LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Schultz v Ember Resources Inc, 2022 ABLPRT 900348

Date: 2022-09-26
File No.: RC2021.1030
Decision No.: LPRT2022/SR900348
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 ¼-14-42-21-W4M as described in Certificate of Title No. 002 090 532 +1 (the "Land"), particularly the area granted for a well site and access road for the 04-14-042-21W4M well, Alberta Energy Regulator Licence No. 0184823 (the "Site").

Between:

Ember Resources Inc.

Operator,

- and -

Russell Dean Schultz

Applicant.

<u>Before:</u> Tamara M. Bews
(the "Panel")

Appearances by written submissions:

For the Applicant: Paul Vasseur

For the Operator:
Ember Resources Inc. Tara M. Rout, counsel, Owen Law

DEMAND FOR PAYMENT AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS

THE TRIBUNAL DEMANDS that the Operator pays ONE THOUSAND FIVE HUNDRED SEVENTY and 00/100 DOLLARS ($1,570.00) (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 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 remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from October 11, 2022, lasting 15 days.
- Termination effective from October 26, 2022.

DECISION AND REASONS

[1] On March 26, 2021, the Applicant applied under section 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease dated January 15, 1996 for the Site. The Applicant submits that Ember did not pay the full annual compensation amount of $3,684.00 due on January 15, 2021.

[2] The Applicant claims that $1,570.00 is outstanding for the 2021 Surface Lease year. Also, the Applicant is seeking costs of $918.75 plus GST for seven applications including this Application.

[3] By letter dated May 26, 2021, the Tribunal issued a Notice of Proceedings to Ember Resources Inc. By letter dated July 22, 2021, Ember responded to sixty Tribunal notices, including this Site.

ISSUES

[4] The issues before the Panel are:

(1) Who is the Operator under section 36 of the *Act*?

(2) Is there money past due that has not been paid by the Operator to the Applicant under the Surface Lease?

(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 out of the General Revenue Fund under section 36(6) of the *Act*?

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

DECISION

[5] The Panel decides:

(1) The Operator is Ember Resources Inc.

(2) Compensation of $1,570.00 is payable to the Applicant 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 Applicant, 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 Applicant, then without further notice the Tribunal may direct the Minister to pay Compensation of $1,570.00 out of the General Revenue Fund.

(5) Costs of $125.00 plus GST are payable to the Applicant by the Operator.

ANALYSIS

1. Who is the operator under section 36 of the Act?

[6] Section 36 (1) of the *Act* defines "operator" as any person who, at the time of the non-payment under a surface lease…. became liable to pay the money in question because that person

(a) was an approval or registration holder who carried on an activity on or in respect of specified land pursuant to an approval or registration,
(b) carried on an activity on or in respect of specified land other than pursuant to an approval or registration,
(c) was the holder of a licence, approval or permit issued by the Alberta Energy Regulator...
(d) was a working interest participant in a well…or
(e) was the holder of the surface lease...

and includes a successor, assignee, executor, administrator, receiver, receiver-manager, or trustee of a person referred to in clause (a) (b) (c), (d) or (e)…and persons acting as principal, or agent of any person referred to in or after clauses (a) to (e).

[7] An AER Well Summary Report Search dated May 18, 2022, for Well Licence No. 0184823 shows that Ember is the licensee and 100% working interest participant in the well, effective November 15, 2013. An AER OneStop Search dated June 22, 2022 shows that the well is a producing gas well.

[8] Land Title Registration No. 962 015 089 registered on the Current Certificate of Title shows that Ember was the holder of the Surface Lease for the Site on the 2021 due date.

[9] In its response, Ember acknowledges that it is an Operator for various surface leases, including the Surface Lease for this Application.

[10] Having regard to the above, the Panel finds that Ember is an operator under section 36(1)(c), (d), and (e) of the *Act*.

2. Is there money past due and unpaid by the Operator to the Applicant under the Surface Lease?

[11] Certificate of Title No. 002 090 532 +1 confirms the Applicant has owned the Land since April 7, 2000. Accordingly, the Applicant was the owner of the Land when the Surface Lease annual compensation was due.

[12] The Application and the Applicant's declaration indicate that compensation of $1,570.00 is owed under the Surface Lease as follows:

Year Requested	**Amount Claimed**	**Amount Received**	**Amount Owed**
January 15, 2021	$3,684.00	$2,114.00 *	$1,570.00
Total			$1,570.00

Note: The Applicant indicates that they are claiming $1,570.00 for 2021.

[13] In support of their Application and the Applicant's declaration, the Applicant provided a letter dated October 8, 2020 from Ember to the Applicant. This letter indicates, among other things, that:

a. The rental for the Surface Lease is up for review in 2020 under section 27 of the *Act*.
b. Ember proposes to adjust the annual rental from $3,684.00 to $2,114.00 per year effective January 15, 2021.
c. If the Applicant agrees, please acknowledge by dating, signing and returning the duplicate letter to Ember's attention.
d. Any payment directed to the Applicant's account, including the cashing of any cheques, is not deemed as acceptance of this offer.

[14] In the Panel's view, it appears that the Applicant's position is that the Surface Lease was not amended to reduce the compensation from $3,684.00 to $2,114.00 per year, effective January 15, 2021, such that $1,570.00 remains outstanding for the 2021 Surface Lease year.

[15] Surface leases are privately negotiated contractual agreements. A copy of the Surface Lease has not been provided.

[16] The onus is on the Applicant to prove that the money is due and paid under the Surface Lease. The Panels notes that the Applicant's declaration references and provided a copy of Ember's letter dated October 8, 2020; and provided other documentary evidence related to the Surface Lease.

[17] By letter dated July 22, 2021, Ember responded to sixty Tribunal notices, including this Site. Ember acknowledges that they are an Operator for various surface leases, including the Surface Lease for this Application. However, Ember did not specifically respond to the Applicant's submission that the full Surface Lease compensation amount of $3,684.00 due on January 15, 2021 was not paid.

[18] In the absence of additional submissions, evidence and legal authorities being provided, the Panel finds that Ember's proposed October 8, 2020 amendment to the Surface Lease is not legally binding on the Applicant. Accordingly, the Panel finds that the annual Surface Lease compensation due on January 15, 2021 was $3,684.00.

[19] Furthermore, the Panel does not have the authority under section 36 of the *Act* to vary the annual compensation, but only to require or order the payment of annual unpaid compensation: see, e.g., *Penner v Canstone Energy Ltd*, 2021 ABLPRT 416 (CanLII) at paragraph 20.

[20] The Panel is satisfied that compensation of $1,570.00 (namely, $3,684.00 – $2,114.00 = $1,570.00) is still owed by the Operator to the Applicant for the Surface Lease anniversary date: January 15, 2021, and the written evidence satisfactorily proves that it has not been paid. The Site has not been reclaimed, 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] Section 36(4) of the *Act* instructs the Tribunal to demand full payment from an Operator if evidence satisfactory proves non-payment. The Tribunal can suspend and terminate an Operator's right to access the Site when appropriate (section 36(5) of the *Act*).

[22] AER records show that the Site is a producing gas well.

[13] In its July 22, 2021 response, Ember submits the Tribunal's discretion to suspend an Operator's rights must be considered in light of the public interest, as well as all relevant factors. Ember argues that income from a producing well site enables the Operator to make payments on the surface lease and continues to contribute to the liquidity of the Operator and its ongoing ability to meet its obligations. Suspending the surface lease for a producing well increases the risk of the well becoming an orphan well and ongoing burden on the taxpayer. Furthermore, Ember argues that if sites are suspended, this will mean an end to the 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. Therefore, Ember asks that the Tribunal hear further submissions before proceeding to make any order suspending the Operator's rights under the surface leases.

[23] The Panel denies Ember's request to provide further submissions. Nonpayment of compensation is the only permissible prerequisite for a suspension and termination order under section 36(5). The Tribunal may not determine what specific rights the Operator has under the Surface Lease nor whether the Operator is in default of the Surface Lease terms; other than the Operator's failure to pay compensation. Here, the Operator has failed to pay compensation and this compensation remains unpaid. Considerations regarding the Operator's liquidity/financial viability, reduction of mineral royalties, etc. are not relevant. The only relevant consideration is whether the Operator has paid the compensation due under the Surface Lease.

[24] Unless the Tribunal receives satisfactory evidence that the remaining compensation of $1,570.00 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?

[25] Concerning the condition of the Site, the Applicant submitted, among other things, that: there is equipment or structures on the Site, the Site is still being visited by workers, and no reclamation certificate has been issued. The Applicant's position is the losses and the impacts from the Site remain the same. Also, the Applicant submits that the impacts are not reduced including having to deal with regulatory officials and the Tribunal to have the Alberta Government honor its commitment to pay landowners annual compensation when energy companies don't.

[26] In its July 22, 2021 response, Ember argues that:

a. The Tribunal must assess what proper compensation would be under the surface leases, and this should be the limit which the treasury should be ordered to pay to the Lessors.

b. The Tribunal's function is not to enforce payment under the Surface lease, but to ensure that the landowner is fairly compensation for any loss. Payment beyond this would constitute unjust enrichment at the expense of the taxpayer.

c. The rental payments Ember has made under the Surface Lease represent fair compensation for the actual loss of use and adverse effect on the landowners.

d. The Tribunal must consider the public interest given that funds are paid under section 36(6) from the public purse.

e. The Lessors can recover any outstanding balances through the courts using the usual civil remedies for enforcing their Surface Lease.

f. The Lessors have a duty to mitigate their losses to the extent possible in the circumstances, and that the Tribunal in assessing the compensation that be paid to them from the Treasury.

[27] Finally, Ember asks that the Tribunal hear more extensive submissions on these factors before exercising its discretion under section 36(6) of the *Act*.

[28] The Panel denies Ember's request to provide further submissions. In the Panel's view, a party's right to make further submissions is not absolute. In other words, the Panel retains the discretion to grant such a party's request. In this case, the Panel finds that Ember could have and should have presented all their arguments, evidence, and legal authorities relevant to the issues in the proceeding.

[29] *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 ("*Devon*") is the leading case on what constitutes the Tribunal's responsibility when considering an order under s. 36(5) and (6). Justice Sirrs wrote 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.*

[30] 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.

[31] 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 as well as the kind of evidence needed to support a decision to order 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 paragraph 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*.

[32] The Applicant argues they should be compensated in full. Ember's position is that the payments they have made under the Surface Lease represent fair compensation for the actual loss of use and adverse effect on the Applicant.

[33] There is no evidence to convince the Panel that payment of the remaining compensation of $1,570.00 would result in overpayment to the Applicant. The Operator has active equipment and structures on the Site, including a producing gas well. The Panel finds that loss of use and adverse effect from the Site has continued to occur.

[34] Unless the Tribunal receives satisfactory evidence that the remaining compensation of $1,570.00 has been paid in full to the Applicant, then according to the preceding order Tribunal may direct the Minister to pay.

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

[35] The Applicant filed an invoice for costs in the sum of are seeking costs of $750.00 plus GST for six applications including this Application. The total costs are based on 6 hours at $125.00 per hour.

[36] Section 39(1) of the *Act* puts costs of and incidental to proceedings under the *Act* at 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.

[37] 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 Applicant. 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)

[38] The Panel applies the reasoning in *Bear Canyon* to the costs claimed by the Applicant. The Panel finds that 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" at a professional rate of no more than $150.00 per hour.

[39] Given the Applicant claimed costs for six applications, the Panel finds it reasonable to divide the total costs by the six applications (which amounts to $125.00 plus GST per application). On that basis, the Tribunal finds costs of $125.00 plus GST are payable to the Applicant by the Operator for this proceeding.

ORDERS:

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

Dated at the Calgary in the Province of Alberta this 26th day of September, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Tamara M. Bews, Member

LAND AND PROPERTY RIGHTS TRIBUNAL

Date: 2022-09-26
File No. RC2021.1030
Order No. LPRT901069/2022

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SW ¼-14-42-21-W4M as described in Certificate of Title No. 002 090 532 +1 (the "Land"), particularly the area granted for a well site and access road for the 04-14-042-21W4M well, Alberta Energy Regulator Licence No. 0184823 (the "Site").

BETWEEN:

Ember Resources Inc.

Operator,

- and -

Russell Dean Schultz

Applicant.

ORDER DETERMINING COSTS
PURSUANT TO SECTION 39 OF THE ACT

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[1] By Decision No. LPRT2022/SR900348 dated September 26, 2022 the Tribunal has determined the amount of and to whom costs are payable pursuant to s. 39 of the *Act.*

[2] IT IS ORDERED that costs in the amount of ONE HUNDRED TWENTY FIVE and 00/100 DOLLARS plus GST ($125.00 plus GST) are payable by the Operator to Russell Dean Schultz.

Dated at the City of Calgary in the Province of Alberta on September 26, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Tamara Bews, Member