LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Metzger v Ember Resources Inc., 2022 ABLPRT 1009

Date: 2022-07-12
File No. RC2020.2099
Decision No. LPRT2022/SR1009
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 ¼-22-29-24-W4M as described in Certificate of Title No. 111 079 840 (the "Land"), particularly the area granted for a wellsite and access road, Alberta Energy Regulator Licence No. 0353613 (the "Site").

Between:

Ember Resources Inc.
and
Bumper Development Corporation Ltd.,

Operators,

\- and -

Steven R. Metzger,

Applicant.

Before: Miles Weatherall (the "Panel").

Appearances by written submissions:

For the Applicant:	Nickerson Roberts Holinski & Mercer, Terry Roberts, Q.C.
For the Operators:	
Ember Resources Inc.	Owen Law, Thomas R. Owen
Bumper Development Corporation Ltd.	No written submissions.

DEMAND FOR PAYMENT
AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS

THE TRIBUNAL DEMANDS that the Operators pay FIVE THOUSAND TWO HUNDRED NINETY-FIVE and 00/100 DOLLARS ($5,295.00) (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 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 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 July 27, 2022, lasting 15 days.
- Termination effective from August 11, 2022.

DECISION AND REASONS

[1] The Applicant 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 March 17, 2005 (the "Surface Lease"). On April 14, 2021, and March 23, 2022, the Applicant filed amendments to the Application to claim outstanding amounts due on the Surface Lease anniversary dates for the years 2021 and 2022. The Applicant claims a total amount of $5,295.00 under the amended Applications.

[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 April 29, 2022, of Ember Resources Inc. shows its legal status as active.

b. An Alberta Corporate Registry Search dated February 18, 2022, of Bumper Development Corporation Ltd. shows its legal status was struck on June 2, 2018.

[4] Documentation on file includes a Receivership Order made by the Court of Queen's Bench of Alberta on February 16, 2016, which appointed Alvarez & Marsal Canada Inc. as Receiver for Bumper Development Corporation Ltd. (debtor).

ISSUES

[5] 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 section 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 section 36(6) of the *Act*?

DECISION

[6] The Panel decides:

(1) For the purposes of section 36 of the *Act*, the Operators are Ember Resources Inc. and Bumper Development Corporation Ltd., jointly.

(2) The Compensation is payable to the Applicant 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 Applicant, the entry rights of Ember Resources Inc. shall be suspended and terminated according to the preceding order. The decision to suspend and terminate Bumper Development Corporation Ltd.'s rights is reserved.

(4) If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant then, <u>without further notice</u>, the Tribunal may direct the Minister to pay Compensation of $5,295.00 out of the General Revenue Fund.

ANALYSIS

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

[7] 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>

[8] 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. 0353613 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 March 17, 2020, March 17, 2021, and March 17, 2022, due dates.

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

[9] Under section 36(1)(d) working interest participants are *operators*. The Panel finds that Ember Resources Inc. and Bumper Development Corporation Ltd. are *operators* under section 36(1)(d) on the March 17, 2020, March 17, 2021, and March 17, 2022, due dates for the following reasons:

a. AER Well Summary Report dated May 10, 2022, for AER Well Licence No. 0353613 shows Ember Resources Inc. and Bumper Development Corporation Ltd. were working interest participants on the Site with 77.08% and 22.92% interests, respectively.

[10] In response to the October 5, 2020, Notice of Proceedings, Ember Resources Inc., by correspondence dated November 3, 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 Ember Resources Inc. and Bumper Development Corporation Ltd. are *operators* for the purpose of section 36(1)(d) on the due dates: March 17, 2020, March 17, 2021, and March 17, 2022.

<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 March 17, 2020, March 17, 2021, and March 17, 2022, due dates because:

a. Land Title Registration No. 061 064 931 registered on the Current Certificate of Title shows that Ember Resources Inc. was the holder of the Surface Lease for the Site on the March 17, 2020, March 17, 2021, and March 17, 2022, due dates.

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

[15] 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 the Right of Entry Instrument has been provided and the compensation is supported by the application and supporting documentation. The Applicant 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. In an April 19, 2022, email to the Tribunal, the Applicant confirmed the outstanding amount for each of three years from 2020, 2021 and 2022 is $1,765.00. The Panel finds that the compensation owed by the Operators is calculated as three (3) payments of $1,765.00 due on March 17th for the years 2020, 2021 and 2022. 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. and Bumper Development Corporation 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 Applicant by the Operator, 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 insolvent. As discussed above, Bumper Development Corporation Ltd.'s legal entity status was struck on June 2, 2018.

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

[21] The Applicant stated the Site is fenced with a well head remaining on site which is still being visited by workers. The land is used for crops. The Applicant submitted two (2) photographs to support this statement.

[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 a well head 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 landowner's loss of use and adverse effect continue

[26] 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 three payments of $1,765.00 to the Applicant for each of the years 2020, 2021 and 2022, for a total of $5,295.00.

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

LAND AND PROPERTY RIGHTS TRIBUNAL

Miles Weatherall, Member