LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Vold v Ember Resources Inc. 2022 ABLPRT 965

Date: 2022-07-12
File No. RC2021.1008
Decision No. LPRT2022/SR0965
Municipality: Ponoka 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:
SW ¼-30-42-22-W4M as described in Certificate of Title No. 052 058 550 (the "Land"), particularly the area granted for a wellsite and access road, Alberta Energy Regulator Licence No. 0325868 (the "Site").

Between:

Ember Resources Inc.,

Operator,

- and -

Diane Vold
and
Lynden Vold,

Applicants.

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

Appearances by written submissions:

For the Applicants: Paul Vasseur, Landowners' Representative

For the Operator: Thomas Owen, Owen Law

DECISION AND REASONS

[1] The title to the Site is in the name of Diane Vold and Lynden Vold. The Operator is Ember Resources Inc.("Ember").

[2] The Applicants filed an application under section 36 of the Act seeking recovery of unpaid compensation due under a surface lease agreement, which was signed on January 18, 2005, for the above Site. On March 22, 2021, the Applicants signed an Application for the above Site to claim outstanding amounts due on the Surface Lease anniversary dates of January 18, 2020 and 2021. The Applicants claim a total amount of $1,972.00 under the Application.

[3] On July 30,2021, a Notice and Demand for Payment ("Notice") was sent by Tribunal administration to Cordero Energy Inc. ("Cordero") and Ember Resources Inc. ("Ember"), Cordero's amalgamation successor, as noted in the Corporate Registry, to pay the Applicants the total amount of compensation outstanding for the 2020 and 2021 due dates as well as advising the Operator that the Tribunal may suspend and terminate its access rights if compensation was not paid in full within 30 days of the Notice.

[4] In response to the Notice submissions were received from both Ember and the Applicants.

[5] This decision does not deal with this issue.

ISSUES- PRELIMINARY MATTERS

[6] The decision is confined to the following issues:

1. Is the Application form, as submitted, complete as required by Rule 14(2) and (3)(e)?

2. If the Application is incomplete should the Tribunal consider it?

FACTORS CONSIDERED

[7] In considering the Application from the Applicants and s.36 of the Act, the Panel also considered the Surface Rights Rules and the following legislation:

The *Land and Property Rights Tribunal Act* s.6(1) and (2):

> 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.*
>
> 6(2) *The Tribunal has all the powers of a commission appointed under the Public Inquiries Act.*

Public Inquiries Act, RSA 200, C P-39:

> 4. *The commissioner or commissioners have the power of summoning any person as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce documents, papers and things that the commissioner or commissioners consider*

to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.

[8] The Land and Property Rights Tribunal has prescribed a form for s.36 applications. Part 3 of the application form, as it existed at the time of application requests information on lease and lease information including the condition of the leased area. This required information has been more recently referred to as the Condition of Leased Area (COLA) and is required to be completed within the application. Rule 14 (2) of the Surface Rights Rules says that the application must include a completed form where one is prescribed by the Tribunal. The requirement is mandatory although the Tribunal has discretion under Rule 6 of the SR Rules to waive or vary a requirement if there is a reason to do so. 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.

[9] In Part 3 of the Application form instructions, a section entitled “Condition of Leased Area” asks the Applicants to indicate whether

(1) the site is fenced
(2) there is equipment or structures on the site, such as a wellhead
(3) the site is still being visited by the workers (including for reclamation work).

[10] In this case, the Applicants checked the “YES” box on the form attesting that there is equipment or structures on the unfenced Site, and that the Site is still being visited by workers (including for reclamation work). The Applicants also noted that the land is being used for crops.

[11] The Panel found no evidence included in the Application, nor was any detail provided as to the extent of the of the equipment or worker activity on the Site, including reclamation work. The Panel was given insufficient evidence that reclamation work started, continues, or that a reclamation certificate has been issued.

[12] The Panel found the box in Part 3 of the Application, 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.” There were no arguments provided, as requested, about whether payment of the full rental amount is still justified.

[13] Part 3 of the Application provides the following explanation:

“WHY IS THE BOARD ASKING THIS? *When a landowner applies for recovery of rentals, the Board must decide whether to direct the Minister to pay the full amount claimed, a lesser amount, or to not direct any payment. The Board 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 Board 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.”*

[14] Although Tribunal Administration will review the applications, it is always the applicant’s responsibility to ensure that their application is complete, accurate and complies with the Tribunal’s requirements (Rule 16 (2)). The application forms prescribed for s.36 provide the Tribunal with information and documentary evidence necessary to make a decision and all affected parties are given an opportunity to participate.

[15] The Panel considering an application will determine who the operator is, whether there is any money payable by an operator under a compensation order or surface lease that has not been paid, whether to suspend or terminate the operator's rights and finally, whether to direct the Minister to make the payment to the person entitled from the General Revenue Fund. Section 36(4) of the *Act* requires the Tribunal to send a written notice to the operator demanding payment in full, however the remaining provisions require the Tribunal to exercise discretion.

[16] Sections 36 (6) and (7) specifically say the Tribunal *may* direct the Minister to pay unpaid compensation. Other than s.36(4) the words "must" or "shall" do not direct the Tribunal in this section. A decision to direct the Minister to pay a lesser amount does not alter or change the agreement between the parties, nor does it absolve the operator of its liability to pay the full amount.

[17] The Panel notes that in *Devon Canada Corp. v. Surface Rights Board, 2003 ABQB 7 ("Devon"),* the Court clearly found that the wording of s.36(6) entitles the Tribunal to exercise statutory discretion. Honourable 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 Tribunal 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.*

[18] 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), Court of Queen's Bench,* it was found that the Tribunal properly exercised their discretion in accordance with *Devon*.

[19] Following *Devon*, there are numerous Tribunal decisions, and the Court of Queen's Bench has considered the Tribunal's discretion under section 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) *"Provident,"* where the Court found that the Tribunal 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.

[20] 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 that a condition of leased area be submitted with s.36 applications.

[21] 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

DECISION

1. *Is the Application form, as submitted, complete as required by Rule 14(2) and (3)(e)?*

[22] The application, as submitted, is incomplete.

2. *If the Application is incomplete should the Tribunal consider it?*

[23] The Tribunal will not consider the incomplete application. The Applicants have 45 days from the date of this Decision to submit a completed Condition of Leased Area Form (COLA) to the Tribunal. If the Applicants fails to do so, the Application will be considered withdrawn, and the file will be closed.

[24] No other issues relating to the application have been considered by this Panel.

Dated at the City of Calgary in the Province of Alberta this 12th day of July, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Barbara A. Samuels, Member