators* under s. 36(1)(d) on the 2020 and 2021 due dates because AER Well Summary Report dated June 1, 2021 for AER Well Licence No. 0336465 shows Ember Resources Inc. and Bumper Development Corporation Ltd. were 75% and 25% working interest participants at this site. The Panel finds that Ember Resources Inc. and Bumper Development Corporation Ltd. are *operators* under s. 36(1)(d) on April 28, 2020 and 2021.

Section 36(1)(e) – Holder of a surface lease or right of entry order

[13] Under s. 36(1)(e) the holder of the Surface Lease or Right of Entry Order for the Site is an *operator*. This includes persons who held the surface lease at the time of non-payment and their successors. The Panel finds Ember Resources Inc. is an *operator* for the purpose of s. 36(1)(e) on the 2020 and 2021 due dates because a copy of correspondence from Ember Resources Inc. and a caveat listed on Certificate of Title No. 051 114 626 confirms the surface lease. As well in its submission, Ember acknowledges that it is the surface lease holder for the site.

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

[14] Certificate of Title No. 051 114 626 shows Dau Farms Ltd. is the Owner and the compensation is supported by the application and supporting documentation. The rate of compensation is \$3,350.00 per year, as stated in the March 27, 2020 letter from Ember Resources Inc. to the Applicant. The Applicant reported receipt of \$1,900.00 compensation for each of 2020 and 2021. This leaves a total outstanding payment of \$2,900.00 for 2020 and 2021. The Applicant declared in writing that this Compensation has not been paid.

[15] By letter on March 27, 2020 Ember Resources Inc. offered the Applicant a change in rate from \$3,350.00 to \$1,900.00 per year, but the Applicant did not accept that change. There is no record of a s. 27 Tribunal decision ordering a reduction in compensation for this lease, nor of an agreement between the Applicant and the Operator to a reduction.

[16] Section 27 of the *Act* sets out the process for either party to a surface lease to trigger a review of the annual compensation rate associated with that surface lease. Section 27(14) states:

(14) The operator shall give a notice that complies with subsection (5) to the other party on or within 30 days after every 5th anniversary date after the date notice should have been given under subsection (4) for as long as the surface lease or right of entry order, as the case may be, is in effect and subsections (6) to (13) apply to that notice.

[17] If Ember Resources Inc. wished to have the rate of compensation reviewed, s. 27 provides it the opportunity to issue its required notice under s. 27 and enter into negotiations with the Applicant. Then if the parties did not agree to a rental rate, Ember Resources Inc. could apply to the Tribunal to determine the rate of compensation. If the Tribunal issued a compensation order, the order would operate to amend the surface lease with respect to the compensation only, notwithstanding anything contained in the surface lease. The March 27, 2020 letter alone does not vary the rate of compensation and it appears to fall outside of the notice requirements under s. 27(4) and s. 27(14) to initiate a review effective 2020. The Panel refers to *Shepstone v. Alberta (Surface Rights Board)*, 2000 ABQB 1003:

[13] It seems logical that if nothing is done within the proverbial reasonable time and the operator did not give the notice required pursuant to s. 27(4) then the rental established for the

prior 5-year time period of the lease would prevail for the next 5-year period of the lease (barring of course a mid-term amending agreement being reached by the parties).

[18] Since Ember Resources Inc. did not avail itself of the provisions of the *Act*, and specifically s. 27, the only option available to adjust the annual compensation rate is for the parties to do so via a mutual agreement, and no evidence was provided that this occurred.

[19] The Panel finds that the payment proposed and made by Ember Resources Inc. for the April 28, 2020 and 2021 payment due dates was a unilateral decision made by Ember Resources Inc. based on Ember Resources Inc.'s opinion of what the annual compensation should be and did not operate to vary the rate of compensation payable under the surface lease. No evidence was presented by either party related to any efforts made to engage in discussions, exchange of information or negotiations prior to or subsequent to the March 27, 2020 letter. The rate paid by Ember Resources Inc. for the 2020 and 2021 payment due dates was not negotiated with or agreed to by the Applicant. There is no evidence before this Panel to show that the contract annual rental rate of \$3,350.00 was altered by mutual agreement.

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

[20] On July 22, 2021 Ember Resources Inc. asked that the Tribunal hear more extensive submissions on the factors to be considered in exercising its discretion under subsections 36(5) and 36(6) of the *Surface Rights Act*. Sections 36(5) and 36(6) address the issues of suspending and terminating an operator's right to enter a site and the Tribunal's ability to direct the Minister to pay the money owed if the operator does not comply with the compensation order. Ember Resources Inc.'s submission is silent with regard to the issue of whether the Operator made appropriate payment for the 2020 and 2021 payment due dates.

[21] Ember Resources Inc. seeks to make submissions but it does so while refusing to pay the compensation it owes to the Applicant. Ember Resources Inc. misunderstands the purpose of s. 36, which is to ensure that the Owner is paid what is owed. Operators should not be encouraged to simply fail to pay the full amount of compensation so that they can then make submissions through the s. 36 hearing process on the amount of compensation the Minister should pay. If Ember Resources Inc. wishes to make submissions on the appropriate rate of compensation, it can pay the full amount of compensation it is required to pay to the Applicant and then seek a review of the rate of compensation under s. 27.

[22] Section 36 requires the Tribunal make a determination of whether non-payment has occurred, and if so, to issue a written notice to the operator demanding full payment. Only if the operator does not comply with the notice demanding full payment does the Tribunal have the ability to direct the Minister to pay. The direction for payment to the Minister occurs only after the Tribunal has not received satisfactory evidence that the operator has complied with the notice and direction to pay.

[23] The Panel considered s. 36 within the context of the *Act*. Once the operator is determined under s. 36(1) and (2), s. 36(4) requires:

(4) On receiving the evidence, if the Tribunal considers that it satisfactorily proves the non-payment, the Tribunal shall send written notice to the operator demanding full payment.

[24] The Panel notes that s. 36(5) allows the Tribunal to suspend and terminate an operator's right to enter the site affected by the lease only if the operator has failed to comply with the notice demanding full payment under s. 26(4). It is true that this is a discretionary authority, however Ember Resources Inc. has not satisfied the Panel that its authority should not be exercised in this case. The operator has not provided satisfactory evidence of payment to the Tribunal within the specified time (compliance with the notice and

demand to pay), has not provided any evidence that the amount demanded was not owed, or that there was an error. The Panel is not satisfied that the contract has been amended. Even if the operator had sought a review of the rate of compensation under s. 27, it is not entitled to pay less than the contractual amount until it obtains a new compensation order from the Tribunal.

[25] Where the operator who is responsible for the non-payment does not comply with the notice demanding payment, s. 36(5) then allows the Tribunal to suspend and terminate the operator's rights under the surface lease. This is the authority allowed under the *Act* to enforce the notice for demand of payment where the Tribunal finds evidence of non-payment. The Panel finds such a consequence reasonable under the circumstances where the operator has ceased (for whatever reason) to pay compensation as required under the surface lease. If the operator is not complying with the terms of the surface lease as negotiated between the parties, then the operator should no longer have the right to access that site and benefit from its production.

[26] Section 36 provides a remedy in the case where an operator has ceased making payments as required under a surface lease agreement, a contract between two parties. This position is supported by *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 ("*Devon*"). The Tribunal merely enforces this agreement under s. 36. Section 36(4) does not introduce any other factors, such as public interest, but is a simple determination of whether non-payment under a surface lease has occurred.

[27] Ember Resources Inc. has been notified of this proceeding and has had time to make the payment. Ember Resources Inc. will have another opportunity following this decision to make the payment, failing which a suspension order will issue. If Ember Resources Inc. continues to refuse to make the payment a termination order will be in effect.

[28] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, the Operators' entry rights shall be suspended and terminated according to the preceding 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 operator out of the General Revenue Fund under s. 36(6) of the Act?*

[29] With regard to s. 36(6), the Operator argued, "*Ember (Resources Inc) takes the position that for the purposes of s. 36(6), the Tribunal must assess what proper compensation would be under the Leases, and that this should be the limit which the treasury should be ordered to pay to the Lessors.*

Ember (Resources Inc) submits that the Tribunal's function under s. 36(3) is not to enforce payment under a Lease, but to ensure that the Landowner is fairly compensated for any loss. Payment beyond this would constitute unjust enrichment at the expense of the taxpayer.

Ember (Resources Inc.) submits that the rental payments it has made under these Leases represent fair compensation for the actual loss of use and adverse effect on the Landowner.

Given that the funds paid under this section. are taken from the public purse, Ember (Resources Inc.) submits that the public interest is also engaged in this analysis, and that the Tribunal must consider this in its reasoning.

Ember (Resources Inc.) submits this does not prejudice the lessors as they still have available to them the usual civil remedies for enforcing the lease as a commercial contract through the courts in order to recover any outstanding balance." (parentheses added)

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

[31] 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.

[32] Section 36(9) speaks to what occurs if the Minister is directed to pay.

(9) Where the Minister pays money under subsection (6) or (7),

(a) the amount paid and any expenses incurred, whether by the Crown or by a private agency, in collecting or attempting to collect the money owing, constitute a debt owing by the operator to the Crown, and

(b) a written certificate issued by or on behalf of the Minister certifying the payment of the amounts referred to in clause (a), including expenses, may be entered as a judgment of the Court of Queen’s Bench for those amounts and enforced according to the ordinary procedure for enforcement of a judgment and that Court.

[33] In a recent decision, *Praskach Farms v Lexin*, 2020 ABSRB 85 (“Praskach”), the Tribunal concisely summarizes the scope of authority under s. 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 paragraphs 10):

[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.

and this Panel adopts and applies the reasoning from *Praskach*.

[34] The Applicant has stated that the site is still being visited by workers. The well is still operational and there is still equipment on the site.

[35] There is no evidence to convince the Panel that payment of the full Compensation is unjustified, patently absurd or would result in overpayment to the Applicant. Ember Resources Inc.’s submission does not address the quantum of the compensation in any detail, other than to opine that it is excessive. It was

open to Ember Resources Inc. to provide submissions more specific to the Site but it chose not to do so and did not explain why. Even if Ember Resources Inc. succeeded in convincing the Panel that it should not direct the Minister to pay the full amount owed under the surface lease, this finding would not absolve Ember Resources Inc. of its obligation to pay the full amount under the surface lease agreement.

[36] Ember Resources Inc.’s submission concluded by asking for a further delay in the proceeding; “that the Tribunal hear more extensive submissions on the factors to be considered in exercising its discretion under these two subsections” [s. 36(5) and 36(6)].

[37] The Panel finds that Ember Resources Inc. provided a submission in response to the Notice and Demand for Payment triggered by the Application. Ember Resources Inc. had the opportunity to include a fulsome response to the Application, including disputing anything in the Application Ember Resources Inc. did not agree with, providing evidence to support Ember Resources Inc.’s position, and any argument to support its position. The submission addressed the Tribunal’s discretion with regard to section 36(5) and 36(6) and there was nothing preventing Ember Resources Inc. from providing supporting documentation, arguments, or detail. Ember Resources Inc.’s submission did not provide any evidence to demonstrate that the Minister should pay less than the current rate of compensation for the Site. The Panel finds that providing another opportunity for Ember Resources Inc. to make submissions on this same topic is unfair to the Applicant, as it merely extends the process without a good reason to do so, and results in an undue delay to receiving payments due. Section 36 provides a relatively inexpensive avenue for lessors to obtain compensations payments they are due under surface lease agreements or amendments to the annual compensation rate that may occur between the parties. The Panel finds that the full amount outstanding (\$2,900.00 for 2020 and 2021) is due and payable. As with the Suspension and Termination orders, the Direction to the Minister to pay will only issue if Ember Resources Inc. and Bumper Development Corp. fail to pay the amount owing as outlined above.

[38] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, then according to the preceding order Tribunal may direct the Minister to pay the Compensation of \$2,900.00 for 2020 and 2021.

5. *Should the Tribunal award costs under section 39 of the Act, and if so in what amount?*

[39] The Applicant’s Representative filed an invoice for costs for this Application amounting to \$131.25. Section 39(1) of the *Act* puts costs of and incidental to proceedings under the *Act* in the discretion of the Tribunal. Rule 31(2) the *Surface Rights Rules* provides guidance as to the factors the Tribunal may consider when awarding costs.

[40] In *Bear Canyon Farms Holdings Ltd. v Apex Energy (Canada) Inc.* 2018 ABSRB 64 (CanLII) (“*Bear Canyon*”), the Tribunal held at paragraphs 17 and 20:

[17]: ...s.36 application costs tend to be on low side as the applications are only 2 pages, not complex and most of the info comes from applicants. The board administration performs all necessary searches and prepares the statutory declaration and [they] are decided generally without an in-person hearing...

[20] In the opinion of the panel, an experienced professional should be able to file a s.36 application within one hour or less. (Emphasis added)

[41] This Panel applies the reasoning in *Bear Canyon* to the costs claimed by the Applicant. The Panel finds the application is not complex and the Applicant’s representative is an experienced professional and should be able to file a s. 36 application within one hour or less. The Panel therefore accepts the Applicant’s

requested Cost calculation and awards costs for one hour of professional assistance at a rate of \$125.00/hour plus 5% GST, for a total of \$131.25

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

ORDERS:

[43] An Order shall issue awarding the Applicant Costs as set out in this decision.

Dated at the Village of Cremona in the Province of Alberta on June 7, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL



Lana Yakimchuk, Member