



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Balderson v Ember Resources Inc, 2022 ABLPRT 1010

Date: 2022-07-12

File No.: RC2020.1619

Decision No.: LPRT2022/SR1010

Municipality: Rocky View 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:

SE ¼-34-28-25-W4M as described in Certificate of Title No. 081 375 839 (the “Land”), particularly the area granted for: a wellsite and access road, Alberta Energy Regulator Licence No. 0239345 (the “Site”).

Between:

Ember Resources Inc.

Operator,

- and -

Wayne Charles Balderson

and

Josephine Faye Balderson,

Applicants.

Before: Miles Weatherall
(the “Panel”)

Appearances by written submissions:

For the Applicants: Wayne Charles Balderson and Josephine Faye Balderson

For the Operator: Ember Resources Inc. – Owen Law, Thomas R. Owen

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

THE TRIBUNAL DEMANDS that the Operator pay TWO THOUSAND EIGHT HUNDRED NINETY-SIX and 00/100 DOLLARS (\$2,896.00) (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 then, without further notice, the Operator’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. 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 June 2, 2000 (the “Surface Lease”). On May 10, 2022, the Applicants filed an amendment to the Application to claim an outstanding amount due on the Surface Lease anniversary date for the year 2021. The Applicant claims a total amount of \$2,896.00 under the amended Application.

[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] The Panel acknowledges the Operator’s April 28, 2020, rental review request related to the Surface Lease for a decrease in the compensation rate from \$3,560.00 to \$2,112.00; an annual decrease of \$1,448.00. The Panel is guided by the Court of Queen’s Bench decision in *Karve Energy Inc v Drylander Ranch Ltd*, 2019 ABQB 298 – Justice Dilts. That decision held:

[47] “Under s. 36, the Board is only entitled to determine whether compensation is owed under the Lease. It is not authorized to review the rate of compensation or to intervene in or alter the parties’ agreement regarding compensation.”

[4] The Panel finds it cannot consider a variance in the rate of compensation established in the right of entry instrument.

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 Applicants 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 Applicants 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 Operator is Ember Resources Inc.
- (2) The Compensation is payable to the Applicants by the Operator 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 Applicants, the Operator'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 \$2,896.00 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*.

Section 36(1)(c) – AER Licence Holder

[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. 0239345 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 June 2, 2020, and June 2, 2021, due dates.

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

[9] Under s. 36(1)(d) working interest participants are *operators*. The Panel finds that Ember Resources Inc. is an *operator* under section 36(1)(d) on the June 2, 2020, and June 2, 2021, due dates for the following reasons:

- a. AER Well Summary Report dated May 10, 2022, for AER Well Licence No. 0239345 shows Ember Resources Inc. is a working interest participant on the Site with 100% interest.

[10] In response to the July 31, 2020, Notice of Proceedings, Ember Resources Inc., by correspondence dated September 17, 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] Having regard to the above, the Panel finds Ember Resources Inc. is an *operator* for the purpose of section 36(1)(d) on the due dates: June 2, 2020, and June 2, 2021.

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

[13] 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 June 2, 2020, and June 2, 2021, due dates because:

- a. Land Title Registration No. 041 111 737 registered on the Current Certificate of Title shows that Ember Resources Inc. was the holder of the Surface Lease for the Site on the June 2, 2020, and June 2, 2021, due dates.

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

[14] 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 an April 28, 2020, letter from the Operator requesting a reduction in the annual compensation from \$3,560.00 to \$2,112.00. The Applicants declared in writing that the Compensation has not been paid.

[15] The Panel is satisfied that Compensation is owed by the Operator to the Applicants for annual payment due under the Surface Lease or Compensation Order. The Panel understands that the Applicants acknowledge \$1,448.00 remains outstanding for each of the years 2020 and 2021. The Panel finds that the compensation owed by the Operators is calculated as two (2) payments of \$1,448.00 due on June 2nd for the years 2020 to 2021. The Site has not been reclaimed, and the Surface Lease or Right of Entry Order remains in effect.

[16] The Panel finds the Compensation is payable to the Applicants by the Operator and the evidence satisfactorily proves non-payment.

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

[17] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, the Operator's 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 section 36(6) of the Act?*

[18] The Applicants stated the Site is partially fenced with equipment remaining on site which is still being visited by workers. The land is used for crops. Documentation on file includes a May 25, 2020, letter sent by the Applicants to the Operator which indicates their use of the Site is limited by access easements, well site areas, and pipeline easements.

[19] 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.

[20] 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.

[21] 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*.

[22] 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 the Site is partially fenced with equipment remaining on site, is still being visited by workers, and use of the Site is limited by access easements, well site areas, and pipeline easements. The Site has not been reclaimed. The Panel finds that the landowner’s loss of use and adverse effect continue.

[23] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, then according to the preceding order, the Tribunal may direct the Minister to pay. The award is calculated as \$1,448.00 to the Applicants for each of the years 2020 and 2021, for a total of \$2,896.00.

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