LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Kaechele v Ember Resources Inc., 2022 ABLPRT 1007

Date: 2022-07-12
File No. RC2020.2320
Decision No. LPRT2022/SR1007
Municipality: Camrose 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 ¼-10-42-22-W4M as described in Certificate of Title No 162 290 609 +2 (the "Land"), particularly the area granted for Alberta Energy Regulator Licence No. 0334660 (the "Site").

Between:

Ember Resources Inc.,
Terra Energy Corp.,
and
Prairie Provident Resources Canada Ltd.,

Operators,

\- and -

Gary Kaechele
and
Mary Kaechele,

Applicants.

Before: Miles Weatherall (the "Panel").

Appearances by written submissions:

For the Applicants: Stringam LLP, Patrice Brideau

For the Operators:

Ember Resources Inc.	Owen Law, Thomas R. Owen
Terra Energy Corp.	No written submissions
Prairie Provident Resources Canada Ltd.	No written submissions

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

THE TRIBUNAL DEMANDS that the Operators pay ONE THOUSAND SIX HUNDRED NINETY-THREE and 00/100 DOLLARS ($1,693.00) (the "Compensation") to the Applicants.

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, the right of Ember Resources Inc. and Prairie Provident Resources Canada Ltd. 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 Operators' obligations in regards to the Site, nor any other person's rights against the Operators. The Surface Lease or Tribunal Right-of- Entry Order remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from «15 days from signing date», lasting 15 days.
- Termination effective from «30 days from signing date».

DECISION AND REASONS

[1] The Applicants filed an application under section 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement for the above Site dated May 28, 2005 (the "Surface Lease").

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

[3] During the Board'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. A summary of these searches is as follows:

a. An Alberta Corporate Registry Search dated March 5, 2021, of Ember Resources Inc. shows its legal status as active.

b. An Alberta Corporate Registry Search dated March 15, 2021, of Prairie Provident Resources Canada Ltd. shows its legal status as active. This search shows Marquee Energy Ltd. as an amalgamation predecessor.

c. An Alberta Corporate Registry Search dated May 16, 2022, of Marquee Energy Ltd. shows its legal status as amalgamated. This search shows its amalgamation successor as Prairie Provident Resources Canada Ltd.

d. An Alberta Corporate Registry Search dated April 29, 2022, of Terra Energy Corp. shows its legal status was struck on July 2, 2018.

ISSUES

[4] 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(s) under a surface lease or compensation order?

(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 Applicant(s) any of the money past due that has not been paid by the operator(s) out of the General Revenue Fund under section 36(6) of the *Act*?

DECISION

[5] The Panel decides:

(1) For the purposes of section 36 of the *Act*, the Operators are Ember Resources Inc., Terra Energy Corp., and Prairie Provident Resources Canada Ltd., jointly.

(2) The Compensation is payable to the Applicants by the Operators, jointly, and the written evidence satisfactorily proves that it has not been paid.

(3) Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, the entry rights of Ember Resources Inc. and Prairie Provident Resources Canada Ltd. shall be suspended and terminated according to the preceding order. The decision to suspend and terminate Terra Energy Corp.'s rights is reserved.

(4) If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicants then, <u>without further notice</u>, the Tribunal may direct the Minister to pay Compensation of $1,693.00 out of the General Revenue Fund.

ANALYSIS

1. Who is an operator for the purpose of 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*.

<u>Section 36(1)(c) – AER Licence Holder</u>

[7] 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 licence. AER Well Licence No. 0334660 for the Site is in the name of Ember Resources Inc. The Panel finds that Ember Resources Inc. is an *operator* under section 36(1)(c) on the May 28, 2020, due date.

<u>Section 36(1)(d) – Working Interest Participants</u>

[8] Under section 36(1)(d) working interest participants are *operators*. AER Well Summary Report dated March 15, 2021, for AER Well Licence No. 0334660 shows Ember Resources Inc., Terra Energy

Corp., and Marquee Energy Ltd. were working interest participants on the Site with 65%, 31.5% and 3.5% interests, respectively.

[9] The Panel finds that Prairie Provident Resources Canada Ltd., as the corporate successor to Marquee Energy Ltd., is an *operator* for the purpose of 36(1)(d) on the May 28, 2020, due date. The Panel understands that Prairie Provident Resources Canada Ltd. is the amalgamation successor to Marquee Energy Ltd. on November 21, 2018.

[10] In response to the October 26, 2020, Notice of Proceedings, Ember Resources Inc., by correspondence dated December 9, 2020, noted the authority of the Tribunal to suspend the operator's rights is a discretionary one. Further, Ember Resources Inc. reminded the Tribunal that the Lessors in these applications are required to demonstrate that they have mitigated their losses to the extent possible in the circumstances.

[11] The Panel is satisfied it has the evidence to proceed with a decision in this Application and notes it will address the issue of loss of use and adverse effect in the paragraphs that follow below.

[12] With multiple definitions of an "*operator*" in the *Act* (sections 1, 27(1), and 36) along with the requirement for an approval from the regulator, it is clear that there can be more than one operator concurrently responsible for the Site. Indeed, that appears to be the case here. The Tribunal has provided the parties with an opportunity to bring forward all the necessary evidence and arguments, so that the Panel can make its decision.

[13] Having regard to the above, the Panel finds that Ember Resources Inc., Terra Energy Corp., and Prairie Provident Resources Canada Ltd. are *operators* for the purpose of section 36(1)(d) on the May 28, 2020, due date.

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

[14] Under section 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 section 36(1)(e) on the May 28, 2020, due date because:

a. Land Title Registration No. 052 294 680 registered on the Current Certificate of Title shows that Ember Resources Inc. was the holder of the Surface Lease for the Site on the May 28, 2020, due date.

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

[15] The current Certificate of Title confirms the Applicants are the owners of the Land and were the owners when the rentals became due. A copy of the Right of Entry Instrument has been provided and the compensation is supported by the application and supporting documentation including a record of deposit for a payment of $1,932.00 issued by Ember Resources Inc. to the Applicants on April 30, 2020. The Applicants declared in writing that the Compensation has not been paid.

[16] The Panel is satisfied that Compensation is owed by the Operators, jointly to the Applicant for annual payment due under the Surface Lease or Compensation Order. This amount is calculated as one (1) payment of $3,625.00 due on May 28, 2020, for the year 2020. The Site has not been reclaimed, and the Surface Lease or Right of Entry Order remains in effect.

[17] At the time the Compensation became due, Ember Resources Inc., Terra Energy Corp., and Prairie Provident Resources Canada Ltd. were Operators. Past Tribunal decisions with multiple operators have found the operators to be concurrently responsible to pay compensation. *Dobish v Terra Energy Corp,* 2019 ABSRB 737 held at Para 14: **"…** *nothing in the Act limits the liability of any one of the operators, including s.36(4) and working interest participants. If the Act meant to limit the liability of a working interest participant to the percentage of its working interest, it would have explicitly said so. Rather, s.36(4) of the Act instructs the Board to demand "full payment' from an operator if evidence satisfactorily proves non-payment.*" Section 36 (2) of the Act directs that the words and expressions in s.36(1) shall be construed in accordance with the *Environmental Protection and Enhancement Act* The Court of Appeal in *Sarg Oils Ltd. v. Environmental Appeal Board*, 2007 ABCA 215 considered operator liability for reclamation and found that it was not patently unreasonable for the Environmental Appeals Board (EAB) to conclude that Sarg Oils was responsible for clean-up of the well sites, even if there might be other operators who were concurrently responsible.

[18] The Panel accepts this reasoning and finds the Compensation is payable to the Applicants by the Operators, jointly, and the evidence satisfactorily proves non-payment.

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

[19] 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 this application by doing so when an Operator is not accessing the Site. As discussed above, Terra Energy Corp.'s legal entity status was struck on July 2, 2018.

[20] As noted above, if compensation remains unpaid, the entry rights of Ember Resources Inc. and Prairie Provident Resources Canada Ltd. shall be suspended and terminate 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 operators out of the General Revenue Fund under section 36(6) of the Act?*

[21] The Applicants stated that the Site is fenced with equipment remaining on site. The Site continues to be visited by the workers and the land is used for crops.

[22] 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 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.*

[23] 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.

[24] 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 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*.

[25] There is no evidence to convince the Panel that payment of the full Compensation would result in overpayment to the Applicants. The Panel understands that equipment remains on the Site which is fenced and continues to be visited by workers. The Site has not been reclaimed. The Panel finds that the landowners' loss of use and adverse effect continue.

[26] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, then according to the preceding order Tribunal may direct the Minister to pay. The award is calculated as $3,625.00 to the Applicants for the year 2020 less a payment of $1,932.00 which results in a total of $1,693.00.

Dated at the City of Medicine Hat in the Province of Alberta this «dayth» day of CHOOSE MONTH, «year».

LAND AND PROPERTY RIGHTS TRIBUNAL

Miles Weatherall, Member