



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Clearvalley Farms Ltd. v Ember Resources Inc., 2022 ABLPRT 1134

Date: 2022-08-16

File No.: RC2021.1393

Decision No.: LPRT2022/SR1134

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:

SW ¼-3-33-24-W4M as described in Certificate of Title 151 078 372 (the “Land”), particularly the area granted for: L.S.06, a well site and access road, Alberta Energy Regulator Licence No. 0425212 (the “Site”).

Between:

Ember Resources Inc.

Operators,

- and -

Clearvalley Farms Ltd.

Applicant.

Before: Dierdre Mullen
(the “Panel”)

Appearances by written submissions:

For the Applicant: Paul Vasseur, Representative

For the Operator: Tara M. Rout, OWEN LAW

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

THE TRIBUNAL DEMANDS that the Operator pay TWO THOUSAND FOUR HUNDRED SEVENTY FOUR and 00/100 DOLLARS (\$2,474.00) (the “Compensation”) to the Applicant within THIRTY (30) DAYS from the date of this decision. IT IS ORDERED that if Ember Resources Inc. does not prove to the Tribunal’s satisfaction that the Compensation has been paid in full to the Applicant, then without further notice the Tribunal may direct the Minister to pay TWO THOUSAND AND FOUR HUNDRED SEVENTY FOUR and 00/100 DOLLARS (\$2,474.00) to the Applicant out of the General Revenue Fund.

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 Operator’s obligations in regard 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 August 31, 2022, lasting 15 days.
- Termination effective from September 15, 2022.

DECISION AND REASONS

BACKGROUND

[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 May 4, 2005 (the “Surface Lease”). On May 6, 2021 the Applicant filed an Application to claim outstanding amounts due on Surface Lease anniversary dates: 2021. The Applicant claims a total amount of \$2,474.00 under the Application.

[2] According to Certificate of Title No. 151 078 372, the Applicant is the owner of the Land since March 20, 2015. The Applicant is also named on cheque stub for the 2021 payment.

[3] The Applicant claims an amount of \$2,474.00 for the May 4, 2021 payment due date. This amount is based on the annual compensation rate of \$4,374.00 less the \$1,900.00 payment received from the Operator for the year.

[4] AER Well License No. 0425212 indicates Ember as the Licensee. The AER Well Summary Report shows that Ember became the Licensee on January 26, 2015 and is the 100% working interest participant.

[5] Included in the application was a letter from Ember Resources Inc. (“Ember”) dated January 21, 2021 to the Applicant offering to reduce the annual payment from \$4,374.00 to \$1,900.00 for the 3.76 acre Site; “using a new formula outlined in the enclosed information package”. The letter states: *“If you are in agreement, please acknowledge by dating, signing and returning the duplicate copy of this letter to our attention...”* and further; *“Please note that any payment directed into your account, including the cashing of any cheques, is NOT deemed as acceptance of this offer.”*

[6] The Applicant did not sign the letter and takes the position that they did not agree to any change in the annual compensation rate.

[7] The Site is active, with a producing gas well. The Application indicates that the site is not fenced, has equipment or structures on the site, such as a wellhead, is still being visited by workers (including for reclamation work) and the land is being used for crops.

[8] The Operator's submission is a letter dated September 15, 2021 from its legal counsel discussing the Tribunal's discretion and exercise thereof under section 36(5) and 36(6) of the *Act*.

PRELIMINARY MATTER

[9] A Notice and Demand for Payment under s.36(4) of the *Surface Rights Act* (the "Notice") was sent to Ember Resources Inc. (Ember), identifying the Applicant, the licensed operator, the land description, the date of the original document, the current compensation and the total amount claimed.

[10] Ember submitted a letter dated September 15, 2021 in response to the Notice requesting that the Tribunal "reconsider the decision to issue a notice and demand for payment in respect of this matter" under section 29(1) of the *Act*. Ember identified errors of fact with respect to the Notice.

[11] The Panel in considering the Ember request notes a similar situation was addressed in *Ember Resources Inc. v Buckland*, 2021 ABLPRT 846 and this Panel adopts the reasoning in that decision. That decision provides considerable detail as to the reasons for not considering a review under section 29(1) of the Notice and Demand for Payment, including a detailed discussion of the law and references to previous Tribunal decisions to support those reasons, which this Panel also adopts.

[12] Section 29(1) does not apply to the Notice and Demand for Payment. Neither reflect a final decision by the Tribunal, as both are issued in advance of the merits of the application being considered. Ember was not prejudiced in that it had the opportunity to provide submissions in response to the Notice, which it did, and these submissions will be considered in the written hearing.

[13] In the alternative, if the Demand could be characterized as a "decision" of the Tribunal, when it would be an interlocutory or interim decision and that the test provided for in *689799 Alberta v Edmonton (City)*, 2018 ABCA 212 which would allow for a review has not been established. As a section 29 application is a discretionary remedy, this Panel would not consider a review in this circumstance.

[14] The Panel dismisses the request for a section 29 review and will proceed to consider the merits of the Application.

ISSUES

[15] The issues before the Panel are:

- (1) Is there money past due that has not been paid by the Operator to the Applicant under a surface lease or compensation order?
- (2) Should the Tribunal suspend and terminate the Operator entry rights under section 36(5) of the *Act*?
- (3) 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*?
- (4) Should the Tribunal award costs under section 39 of the *Act*, and if so in what

amount?

DECISION

[16] The Panel decides:

- (1) Compensation is due and payable to the Applicant by Ember, and the written evidence satisfactorily proves that it has not been paid.
- (2) If the Ember has not complied with the Demand Notice and paid the Compensation in full to the Applicant, Ember's entry rights shall be suspended and terminated on the dates in the attached Order.
- (3) If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant, then without further notice the Tribunal may direct the Minister to pay Compensation of \$2,474.00 out of the General Revenue Fund.
- (4) The Operator shall pay to the Applicant costs in the sum of ONE HUNDRED AND TWENTY-FIVE and 00/100 DOLLARS plus GST (\$125.00 plus GST of \$6.25=\$131.25).

ANALYSIS

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

[11] The application states that the annual rental rate for 2021 was not paid in full. The rental rate for the year is \$4,374.00 and that \$1,900.00 was paid for the May 4, 2021 payment.

[12] Evidence regarding the payment received by the Applicant for the May 4, 2021 due dates consists of a signed declaration that the Compensation owing is \$2,474.00 and that it has not been paid. The January 21, 2021 from Ember to the Applicant stating that a payment was made for the proposed new rental rate of \$1,900.00. A copy of an electronic transfer from Ember to the Applicant was in evidence showing that a payment of \$1,900.00 was received by the Applicant for the Site, dated May 6, 2021.

[13] The January 21, 2021 letter from Ember to the Applicant refers to section 27 of the *Act* (Review of Rate of Compensation) and states; "*Ember Resources Inc. would like to inform you that the rental for the above noted lease is up for review in 2020.*" The Ember letter does not indicate that it is a formal notice under section 27(14) or section 27(5) of the *Act*.

[14] The January 21, 2021 letter informs the Applicant that Ember has decided to adopt a "new formula" to adjust annual rental payments (a copy of the information package describing the new formula was apparently attached to the letter but was not in evidence before the Panel). The letter sets out the rate of annual compensation under this "new formula" for the Site, being \$1,900.00. The letter then states the following:

If you are in agreement, please acknowledge by dating, signing and returning the duplicate copy of this letter to our attention in the self-addressed envelope. In anticipation of your acceptance, we have enclosed your annual rental cheque in the amount of our proposed offer.

We understand that you may have some questions or concerns about our offer. As mentioned in our information package, we will be applying this formula to all of our leases as they come up for

review. If you believe this offer is unacceptable, please be prepared to justify your position, and back it up with specific, detailed data from your farming operation. Ember will be more than happy to discuss any concerns you may have. You can contact us.....

Please note that any payment directed into your account, including the cashing of any cheques, is NOT deemed as acceptance of this offer.”

[15] The Panel has considered *Karve Energy Inc. v Drylander Ranch Ltd.*, 2019 ABQB 298, where the Court concluded:

*[36] The Board correctly concluded that compensation under a surface lease can be set one of two ways: either by agreement of the parties or by a decision of the Board under s. 27 of the Act. That conclusion accords with the Act and with the law. While parties to a surface lease are precluded from contracting out of the s.27 review cycle, they are not precluded from reaching agreement regarding the particulars of compensation: **Shepstone** para 18.*

[37] It is trite law that one party to a contract cannot unilaterally impose on the other a change to a term of the contract. However, neither the Act nor the law precludes the parties to a surface lease from agreeing to the compensation payable under the lease, or from agreeing to a mechanism for adjustment to the compensation payable”.

[16] There is no evidence that the surface lease includes a clause where the parties agreed to a formula to reduce the compensation, however Ember was not without a remedy if it wished to have the rate of compensation in the surface lease varied and could not reach an agreement with the owner. 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 wished to have the rate of compensation reviewed, it issued its required notice under section 27 and entered into negotiations with the Applicant, and then if the parties did not agree to a rental rate, Ember 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 January 21, 2021 letter alone does not vary the rate of compensation.

[18] Since Ember did not avail itself of the provisions of the *Act*, and specifically section 27, the only option available to adjust the annual compensation rate is for the parties to do so via a mutual agreement, which has not occurred.

[19] The Panel finds that the payment proposed and made by Ember for the May 4, 2021 payment due date was a unilateral decision made by Ember based on Ember'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 after the January 21, 2021 letter. The rate paid by Ember for the 2021 payment due date 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 \$4,374.00 was altered by mutual agreement.

[20] The Panel is satisfied that Compensation is owed by the Operator to the Applicant for annual payment due under the surface lease. The Compensation outstanding is calculated as one payment of \$2,474.00 due on date for the year 2021, calculated as the annual payment rental rate of \$4,374.00 less the \$1,900.00 paid per year. The Site is active, and the surface lease remains in effect.

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

[21] Ember's submission, dated September 15, 2021, addresses the issue of suspending and terminating an operator's right to enter a site (section 36(5)) 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's submission is silent with regard to the issue of whether the Operator made appropriate payment for the 2021 payment due date

[22] Ember argued that with regard to section 36(5), the Tribunal has discretion in deciding to suspend an operator's right to access a site, and that this decision must be made in light of the public interest, in addition to other relevant factors. Ember's submission states in part: *"These sites contain producing wells, income from which enables the operator to make payment on the leases and continue to contribute to the liquidity of the operator and its ongoing ability to meet its obligations. Suspending the leases on these sites increases the risk of the wells becoming orphan wells and an ongoing burden on the taxpayer. Furthermore, if the sites are suspended, this will mean an end to production by the wells that they contain, which in turn will reduce the income to public funds in the form of royalties on the minerals they produce."*

[23] The Application before the Panel is under section 36, which is not a compensation review application under section 27 of the *Act*. Furthermore, a decision under section 36 does not amend the surface lease agreement or affect the compensation payable under the surface lease agreement, as is the case under a section 27 application.

[24] 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, then 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.

[25] The Panel considered section 36 within the context of the *Act*. Once the operator is determined under section 36(1) and (2), section 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.

[26] The Panel notes that section 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 section 26(4). It is true that this is a discretionary authority, however Ember 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 section 27, it is not entitled to pay less than the contractual amount until it obtains a new compensation order from the Tribunal.

[27] Where the operator who is responsible for the non-payment does not comply with the notice demanding payment, section 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 whereby 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.

[28] 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 section 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.

[29] The Panel finds that Ember is an active corporation and is operating a producing gas well on the Site and benefitting from that operation. Ember has not provided evidence that the amount claimed is not payable, rather it is asking the Tribunal not to enforce a debt that is clearly outstanding. Ember argues, without providing supporting authorities, that suspension and termination increase the risk that the well on the Site will become an “orphan”. The submission also makes vague statements about Ember’s ongoing ability to meet its obligations. As previously noted by the Panel, Ember had a remedy available to it under section 27 of the *Act* if it is paying more compensation than it believes is reasonable.

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

[31] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, 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 Applicant 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?*

[32] With regard to section 36(6), the Operator argued; “*The amounts paid under each of these leases represented Ember’s assessment of fair compensation for each respective lease in all the circumstances. Ember 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 submits that the Tribunal’s function under s.36(6) is not to enforce payment under the 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. Given that the funds paid under this section are taken from the public purse, Ember submits that the public interest is also engaged in this analysis, and that the Tribunal must consider this in its reasoning. Ember submits this does not prejudice the landowner 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.*”

[33] 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.

[34] 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.

[35] 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."

[36] 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*.

[37] The Applicant has checked the "yes" box in Part 3 of the Application, which asks: "Check "yes" if any of the following is true: (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." The Panel notes that there was no evidence that the activity on the Site or the Applicant's access to and ability to use the Site for farming purposes has changed since the last anniversary payment was made in January 2020. The compensation rate of \$4,374.00 was determined via private agreement between the parties.

[38] 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'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 to provide submissions more specific to the Site but chose not to do so and did not explain why. Even if Ember succeeding 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 of its obligation to pay the full amount under the surface lease agreement.

[39] Ember’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 s.36(5) and s.36(6) of the Act.”

[40] The Panel finds that Ember provided a submission in response to the Notice and Demand for Payment triggered by the Application. Ember had the opportunity to include a fulsome response to the Application, including disputing anything in the Application Ember did not agree with, providing evidence to support Ember’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 from providing supporting documentation, arguments, or detail. Ember’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 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 has determined that the full amount is due and payable. As with the Suspension and Termination orders, the Direction to the Minister to pay will only issue if Ember fails to pay the amount owing as outlined above.

[41] 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 award is calculated as \$2,474.00 to the Applicant for the year 2021.

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

[42] The Applicant filed an invoice for costs in the sum of \$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.

[43] 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)

[44] 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 section 36 application within one hour or less”. An award of costs helps assist the landowner in remaining whole and the landowner would not have had to incur these costs if Ember had paid the full amount due and owing under the terms of the surface lease. The Panel therefore awards costs for 1 hour of professional assistance at a rate of \$125.00/hour plus 5% GST (\$131.25).

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

ORDERS:

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

Dated at the Town of Okotoks in the Province of Alberta this 16th day of August, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL



Dierdre Mullen, Member