LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Canadian Natural Resources Limited v. Robson, 2022 ABLPRT 900354

Date: 2022-09-27
File No. RC2018.0645 & RCR2021.2039
Decision No. LPRT2022/SR900354
Municipality: Lacombe 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 29 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 -11-41-3-W5M as described in Certificate of Title No. 092 365 297 +1 (the "Land"), particularly the area granted for Well Licence No. 0115768 (the "Site").

Between:

Tina Louise Robson
and
Stanley Lee Robson,

Applicants,

- and -

BTG Energy Corp.,
Whitecap Resources Inc. (formerly Nal Resources Limited),
Certus Oil & Gas Inc.,
Manitok Energy Inc.
and
Canadian Natural Resources Limited,

Respondents.

Before: Susan McRory, Chair
(the "Panel")

DEMAND FOR PAYMENT: FILE RC2018.0645

IT IS DEMANDED the Operators jointly pay six thousand and three hundred dollars to the Applicants. If this amount is not paid by the date of termination, below, the Tribunal may direct the Minister to pay six thousand and three hundred dollars to the Applicants.

ORDER SUSPENDING AND TERMINATING ENTRY RIGHTS: FILE RC2018.0645

IT IS ORDERED that if the Tribunal does not receive satisfactory evidence that the full amount due has been paid in full to the Applicants, then without further notice the rights of Canadian Natural Resources Limited, Certus Oil & Gas Inc. and BTG Energy Corp. 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 Right of Entry Instrument remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from October 12, 2022, lasting 15 days.
- Termination effective from October 28, 2022.

The Panel declines to order suspension and termination against Manitok Energy Inc. and Whitecap Resources Inc.

DECISION ON FILE RC2018.0645

BACKGROUND/OVERVIEW:

[1] This is a re-hearing of File RC2018.0645 and a new hearing with respect to File RCR2021.2039. The rehearing was ordered by this Panel on February 16, 2022. Please refer to Canadian Natural Resources Limited v. Robson 2022 ABLPRT 322.

[2] The original application under section 36 of the *Surface Rights Act* was filed by an agent on behalf of the landowners on February 5, 2019. It concerned the recovery of unpaid compensation due on the 2018 anniversary of the Surface Lease Agreement dated June 20, 1985.

[3] Subsequent to the original application, there was a request dated August 27, 2019 to amend the application to reflect unpaid compensation for 2019, and a further amendment request dated June 21, 2020 to reflect unpaid compensation for 2020.

[4] Upon receipt of written evidence that satisfactorily proves non-payment, the Tribunal is required to make a written demand of the Operator(s) for full payment. (Section 36(4)).

[5] A Demand and Notice of Proceedings dated September 8, 2020 were sent to Manitok Energy Inc. Notices were sent to Canadian Natural Resources Limited (CNRL) and Nal Resources Limited on October 1, 2020.

[6] On October 16, 2020, CNRL responded by providing written submissions dated October 16, 2020. It was later determined that these submissions were not provided to the panel deciding the original decision.

[7] The original decision No. 2020/0942 was issued December 22, 2020 without the benefit of submissions provided by CNRL. The original decision also failed to make a clear reference as to which parties the orders of suspension and termination related. The original decision determined that the amount of compensation outstanding for 2018, 2019 and 2020 was $12,600.00 payable by Manitok, CNRL and Nal Resources.

The original Panel concluded that there was no reason to direct the Minister to pay a reduced amount.

[8] Direction to Pay Order No. 0212/2021 in the amount of $12,600.00 was issued January 27, 2021.

[9] On February 17, 2021, Canadian Natural Resources Limited (CNRL) made a partial payment to the Landowners in the amount of $6,300.00.

[10] On March 17, 2021, CNRL brought an application under section 29 of the *Act* for reconsideration of the original decision.

[11] In May of 2021, the Landowner submitted a request to amend their application to reflect the partial payment of $6,300.00.

[12] On August 4, 2021, the Tribunal wrote to all parties indicating that the basic requirements for reconsideration had been met and provided the parties with the opportunity to provide written submissions.

[13] On August 19, 2021, the Landowners through their agent filed a repeat s36 application with respect to an alleged failure to pay compensation for 2021. (File No. RCR2021.2039)

[14] On February 16, 2022 this Panel issued Decision LPRT2022/SR0322 ordering a rehearing on the original application with amendments. The Panel indicated it would also deal with the repeat application and that the Landowners would be given leave to provide additional information as to the condition of the leased area.

[15] On February 22, 2022 a Notice of Rehearing was to be provided to Whitecap, BTG, Certus, CNRL and Manitok, providing an opportunity to provide written submissions on or before March 22, 2022.

[16] In the event submissions were provided to the Tribunal from potential operators, the Landowners were given an opportunity to provide submissions in reply on or before April 5,

2022.

[17] CNRL, Whitecap and the Receiver for Manitok provided submissions. With respect to the repeat application, CNRL suggested that the repeat application be rejected on the basis of a lack of information as to the condition of the leased area. The Landowners did not respond.

EVIDENCE/ADMISSIONS

Documentary Evidence obtained by Tribunal

[18] According to the records provided by the AER as of August 31, 2020, Manitok was the current licensee. According to an Order issued by the AER on August 21, 2019 with respect to the subject Site, Manitok was the licensee, Canadian Natural Resources Limited (CNRL) was a 50% working interest participant, Manitok was a 49% working interest participant and Nal Resources Limited held a 1% interest. (AD-2019-06)

The records also indicate that the well was suspended as of December 31, 2014.

[19] According to the records provided by Land Titles, the Certificate of Title confirms that the Applicants were the owners of the land as of September 9, 2009. A historical search confirms that they were the owners as of May 22, 1992 and accordingly were the registered owners on the June 20, 2018 due date. (Historical Land Title Certificate.)

The Landowners

Evidence in support of the original application with amendments

[20] The documentation provided in the first instance on February 5, 2019 included the following:

- Executed Application Form
- Copy of the Original Surface Lease
- Survey Plan attached to Caveat No 852 144 560
- Copy of the Survey Plan
- Copy of cheque stub for 2016 payment including Attachment Form 034
- Copy of cheque stub for 2017 payment
- Land Titles Certificate
- Wellsite information
- Aerial image of the Site dated February 5, 2019

[21] The cheque stub dated April 13, 2016 was from Chinook Energy Inc. issued to Tina Louise & Stanley Lee Robson referencing "LEASE:S005028." The Attachment Form bearing the same file number provides further information. The date of the Lease is indicated to be "June 20/1985", the Rental Period is described as "From Jun 19/2016 To Jun 18/2017." The names of the lessors, the legal land description, the well name and identification number are included.

The cheque stub dated June 7, 2017 from Manitok Energy Inc. is issued to Tina Louise & Stanley Lee Robson in the amount of $4,200.00.

[22] The Surface Lease included the survey plan with same coordinates and well name as referenced in the AER documents.

[23] The photo of the site which is dated February 5, 2019 shows a well site and access road. It is evident that structures remain and the area where there is no cultivation is not significantly reduced from the area shown in the survey plan. There are no other well sites on the property which is also consistent with the Alberta One Stop record.

[24] In addition to the photo, in describing the condition of the land, the Landowners checked off the box on the application form indicating that at least one of the following conditions applied:

> the site is fenced;
> there is equipment or structures on the site such as a wellhead;
> the site is still being visited by the workers (including reclamation work)

The application form provided the following direction to the landowners:

> Use the box below to describe the condition of the leased area and any facts about the land that you feel are important for the Board to know. Describe what losses you are suffering because of the existence of the lease itself or because of activities on the leased area (including reclamation work). You can also give any arguments about whether payment of the full rental amount is still justified.

The only additional evidence that Landowners provided was to this effect: "This lease contains a pump jack and shack."

[25] In support of the original application is a statutory declaration dated August 27, 2019, in which the applicant solemnly declared that there is a surface lease, that payment has not been made for 2018 and that the amount owing is $4200.00.

The request to amend for 2019 included confirmation by the Landowners that the information contained in the previous application "continues to be true" and that no payment has been made.

The Request to Amend for 2020 contained the same confirmation.

Evidence in support of the repeat application

[26] The application that was filed on August 19, 2021 included a checkbox for the Landowner to indicate whether any of three conditions exist: that the site is fenced, that equipment remains on site and that the site is still being visited by workers. The Applicant checked the "yes" box.

However, the Landowners provided no further evidence or information as to the condition of the land.

CNRL

[27] In the original submissions of October 16, 2020 CNRL acknowledged that it acquired a 50% working interest in the Site in 2014. CNRL also reported that the AER had not issued a reclamation certificate of the site and that CNRL "has placed the well on the Site into its queue for abandonment pursuant to AER Abandonment Order No. AD 2019-06."

On February 17, 2021, Canadian Natural Resources Limited (CNRL) made a partial payment to the Landowners in the amount of $6,300.00.

The Receiver

[28] The Receiver confirmed that Manitok was adjudged bankrupt on February 20, 2018 and the Receiver was discharged as of July 9, 2019.

Whitecap

[29] Whitecap advised that as of March 16, 2020, BTG Energy Corp. and Certus Energy Corp. acquired all of the assets of Nal Resources. Thereafter on January 4, 2021, Nal Resources amalgamated with Whitecap and continues under the name "Whitecap".

Whitecap provided a copy of the purchase and sale agreement which included the site that is the subject matter of these proceedings.

POSITION OF THE PARTIES

The Landowners

Original Application

[30] As to arguments about whether payment of the full rental amount is still justified, in the original application the agent wrote:

> No "rental" is paid on well sites in Alberta. The annual payments are compensation under the Surface Rights Act. This is not an ordinary commercial relationship between willing parties. The compensation obligation arises from a statutory forced taking akin to an expropriation. The annual payment is for loss of use, adverse effect (both tangible and intangible), nuisance, and noise among other criteria. The losses and impacts of this wellsite are the same as when the energy company was in operation. The impacts have not reduced since the company went out of business. Any subsurface contamination has not been delineated nor cleaned up. No reclamation certificate has been issued. Some impacts have increased including needing to deal with regulatory and environmental officials and dealing with the Surface Rights Board to have the Alberta Government honour its commitment to pay landowners when the energy companies don't.

Repeat Application

[31] A similar statement was provided in the repeat application.

With respect to the request for submissions dated August 4, 2021, no submissions were provided.

In the decision dated February 16, 2022, the Landowners were given leave to provide additional information as to the condition of the leased area (Para 42). No additional information was provided.

In response to the Notice of Re-hearing dated February 22, 2022, no submissions were provided.

The Receiver

Original submissions of June 2021

[32] The Receiver indicated that by virtue of stays of proceedings granted in connection with insolvency and bankruptcy proceedings, no party is entitled to obtain relief against Manitok or the Receiver.

Submissions in response to the Notice of Re-hearing

[33] The Receiver indicated that it was content with the position taken by the Tribunal in Decision LPRT2022/SR0322 that no enforcement action could be taken against Manitok or the Receiver but requested that they be copied on all correspondence and any future decision.

Whitecap

March 2, 2021 Submissions

[34] Whitecap did not respond to the original notice and demand but did provide information as to the sale of the assets from Nal Resources to BTG Energy and Certus Oil & Gas.

March 22, 2022 Submissions in response to the Notice of Re-hearing

[35] With respect to alleged non-payment in 2020 and 2021, Whitecap's position is that it should not be responsible as its predecessor had sold its interest in the site effective March 16, 2020.

As to its responsibilities for non-payment in 2018 and 2019, Whitecap argued that it is not an operator as it was not a party to the surface lease, or a person having access to or involvement with the actual operators of the Site. Whitecap suggested that as the ability to suspend and terminate are the "Tribunal's recourse against a noncompliant operator" and that these orders would not impact an operator who does not have access to the site, as the definition of "operator" must imply that there is "a cause or right to access the site."

Whitecap also challenged the notion of joint responsibility and that the legislation "does not

preclude" the Tribunal from requesting something less than full payment.

In the alternative, Whitecap argued that the Tribunal should exercise discretion and only hold it responsible for a payment commensurate with its 1% working interest in the Site.

BTG Energy Corp.

[36] No submissions were provided in response to the February 22, 2022 Notice of Rehearing.

Certus Oil &Gas Inc.

[37] No submissions were provided in response to the February 22, 2022 Notice of Rehearing.

CNRL

Original Submissions of October 16, 2020

[38] CNRL has organized its submissions into two categories: "Submissions on Procedural Fairness" and "Submissions on the Merits of the Application".

[39] Under the heading of Procedural Fairness, CNRL's arguments fall into two categories: the first is whether the Tribunal has the power to do what it does. This a question of jurisdiction although CNRL has used the term "mandate".

CNRL has suggested that Tribunal had exceeded its "mandate" when it included CNRL as an operator "by means of an unknown process and without any specific allegation as to how it has been identified by the Board as an operator."

CNRL also suggests that it is beyond the "mandate" of the Tribunal to undertake an investigative function and that to do so is "inappropriate".

[40] The second category of issues deals whether the Tribunal has fairly exercised the powers that it does have. The bulk of the submissions fall under this second category. A number of specific concerns were raised:

- that the Tribunal's processes had changed without any "explanation or notice" as to the change;
- that CNRL did not have "an opportunity to be heard";
- That the Notice provided "does not invite Canadian Natural to provide submissions";
- that without knowing how it was identified as an operator CNRL "is unable to prepare a complete and fulsome response to the Application";
- that CNRL was forced to speculate as to why it was named as working interest participant;
- that the applicants had not identified CNRL as an operator and that the evidentiary burden falls to the applicant;

- that if the Tribunal undertakes is own investigation at the very least, the Tribunal should provide CNRL with specific details as to the "investigative actions";
- that the Tribunal has provided no information as to whether it "exhausted its search for other responsible parties".

CNRL then referenced other files where it was also named as a party.

[41] CNRL also classified issues relating to sufficiency of evidence as a preliminary matter. While this panel would characterize these issues as matters relating to the merits, CNRL has suggested that the Tribunal has not:

> … fulfilled its duty to perform a fulsome review of the Application, which forces Canadian Natural to perform duties assigned to the Board under the Act.

CNRL suggested that the Tribunal ought not to accept a signed application as sufficient evidence of non-payment.

As to deficiencies in the application package, CNRL suggested there is no signed declaration. CNRL also suggests that the applicants did not include any amendments to the surface lease that establish the most recent rate of compensation. CNRL provided excerpts from Part 5 of the Application form.

CNRL also argued that while the cheques do reference the Operator, the cheque for 2017 does not identify the wellsite or agreement for which the payment was made.

CNRL suggested that there are other cases where there are also discrepancies and deficiencies.

[42] The issues that fall under the heading dealing with the merits of the application are more clearly defined.

[43] First, CNRL challenges its classification as an operator. CNRL's position is that it should not be liable because it was not involved in the actual operation and had no access to the site. Additionally, another operator was a party to the surface lease and the holder of the well license. In support, CNRL suggested that the decision of the Court of Appeal in Legal Oil & Gas Ltd. v. Alberta (Surface Rights Board), 2001 ABCA 160 supports the proposition that when there are two potential operators, only the holder of the license is responsible.

CNRL suggested that further support for this argument can be found in the fact that the *Act* provides "recourse" or enforcement, as it were, against the "non-compliant operator" through the mechanism of suspension and termination. CNRL argued that because it did not have any access rights to the Site, an order suspending or terminating access rights "would have no impact upon Canadian Natural". The logical conclusion would be that an "operator" for the purposes of section 36 "must have a cause or right to access the Site".

CNRL then suggested that there are other parties who were liable at the time of alleged non-payment, including Manitok as the holder of the surface lease and license, as well as Manitok's

Receiver.

CNRL argued that the legislation contemplates an ongoing obligation to the landowner that survives bankruptcy and cites earlier decisions of the Tribunal in Nayha v. Joule Resources Inc. 2013 ABSRB 0309 and PetroGlobe v. Lemke 2015 ABSRB 740 in support.

CNRL also suggested that to include receivers as responsible parties is consistent with the decision of the Supreme Court of Canada in Orphan Well Association v. Grant Thornton Ltd. 2019 SCC 5.

[44] CNRL then challenged the notion of joint liability, suggesting that although there might be multiple operators under section 36(1), the *Act* is silent as to who liability "is shared between", and that a "plain reading of section 36 does not support finding all potential operators jointly liable." CNRL suggested that subsection 36(4) "does not preclude" the Tribunal from requesting payment commensurate with "their respective working interests in the Site." CNRL suggested that this approach "corresponds" with the approach taken by the Orphan Well Association with respect to reclamation costs.

[45] Finally, CNRL suggested that as per Devon Canada Corp. v. Surface Rights Board, 2003 ABQB 7, the Tribunal has discretion as to whether compensation should be ordered, and that the Tribunal should "exercise its discretion" and order that CNRL only be responsible for a 50% share of the missed compensation.

[46] CNRL did not address any arguments as to whether the Tribunal should direct the Minister to pay a reduced amount.

Submissions of March 22, 2022 in response to the Notice of Re-hearing

[47] CNRL reiterated and relied upon the original submissions of October 16, 2020.

Regarding the 2021 application, CNRL suggests that the same arguments would apply including the suggestion that there is insufficient evidence to support a finding that the annual compensation is $4,200.00. CNRL also suggests that the partial payment of $6,300.00 should be recognized.

[48] CNRL also challenged the application as being incomplete in that it failed to provide adequate information upon which the panel could exercise its discretion under section 36(6), consistent with the reasoning in Hutterian Brethren Church of Starland v. Trident Exploration (Alberta) Corp. 2022 ABLPRT 5 and other similar decisions.

CNRL also suggested that it had requested but had not received a copy of the repeat application. That issue has been resolved.

PRELIMINARY ISSUES FOR FILES RC2018.0645 & RCR2021.2039

1. Has the Tribunal exceeded its jurisdiction by including CNRL as a party to these proceedings?

2. Was the process by which CNRL was identified as a potential operator procedurally unfair?

PRELIMINARY ISSSUE ON FILE RCR2021.2039

[49] Have the Applicant Landowners provided sufficient evidence for the panel to determine whether it should exercise its discretion under section 36(6)?

ISSUES ON THE MERITS FOR FILE RC2018.0645

1. Who are the operators for the purposes of section 36?

2. Is there money past due and unpaid by the Operators to the Applicants under a surface lease agreement?

3. If money is past due and unpaid, is there any reason why the Tribunal should direct the Minister to pay a reduced amount?

4. Should the Tribunal suspend and terminate the Operator's entry rights and direct the Minister to pay the Applicants out of the General Revenue Fund under section 36(6) of the *Act*?

DECISION ON PRELIMINARY ISSUES FOR FILE RC2018.0645 & RCR2021.2039

1. The Tribunal has not exceeded its jurisdiction.

2. The process by which CNRL was identified as a potential operator was not procedurally unfair.

DECISION ON PRELIMINARY ISSSUE ON FILE RCR2021.2039

The Application submitted by the Landowners is not complete as there is insufficient evidence for the panel to determine whether it should exercise its discretion under section 36(6). The Panel will not consider the incomplete application.

DECISION ON THE MERITS FOR FILE RC2018.0645

1. For the purposes of section 36 of the *Act*, the operators are Manitok Energy Inc., BTG Energy Corp., Certus Oil & Gas Inc. and Canadian Natural Resources Limited, jointly for the unpaid compensation due in 2018, 2019 and 2020. Whitecap Resources Inc. is also an operator but only in respect to unpaid compensation due in 2018 and 2019.

   The liability as between the operators is joint.

   The Tribunal has no jurisdiction to demand less than full payment.

   In the alternative, if the Tribunal has the discretion to demand less than full payment,

there is no principled reason to do so.

2. A total of $6,300.00 is payable to the Applicant by the Operators and the evidence satisfactorily proves non-payment.

3. The Panel finds it is reasonable to direct the Minister to pay the full amount owed.

4. Unless the Tribunal receives satisfactory evidence that $6,300.00 has been paid in full to the Applicant, the entry rights of BTG Energy Corp., Certus Oil & Gas Inc. and Canadian Natural Resources Limited shall be suspended and terminated according to the preceding order and the Tribunal may direct the Minister to pay.

ANALYSIS – PRELIMINARY ISSUES

Jurisdiction

[50] CNRL has challenged the jurisdiction of the Tribunal "add" or "include" CNRL to the proceedings and its ability to undertake investigative procedures.

This analysis begins with a review of the legislation and case law as it relates to the Tribunal's ability to initiate its own inquiries.

[51] First, section 8(3) (b) of the *Act* gives the Tribunal powers of entry and inspection. Subsection 3(c) gives the Tribunal "the rights, powers and immunities conferred on a commissioner under the *Public Inquiries Act."* Section 4 of the *Public Inquiries Act* provides as follows:

> The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.

CNRL suggests that there is no explicit authority to "search for and include additional operators to those named in the Applications." However, the powers that are given to the Tribunal under the *Public Inquiries Act* to order the production of documents are very broad, which would include documentation from the Alberta Energy Regulator (AER) which is the agency that governs the oil and gas industry. The AER decides who is a working interest participant, not the Tribunal.

[52] The *Surface Rights Act* also specifically gives the Tribunal the power to obtain that evidence from any Government department without cost:

> 37(1) Every Registrar of Land Titles and every department of the Government shall furnish without charge to the Tribunal any certificates and certified copies of documents that the Tribunal requests in writing.
> 37(2) The Tribunal or a person authorized in writing by the Tribunal may search at any

> time in the public records of a Land Titles office without charge.

The AER is clearly a department of the Government of Alberta.

[53] To suggest that the power to make inquiries is outside the jurisdiction of the Tribunal is not supported in the legislation.

[54] Furthermore there is binding judicial authority on that very issue. In Provident Energy Ltd. v. Alberta (Surface Rights Board), 2004 ABQB 650 Justice Erb began by outlining the purpose of section 36:

> In my opinion, the purpose of Section 36 of the *Act* is obvious. It is to provide a mechanism by which the surface owner is guaranteed payment of the compensation to which he is entitled whether the compensation has been fixed by an agreement or not. In order to carry out its duties in some sensible fashion, the Board would have to determine whether the lease was valid and whether compensation was payable to any party and by whom. As Sirr J. held in the Devon case, the application of Section 36 is discretionary and even if a landowner shows sufficient evidence that a lease exists, the Board is not bound to order compensation…[Para 27]

[55] Justice Erb then reflected on what evidence would be required to establish whether there was a valid lease, which included such matters as corporate succession, current ownership of the land, where the well was located and whether there was a reclamation certificate. (Para 28)

[56] Evidence to establish corporate succession, ownership of land, and the well site and reclamation status are available through publicly assessable databanks. These databanks are maintained by Departments of the Government of Alberta such as Corporate Registry, Land Titles, the Alberta Energy Regulator and Alberta Environment, and are therefore within the power to the Tribunal to obtain.

[57] Without the ability to acquire evidence, protections provided in the legislation would be defeated, as Justice Erb explained:

> To deny the Board the authority to determine whether there was a valid lease would reduce the Board's purpose of offering a pragmatic and inexpensive resolution unworkable and the Act itself somewhat hollow if not altogether meaningless. [Para 28]

[58] This reference to a "pragmatic" process echoes the comments from Justice Sirrs in Devon Canada Corp. v. Surface Rights Board, 2003 ABQB 7 (CanLII):

> …the function of section 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 provide the existence of a lease and that rent has not been paid….(Para 29)

[59] Our Court of Appeal has stated that the Tribunal's process to determine compensation is intended to be "an expeditious yet fair method." (Imperial Oil Resources Ltd. v. 826167 Alberta Inc., 2007 ABCA 131 at Para 16) That same language was used by the Court of Queen's Bench in Husky Oil Operations Limited v. Scriber, 2013 ABQB 74 at Para 11.

[60] To adopt CNRL's argument would also mean that landowners would have to undertake and pay for searches that the Tribunal is already empowered to do.

Such an interpretation would restrict access to only landowners able to obtain certificates of Title and corporate registry documents and to navigate the Alberta Energy Regulator's records.

Such a result would not be a "pragmatic," "inexpensive" or "expeditious." Nor would it be consistent with section 10 of the *Interpretation Act,* which requires that:

> An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[61] A discussion as to the jurisdiction of the Tribunal should not ignore the fact that CNRL has admitted to being a working interest participant.

[62] It has now been established that CNRL is a working interest participant, and the legislation itself imposes the liability upon working interest participants. The Act requires that the Tribunal "shall" send a notice to the operator. (Section 36(4). "Shall" is obviously a mandatory requirement. Working interest participants fall within the definition of "operator". Evidence establishing that CNRL is a working interest participant includes the admission by the company to that effect and Alberta Energy Regulator Order AD 2019-06 issued on August 21, 2019.

The process by which CNRL was included in these proceedings is mandated in the legislation. It is difficult to understand how a process which is enshrined in legislation could be described as "unknown" or "inappropriate".

While there is further argument by CNRL to limit that responsibility, there can be no issue with respect to the Tribunal's jurisdiction to identify potential operators.

Procedural Unfairness

[63] CNRL has raised a number of specific issues. I will attempt to deal with them in the order in which they were presented in CNRL's submissions:

That the Tribunal has changed its practices without giving an explanation of the change

[64] Section 8(2) of the *Act* gives the Tribunal the power to make rules governing its procedures and practices (subsection (b)) and respecting the service of applications, notices, orders or other documents (subsection (d)) and "any other matter that the Tribunal considers advisable." (Subsection (g)).

In matters of common law the Tribunal is, in the language of the Supreme Court of Canada in Prassad v. Canada (Minister of Employment and Immigration) [1989] 1 S.C.R 560, the "master of its own procedure". The authors of Hearing before Administrative Tribunals (Macaulay & Sprague) have dedicated an entire chapter to the concept.

The Tribunal has developed and published the Surface Rights Rules, which provide as follows:

1. Purpose

    [1] The purpose of these rules is to provide a means by which application filed with the Tribunal can be resolved through a fair and independent process in a timely and cost effective way.
    [2] The Tribunal may publish guidelines, interpretation bulletins, information sheets and forms to assist parties in using these rules.

Rule 14(2) provides that where a form is prescribed by the Tribunal, the application must include a complete form.

[65] The Rules are published on the website and are vetted first by the Members and then provided to stakeholders for their comments. Before adoption, the rules were sent out for consultation with various stakeholders.

The suggestion that the Tribunal has changed how it processes section 36 applications "without providing any explanation or notice of the change" is not consistent with the principle that the Tribunal is in charge of its own processes.

That CNRL did not have "an opportunity to be heard"

[66] This is a confusing reference. If this refers to the opportunity to provide submissions in response to the Notice, CNRL did have that opportunity and did avail itself of that opportunity. CNRL did respond, although those submissions were not put before the original panel. That error lead to the re-hearing of the matter by this Panel today. This Panel is relying upon the submissions made on October 16, 2020 and the further submissions dated March 22, 2022.

If, on the other hand, this is a reference to CNRL not having the opportunity to provide submissions before the Demand was issued, as this Panel ruled in Ember Resources Inc. v Buckland, 2021 ABLPRT 846, based on the scheme created in the legislation, Notice and Demand are statutory prerequisites to having the matter put before a panel.

[67] The legislation establishes the process by which section 36 applications shall proceed. The pre-requisites having been established, the Tribunal "shall" send a written notice to the operator demanding full payment. (Section 36(4)). Again the words are important; written notice is required and the particulars of that written notice must include a demand for payment. There is no discretion in this regard.

The suggestion that there ought to be another process which requires notice and an opportunity to respond prior to issuance of the decision is simply not borne out in the legislation. Section 36(4) does not include an "interim" requirement for notice to either the landowner or the potential operator.

It is difficult to imagine that there should be an opportunity to make submissions in a situation where the legislation gives no option to the Tribunal but to issue the demand.

Nor does the Tribunal have a choice when it comes to identification of CNRL as a working interest participant and licensee. As noted before, it is the Alberta Energy Regulator (AER), not the Tribunal that determines whether a corporation is a working interest participant or licensee.

Ultimately the panel hearing the matter may determine that the evidence establishing non-payment or identifying the operator is not sufficient. The Notice and Demand do not result in a decision that impacts the rights of the parties. They are part of the legislated process required to be followed in advance of a decision that will affect the rights of the parties.

That the Notice that was provided "does not invite Canadian Natural to provide submissions."

[68] The Notice and Demand for Payment which was provided to CNRL on October 1, 2020 specifically provided that:

> THIS IS A DEMAND to the Operators to pay the Applicant(s) the total amount of the compensation outstanding and listed above. If this amount is not paid in full **within 30 days** the [Tribunal] may suspend and terminate the operator'(s) access right and direct the Minister to pay the unpaid amount to the Applicant(s) for the year(s) claimed. Any payment made by the Minister will be a debt owing to the Crown and can be entered by the Crown against the operator(s) as a judgment of the Court of Queen's Bench. [Now the Court of King's Bench]
>
> The [Tribunal] has received a completed application for unpaid compensation under section 36 of the Surface Rights Act (SRA) from the Applicant(s) and the details of the land(s) and claim are listed in the above table.
>
> If you have been identified as an operator above (as defined in section 36(1) of the SRA) you are responsible for making payment under a surface lease or compensation order. A completed Application with a signed declaration is evidence the [Tribunal] accepts to satisfactorily prove non-payment. You can request a copy of the application by contacting [Tribunal] Administration.
>
> **NOTICE:** If any future compensation becomes due for this site and is not paid it may be considered by the [Tribunal] together with this Application **without further notice** to you.
>
> If you have paid the compensation claimed you must provide evidence to the [Tribunal] and **a written response within 30 days from the date of this demand.**
> [Emphasis in the original]

Excerpts from the legislation were included.

It is clear that the Demand requires evidence **and** a written response.

That without knowing how it was identified as an operator CNRL "is unable to prepare a complete and fulsome response to the Application."

[69] The Notice provides information to CNRL as to the legislated process at work: the application is under section 36, CNRL has been identified as an operator as defined in section 36(1), and the licensed Operator is identified. Excerpts from the legislation identify the classes of entities that fall under the definition of "operator".

The Notice indicates that CNRL could request a copy of the application.

The Notice also alerts CNRL as to the evidence that was received and the basis upon which the Tribunal accepts that evidence:

> A completed Application with a signed declaration is evidence the Tribunal accepts to satisfactorily prove non-payment.

Through the Notice and Demand, CNRL was provided with particulars as to the claim, the action required, the consequences that might flow, the basis upon which the demand was being made, that it has been identified as an operator, and that there was an opportunity to respond within 30 days of the demand.

That the Demand and Notice of Proceedings was sufficient for CNRL to effectively respond is evident in the length and thoroughness of the submissions that were provided.

That the applicants had not identified CNRL as an operator and that the evidentiary burden falls to the applicant.

[70] The Act only requires that the Applicants provide evidence that satisfactorily proves non-payment. (Section 36(4) In Devon, Justice Sirrs ruled as follows:

> 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.
> [Emphasis added]

The Act gives the Tribunal the power to obtain information from "every department of government". To suggest that the Landowner would have to identify the operator is not supported in the legislation or the case law.

That the Tribunal has an obligation to explain how it identified CNRL as working interest and to provide information as to the "parameters or extent" of its search

[71] It is hard to reconcile this assertion with the fact that according to legislation, the Tribunal has powers under the *Act* to examine **all** records from **all** government departments and under the *Public Inquiries Act*:

> …to produce **any** documents, papers and things that the **commissioner or commissioners consider** to be required for the full investigation of the matters into which the commissioner or commissioners are appointed to inquire…

That CNRL was forced to speculate as to why it was named a working interest participant

[72] First and foremost, the *Act* defines operators as including working interest participants. Although "working interest participant" is not defined in the *Surface Rights Act*, section 36(2) provides that words and expressions that are defined in the *Environmental Protection and Enhancement Act* (EPEA) shall be construed in accordance with that *Act*.

Section 134(b)(iv) of EPEA defines "operator" as including an approval or registration holder, the holder of a licence, approval or permit issued by the Alberta Energy Regulator, and a working interest participant. Section 134(j) goes on to define "working interest participant" as:

> … a person who owns or controls all or part of a beneficial or legal undivided interest in an activity described in clause (b)(iv) under an agreement that pertain to the ownership of that activity.

Secondly, the Alberta Energy Regulator, which regulates the oil and gas industry, determines who is a working interest participant. (Section 2 *Responsible Energy Development Act (REDA*))

[73] The AER regulates the licensing of wells, including the obligations of licensees and working interest participants. More specifically, Directive 2017 067, which was in effect at the time of the application, required that material changes must be provided within 30 days.

At present, Directive 056 and Directive 067 outline the obligations for filing with the AER with respect to a licensee's working interest participant arrangement, including information about the working interest partner and their working interest in the licensee's assets.

Directive 056, sections 5.6.16 and 7.7.16 require that the applicant for either a facility licence or well licence must be a working interest participant.

Directive 067, section 18 provides as follows:

> An updated Schedule 1 and any associated documents must be provided within 30 days of any material change, which includes the following:
>
> g) a significant change to working interest participant arrangements including participant information and proportionate shares.

Rule 49 of the Alberta Energy Regulator Rules of Practice specifies that: "all documents filed in respect of a proceeding…or other documents filed prior to the commencement of the proceedings, must be placed on the public record."

Accordingly, there is a duty to report and those reports are a matter of public record.

It is difficult to understand why that process would be "unknown" or "undefined" to a major player in that industry.

[74] Third, the Tribunal is clearly entitled to rely on the records of the AER. The legislative intent of section 36(1) cannot be that the Tribunal is expected to duplicate the work of the Regulator when it determines whether a corporation is a working interest participant. The Courts have made it very clear that the Tribunal's jurisdiction is ancillary to the AER. (Windrift Ranches v. Alberta Surface Rights Board, 1986 ABCA 158 (CanLII) at para 5 and Togstad v. Alberta (Surface Rights Board), 2014 ABQB 485, 2015 ABCA 192 at para 7)

The Tribunal relies on approvals from the Regulator to grant Right of Entry Orders under the *Act*. Similarly, the Tribunal is entitled to rely on the records for the AER to establish whether a corporation owns or controls all or part of a beneficial or legal undivided interest in a well.

Again, the characterization of CNRL as a working interest participant is decision made by the regulatory agency that governs oil and gas activity in the province.

[75] Fourth and perhaps most importantly, CNRL has admitted that it is a working interest participant.

Finally, the Notice that was provided included the basis upon which CNRL was named. The Notice included the relevant excerpts from the legislation.

It is also difficult to reconcile this with the fact that the Order is a public document and that CNRL's participation in the industry is a public fact. This is also CNRL's business. It would be difficult to imagine that CNRL would not know who its partners in a joint commercial venture would be.

That the Tribunal has a duty to provide specific details as to the investigative actions taken

[76] First, the *Act* itself provides CNRL with information as to the nature of the inquiries: specifically, certificates and documents from every Registrar of Land Titles and every department of the Government. The information that the searches revealed is information that CNRL is required by law to provide. It is information that predates the application and is collected independently of the application. It is also important to note that the searches conducted were searches of publically available data bases.

Second, as part of the notice, CNRL was given an opportunity to request copies of the application.

Third, CNRL has admitted that it is a working interest participant so that the "details of the investigative actions taken" would appear to be irrelevant.

That the Tribunal has provided no information as to whether it "exhausted" its search for other responsible parties

[77] Abandonment Order AD-2019-06 is a matter of public record. CNRL has confirmed that it was named a 50% working interest participant in its original submissions. Manitok held a 49% interest and Nal Resources held a 1% interest for a total of 100%.

Having established that CNRL is a working interest participant and licensee, again the Tribunal is bound by the legislation to conclude that CNRL is an operator.

Other Files where CNRL alleges similar errors

[78] It is trite law that each case will be determined on its own facts and that this Panel is not bound by earlier decision.

That it is "inadequate" for the Tribunal to accept a signed declaration is sufficient evidence of non-payment

[79] Section 36 creates a statutory remedy that does not otherwise exist. It does not change the contractual obligations of the parties; it proves relief to landowners in the event that operators do not pay. But the statutory regime prescribes certain steps that must be taken before an application can be heard at all.

[80] First, the person entitled to receive money payable by an operator under a surface lease may submit to the Tribunal written evidence of the non-payment. Without written evidence, the application will be dismissed.

Section 36(3) establishes pre-requisites:

- Is money payable?
- Is there an operator who is required to pay?
- Is that obligation to pay under a surface lease or compensation order?
- Has the money not been paid?
- Has the due date for payment passed?
- Is the Applicant the person entitled to receive the compensation?
- Has there been a written application?

The Application Form addresses each and every one of these elements.

[81] Upon receipt of the written evidence required by section 36(3), section 36(4) directs the Tribunal to make a finding with respect to the sufficiency of the evidence provided. The standard of proof is, of course, on a balance of probabilities. Only if the Tribunal "**considers** that [the evidence] satisfactorily proves the non-payment" is the Tribunal required to send a written notice

to the operator demanding full payment. The language is important. The job of the Tribunal is to "consider" whether the evidence provided satisfactorily proves the non-payment. The Legislature has not used the word "decide".

Like a finding as to credibility, this is a ruling by the Tribunal on the evidence.

[82] In the absence of evidence to the contrary, there is written evidence responsive to each element to be proven, documentary proof in support, a solemn declaration made and an acknowledgement by the applicants as to the consequences that might flow from misinformation.

[83] Furthermore, CNRL has the benefit of knowing in advance how the Tribunal considers such evidence. As to what would constitute "satisfactory" proof, the Tribunal issues Guidelines that are publicly accessible to explain Tribunal processes. As Sara Blake notes in Administrative Law in Canada 5th Edition:

> Many tribunals issue guidelines indicating the consideration by which they will be guided in the exercise of their discretion or explaining how they will interpret a particular statutory provision. The publication of policies and guidelines is a helpful practice. It gives regulated persons advance knowledge of the tribunal's opinion on various subjects so that they may govern their affairs accordingly. (Page 10)

Ms. Blake cautions that these guidelines ought not to be cast in stone or, to use her word, "crystalized":

> The tribunal may not fetter its discretion by treating the guidelines as binding rules and refusing to consider other valid and relevant criteria. In the circumstances of each individual case, the tribunal should consider whether it is appropriate to apply the policy (Page 102-103)

This Tribunal has published ABSRB Guideline 2020.1, which deals with the interpretation of Section 36(4) of the *Act*. Consistent with Ms. Blake's advice, the guideline stipulates that:

> This Guidelines does not take away the Board's [Tribunal's] discretion to prevent the Board [Tribunal] from making whatever decision it believes it appropriate in each case. The Board [Tribunal] will still consider all the circumstance of a particular case when it makes a decision.

Guideline 2020.1 provides as follows:

> **When will the Board [Tribunal] send the written notice demanding payment to the operator?**
>
> **Board [Tribunal] Administration can send the written notice to the operator(s) demanding full payment by or on behalf of the [Tribunal] if the Application Form is complete with a signed declaration.**

[84] Accordingly, in this case, the Tribunal had evidence in support of each of the pre-requisites based on the application. Its ruling as to the sufficiency of that evidence is consistent with the published Guidelines.

[85] Although CNRL has not referred to the decision of the Supreme Court of Canada in Baker v. Canada (Minister of Citizenship & Immigration), [1991] 2 S.C.R. 817, in a number of decisions this panel has concluded that the process by which CNRL, in their words, was "added" as a party does not constitute an unfair process. Please refer to CNRL v. Maljaars 2021 ABLPRT 723 (CanLII), CNRL v. Smokey Lake Grazing Association 2022 ABLPRT 235 (CanLII), CNRL v. Zahara 2022 ABPLRT 587 (CanLII) CNRL v. Isley 2022 ABPLRT 424 and CNRL v. Sather 2022 ABLPRT 597 (CanLII).

Conclusion

[86] As the process by which the Demand was sent is prescribed in the legislation and the case law, it cannot be said that the process is beyond the jurisdiction of the Tribunal, a violation of the rules of Natural Justice or constitutes an unfair process.

[87] As to whether a signed declaration is sufficient evidence, that is a decision for the Panel to make and the evidence in the application form addressed each and every element to be proven.

ANAYLSIS – MERITS OF THE APPLICATION

Who are the operators for the purposes of section 36?

Status of Working Interest Participants as Operators

[88] There is no doubt that the evidence establishes that CNRL is a working interest participant. CNRL has admitted that it is. Neither Whitecap or BTG Energy or Certus challenge their status as working interest participants. However CNRL and Whitecap argue that their liability as a working interest participant is extinguished where there is another operator.

Is this an interpretation that accords with the words in the legislation?

[89] The modern rule of statutory interpretation set out in Driedger's definitive text is this:

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The Supreme Court of Canada has cited this passage with approbation in Rizzo & Rizzo Shoes Ltd., Re, 1998 CarswellOnt 1 (S.C.C.) and Bell ExpressVu Ltd. Partnership v. Rex, 2002 CarswellBC 851 (S.C.C.)

[90] On that basis, I begin with the words in the legislation. Under section 36(1) "operator" is defined as:

> …any person, who at the time of non-payment under a surface lease… became liable to pay the money in question because that person …
>
> (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 a 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) who was so liable and any person acting as principal or agent of any person referred to in or after clauses (a) to (e). [Emphasis added]

Section 36(1) clearly contemplates multiple parties, including upwards of twelve different scenarios by which an entity could be classified as an operator, not including principals and agents. The use of the word "and" is a clear signal that all entities who meet the definition are included. Section 26(3) of the *Interpretation Act* also provides that "words in the singular include the plural and words in the plural include the singular".

[91] To suggest that only entities involved in "actual operations or right of access" are responsible under section 36(1) is to ignore the words in the legislation and to "add" a qualification that does not exist.

[92] To suggest that the liability of another entity (whether a party to the surface lease or the receiver or the licence holder) excludes the liability of working interest participants, one must ignore the words in the legislation and "add" a qualification that does not exist.

[93] Both CNRL and Whitecap have suggested that the enforcement mechanism of suspension and termination would not have any impact on an operator having no rights of access and accordingly, that "must" mean that there is an additional element in the definition of working interest participant that would exclude those operators who do not have access rights.

While this is inconsistent with the Abandonment Order which requires ongoing remediation, there are a number of difficulties with that argument.

First, the words in the statute don't say that. To accept the argument advanced by CNRL and Whitecap would be to add words to the legislation that aren't there.

Secondly, suspension and termination are not the "only" recourse available to the Tribunal. Upon a direction to pay being issued, the debt becomes a debt owing to the government and is enforceable in the same manners as a judgement from the Court of King's Bench which includes such options as a writ of execution.

Third, the legislature has chosen the *Oil and Gas Conservation Act* to limit the liability of working interest partners. When different words are used a different intent is presumed. And as

Justice Cote has pointed out in another context, the Legislature knows how to enact legislation with such a purpose and it has not done so in the context of the *Surface Rights Act*. (Tymchak v. Edmonton (Subdivision and Development Appeal Board) 2012 ABCA 22.)

[94] As well, there are fundamental differences concerning the funding that helps pay for remediation of wells.
Under the *Oil and Gas Conservation Act,* operators contribute to this fund. One of the purposes of the Act is "to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool" (section 4(d)). The owner in that context is not the landowner.

The purpose of section 36 on the other hand is to ensure that the surface owner is paid even when the operators default on their contractual duty, but it is the taxpayer who pays.

[95] Turning then to the question of the intent or purpose of the legislation, would the interpretation suggested by CNRL and Whitecap align with the purpose of the legislation?

The purpose of section 36 is clearly to compensate the landowner. To accept the interpretation proposed by CNRL would be to suggest there is a hierarchy between operators, that one is "more" liable than the other. The interpretation suggested by CNRL and Whitecap requires one step further: that once the operator with a higher level of liability is identified, that the "rest" are released from their obligations. The language that would support such an interpretation is missing.

Such an interpretation is also inconsistent with section 36(4) which requires the Tribunal to demand full payment from the "operator".

[96] CNRL has argued that Legal Oil & Gas Ltd. v. Alberta (Surface Rights Board), 2001 ABCA 160 is binding judicial authority for the proposition that when two entities meet the definition of operator, only the operator with actual rights to undertake operations on the site is liable for unpaid rentals. CNRL suggests:

> The Court of Appeal held that Legal Oil & Gas Ltd., "alone", as the holder of the well licence, had "the right to undertake any operations on the site "and was therefore, the "operator" responsible for payment of compensation under the lease.

There are two fundamental flaws in this reasoning: first, the Legal case was dealing with different legislation; second, a careful reading of the Legal case reveals that it does not stand for that proposition at all.

[97] As to the legislation, the Court of Appeal considered whether Legal Oil & Gas Ltd. was an "operator" for the purposes of an application under section 39 of the *Surface Rights Act*, SA 1983, c S-27.1 which at the time provided as follows:

> Section 1(h) "operator" means

> (i) the person or unincorporated group of persons having the right to a mineral or the right to work it, or the agent of such person or group of persons…".

Legal Oil & Gas Ltd. relied on this definition to argue that it was not the "operator" for the purposes of section 39 since it had no right to the minerals or the right to work the minerals after the termination of the mineral lease; and therefore, it was not responsible for the payment of compensation under the surface rights lease. Legal Oil & Gas Ltd.'s appeal was dismissed.

After the Court of Appeal issued Legal, the *Surface Rights Act*, SA 1983, c S-27.1 was amended. Section 36(1) of the *Act* now has a much broader definition of "operator" for the purposes of recovery of compensation. Specifically, section 36(1) (e) of the Act clearly provides that the definition of "operator" includes "a working interest participant in a well or other energy development on, in or under specified land." Accordingly, the Panel finds that the statutory provisions considered in Legal are not the same here.

[98] As to the decision itself, as recounted by the Court of Appeal, Legal began as an application by the Landowners under what was then section 39(1) of the 1983 version of the *Act*. The legislation at that time did not provide for a demand or payment or suspension of access rights. The only power available to the Board at that time was to direct the Provincial Treasurer to pay. If payment was made, the operator owned a debt to the Government.

In the hearing, Legal appeared but did not argue that it was not an operator. The decision of the Board was to award payment to the Landowners, but the Board "declined to decide issues as between the Crown and Legal" (para 8) and those matters would be left "for the decision of the Provincial Treasurer and Legal".

Legal brought an application for judicial review. Justice Lewis, a sitting Chamber judge, dismissed the application. Legal appealed to the Court of Appeal. The only parties to the 2001 decision were Legal and the Surface Rights Board.

As part of the arguments before the Court of Appeal, for the first time Legal raised the question as to whether it was "an operator". In fact in Legal Oil & Gas v. Alberta (Surface Rights Board), 2000 ABCA 150 (CanLII) the court asked the parties for argument on the point:

> In that respect, we will ask the parties to provide further argument, with respect to the legal issue raised before us and whether such an issue can be raised for the first time before the Court of Appeal, having regard to the fact that this is an administrative board and that our powers of review are limited.

[99] Over the objections of the Board the Court was prepared to address the "new" issue.

Under the legislation that was in effect at that time, "operator" was defined as "the person or unincorporated group of persons having the right to a mineral or the right to work it…" As Legal was no longer the owner of the mineral rights, it argued that it was not an operator. The Respondent (Surface Rights Board) argued that Legal was an Operator as it retained the well license.

The Court held that although an appellate court may decide questions of law not raised by the parties at trial, it would not do so unless the question was a purely legal one requiring no additional evidence.

The critical point of the Court of Appeal decision is that the panel declined to make a decision at all:

> The issue whether the holder of the surface lease who continued to hold the well license is relieved of its obligations to the landowner in respect of payment pursuant to the Surface Rights Lease, when it loses the Mines and Minerals Lease but retains the well license, requires a detailed consideration not only of the law but also policy and the facts in this case. This is not a decision which should be made in the first instance by the Court and we declined to do so. (Para 14)

It is in that context that the Court said:

> In these circumstances, we tend to agree with the submissions of counsel for the respondent that Legal, alone, as the holder of the well license, has the right to undertake any operations on this site. (Page 14)

[100] The quote that the Operator relies upon is not what the Court said, would be characterized as *obiter*, is taken out of context and reflects the argument made by the counsel for the Surface Rights Board, not the Operator. To suggest that Legal stands for the proposition that as between potential operators there can be only one, is simply wrong.

Status of CNRL as an operator

[101] CNRL admits that it has been a working interest participant since 2014. The AER has declared that it is a working interest participant. Under s. 36(1) (d), working interest participants are operators. CNRL is therefore an operator at the time of the non-payments in 2018, 2019 and 2020.

Status of Whitecap as an operator

[102] The AER has declared that Whitecap was a working interest participant under the provisions of Order AD 2019-06, which was issued on August 2, 2019. Accordingly by operation of the legislation, Whitecap is an operator.

However, Whitecap has produced compelling evidence establishing that Nal Resources (which is now amalgamated with Whitecap and continues under the name Whitecap) sold its interest to BTG Energy and Certus Oil effective March 16, 2020.

Accordingly, Whitecap was an operator on the 2018 and 2019 due dates but not for the due date of June 20, 2020.

Status of BTG and Certus as operators.

[103] Based on compelling evidence provided by Whitecap, BTG Energy and Certus were working interest participants and therefore operators on the 2020 due date.

But BTG and Certus are also operators with respect to the non-payment in 2018 and 2019. Section 36(1) reads as follows:

> Under section 36(1) "operator" is defined as:
>
> > …any person, who at the time of non-payment under a surface lease… **became liable** to pay the money in question because that person
> >
> > (a) was an approval or registration holder...
> >
> > (b) carried on an activity on or in respect of specified land…
> >
> > (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 a 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) who was so liable and any person acting as principal or agent of any person referred to in or after clauses (a) to (e). [Emphasis added]

Section 36(1) clearly contemplates multiple parties, upwards of twelve different scenarios by which an entity could be classified as an operator, not including principals and agents. The use of the word "and" is a clear signal that all entities who meet the definition are included. Section 26(3) of the *Interpretation Act* also provides that "words in the singular include the plural and words in the plural include the singular".

Successors, assignees, executors, administrators, receivers and trustees are obviously entities whose responsibilities come after the fact and the phrase "became liable" is a clear indication that liability can be retro-active.

[104] The liability of successors in interest was discussed in Murray v. Goodland Energy Ltd. 2017 ABSRB 641, which has been followed in a number of cases:

> The tail section after the clauses in section 36(1) of the *Act* expands the definition of "operator*"* to include successors and assignees.

[105] There are circumstances where a decision of the Court precludes the Tribunal from applying the definition of successor. But there is no evidence presented in this case to that effect.

Neither BTG nor Certus have provided submissions challenging the evidence provided by Whitecap.

Status of Manitok as an operator

[106] 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. 0115768 for the Site is in the name of Manitok. The Panel finds that Manitok is an operator under section 36(1) (c)) on the 2018, 2019 and 2020 due dates.

Manitok also falls under the definition of a working interest participant.

But that is not the end of the discussion. By operation of law, no proceedings may be taken against Manitok.

As referenced in Decision LPRT2022/SR0322, although a demand for payment must be made, the Tribunal is prohibited from initiating the enforcement process. The Receiver is within its rights to deal with the demand as it sees fit but no enforcement mechanism is available, either through suspension or termination or under section 36(9) of the Act.

Status of the Receiver as operator

[107] Notwithstanding CNRL's original submissions suggesting that the Receiver should be named as an operator, the Court Order and statutory protections under the insolvency legislation prohibit the Tribunal from making such a finding and initiating enforcement process against the Receiver.

Could the Tribunal make a demand for payment based on a proportionate share?

[108] CNRL and Whitecap suggest that in the absence of direction in the legislation as to how to appropriate liability, it is reasonable to, in effect, "read in" a notion of proportionality based on working interest participation. Again, there is no language in section 36(1) to support that interpretation. Moreover, the concept of proportionality could only relate to working interest participants. The liability of the approval holder, licence holder or surface lease holder could not be "split".

[109] Missing also from the analysis in the request for re-consideration is reference to the more recent decision of our Court of Appeal in Sarg Oil Ltd. v. Environment Appeal Board, 2007 ABCA 215, which found joint liability under the environmental legislation. This was a decision that the original panel addressed. Given that section 36(2) directs that words and expressions used in section 36 that are defined in the *Environmental Protection and Enhancement Act* shall be construed in accordance with the environmental legislation, this is a particularly relevant decision to consider. In the Sarg decision, the Court of Appeal ruled that considering the environmental legislation exists to protect the environment, it is not unreasonable to interpret the term "operator" to include a subsequent operator and to hold both the former and the subsequent operator jointly responsible.

Neither Whitecap nor CNRL have referred to the Sarg decision.

The legislature has specifically provided for a proportionate share with respect to abandonment under the *Oil and Gas Conservation Act*, but that language is not found in the *Surface Rights Act*. When different words are used, a different intent is presumed.

[110] The Tribunal has been consistent in its interpretation of section 36(1). In Dobish v. Terra Energy Corp., 2019 ABSRB 737 (CanLII) the panel provided this analysis:

> …s. 36 of the *Act* contemplates multiple operators for the same Site. Nothing in s. 36 of the *Act* limits the liability of any one of the operators, including s. 36(4) and the 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(5) of the *Act* allows the Board to suspend and terminate an Operator's right to enter a site if the demand made pursuant to section 36(4) is not complied with. Therefore, the Panel finds that any action the Board takes under section 36(4) and 36(5) including a demand for full payment will apply to [holder of the licence] and the [working interest participants] (Para 14).

According to CanLII, the Dobish decision (at last count) has been cited 105 times. The Operator has not referenced the other decisions of the Tribunal nor attempted to distinguish the Dobish decision.

[111] In the result, this Panel is not convinced that the definition of "operator" includes the limitations CNRL suggests. Accordingly CNRL is an operator for the due dates 2018, 2019 and 2020.

Does the Tribunal have discretion to demand less than full payment?

[112] Both CNRL and Whitecap suggest the Devon decision confers discretion on the Tribunal to limit the amount of compensation to the percentage of an operator's working interest.

[113] Is it possible for section 36(4) to be interpreted in such a way as to find that the Tribunal has the discretion to demand something other than full payment?

[114] In examining the context and grammatical and ordinary meaning of the words in section 36, there are a number of points to consider:

- Section 36(4) requires that the Tribunal "shall send a written notice to the operator demanding full payment".
- Section 36(1) clearly contemplates that multiple parties could fall under the definition of "operator".
- Section 26(3) of the *Interpretation Act* provides that "words in the singular include the plural and words in the plural include the singular".
- The *Oil and Gas Conservation Act*, RSA 2000, c O-6, has clear provisions for and

> definition of proportionate share (definition section – recent amendment to s. 30 for example) which is absent from the *Surface Rights Act.*

The former version of section 36(6) provided as follows:

> If the operator's rights have been terminated under subsection 5(b) and **full payment has not been made,** the Board [Tribunal] may direct the Minister to pay….
> [Emphasis added]

Even with the amendment, section 36(6) now reads:

> If within 30 days of the Tribunal sending a written notice to an operator under subsection (4), the operator has not proven to the Tribunal's satisfaction **that full payment** has been made, the Tribunal may direct the Minister to pay.
> [Emphasis added]

[115] By the terms of the legislation, the Tribunal is directed to demand full payment from the operator and failure to make full payment is the pre-requisite for directing the Minister to pay. On a plain reading of the *Act*, the Tribunal has no choice but to demand full payment.

Further, the legislature has specifically provided for a proportionate share with respect to abandonment under the *Oil and Gas Conservation Act*, but that language is not found in the *Surface Rights Act*. When different words are used, a different intent is presumed.

[116] Next, the purpose of the statute is to be considered. The Supreme Court of Canada in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 at para 118 has emphasized that in addition to considering the text and context, that "legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision."

As the purpose of section 36 is clearly to compensate the landowner, to accept the interpretation proposed by CNRL would be to allow the solvent working interest participant to make only a partial payment to the landowner. Presumably the Landowner would then apply to the Tribunal for the shortfall. The ultimate result would be that the taxpayer would shoulder responsibility for the "missing" share.

[117] Finally, as noted above there has been a consistent application in decisions of the Tribunal on this point. (Please refer to the Dobish decision.) CNRL has not provided any justification for a departure from longstanding practices.

[118] This Panel is of the view that the legislation gives no discretion to the Tribunal as to apportionment of liability.

[119] In the alternative, even if the legislation gives the Tribunal discretion, discretion must be exercised on a principled basis. As Sara Blake notes in *Administrative Law in Canada*:

> Discretion is not absolute or unfettered. Decision makers cannot simply do as they please. All discretionary powers must be exercised within certain basic parameters. The primary rule is that discretion should be used to promote the policies and objects of the governing Act. (Page 99-100)

Ms. Blake goes on to say:

> …discretion may not be used to frustrate or thwart the intent of the statute. A discretionary power should not be used to achieve a purpose not contemplated by the Act.

However neither Whitecap nor CNRL has provided any analysis on how partial payment would be consistent with the purpose of section 36.

[120] This Panel notes that since the surface lease authorizes access to the Land for the activities of the Operator, and the loss to the landowner results from the concerted action of two or more persons acting together toward a common goal, it makes perfect sense that they share liability.

As well, given that the purpose of section 36 is to provide assurance to landowners that they will be paid, it makes sense that the changing financial arrangements between the license holder and its working interest partners should not impact the landowner. To accept the interpretation suggested by the Operator in this case would be to ask the landowner to accept a partial payment that changes with the arrangements between operators. By the terms of a surface lease or right of entry order, the landowner loses the entirety of the land taken and is entitled to be compensated entirely for that loss.

[121] The glaring issue is that the Devon decision does not deal with the question of discretion as it relates to the operator at all.

The Devon decision deals with the discretion in section 36(6) and the interpretation of the word "may" in the context of "the Board may direct the Minster to pay out of the General Revenue Fund the amount of money to which the person referred to in subsection (3) is entitled."

Is there money past due and unpaid by the Operator to the Applicants under a surface lease agreement?

[122] This Panel would include challenges to the sufficiency of the evidence under this issue. It is for the panel to determine the following:

- Is there a surface lease?
- Is it still in effect?
- Is there money payable?
- Is payment outstanding?
- Has the due date passed?
- What is the annual rate of compensation?
- Are the applicants the persons entitled to payment?

As referenced earlier the evidence provided in support of that claim includes the following:

- Executed Application Form
- Copy of the Original Surface Lease
- Survey Plan attached to Caveat No 852 144 560
- Copy of the Survey Plan
- Copy of cheque stub for 2016 payment including Attachment Form 034
- Copy of cheque stub for 2017 payment
- Land Titles Certificate
- Wellsite information
- Aerial image of the Site dated February 5, 2019

The cheque stub dated April 13, 2016 was from Chinook Energy Inc. issued to Tina Louise & Stanley Lee Robson referencing "LEASE:S005028." The Attachment Form bearing the same file number provides further information. The date of the Lease is indicated to be "June 20/1985", and the Rental Period is described as "From Jun 19/2016 To Jun 18/2017." The names of the lessors, the legal land description, the well name and identification number are included.

The cheque stub dated June 7, 2017 from Manitok Energy Inc. is issued to Tina Louise & Stanley Lee Robson in the amount of $4,200.00.

The Surface Lease included the survey plan with same coordinates and name of the well as referenced in the AER documents.

[123] Evidence that there is a surface lease is found in the surface lease itself, the caveat on the certificate of title and the statutory declaration and the executed application form. It is clear that this lease relates to this Land and this Site. The surface lease was protected by a caveat and that caveat is registered to the lands owned by the Applicants as reflected in certificate of title 092 365 297 +1. In this case, the landowners were able to provide a copy of the survey plan which matches the AER's Alberta One Stop report.

[124] However, CNRL challenges whether the evidence provided is sufficient as the Applicants did not include an amendment to the surface lease to reflect the current rate of compensation. CNRL suggests that this fatal to the claim and that the application form requires that the original surface lease must include a copy of the most recent amendment. CNRL also suggests that it is "notable" that the lease has been redacted so that the rate of compensation is not readable.

CNRL's argument does not consider the legislation, the form in its entirety or the other evidence that is available.

The legislation does not require a specific form of evidence to establish the pre-requisites for a section 36 application. The *Act* reads:

> On receiving the evidence, if the Tribunal considers that it satisfactorily proves the non-payment, the Tribunal shall send a written notice to the operator demanding full payment.

The Tribunal must determine sufficiency of evidence. As in any legal proceeding, evidence comes in many forms.

[125] It is incorrect that the application form prescribes what evidence must be provided. First, the form cannot take the place of the decision of the Tribunal member. Second, CNRL has only provided excerpts from the form and the full text of the form does not support CNRL's argument.

Part 5 of the form bears the title "Supporting Documentation". Immediately below that, as part of the title, is the following direction:

> If you are unable to provide any of the documents requested provide an explanation below.

Under the title is this explanatory note:

> You must include a photocopy of at least one of the following as evidence supporting your claim. If you have another kind of evidence that you believe proves the amount of compensation due, provide an explanation below. If you are unable to provide any of the documents, provide an explanation below….

After that explanatory note, the application has the option to check off three options:

> The original lease agreement or consent of occupant agreement, along with the most recent amendment, include the survey plan (map) if available.
>
> The most recent cheque stub from the operator for rental payment. The cheque stub must clearly say which wellsite or facility it is paying for, or clearly identify the agreement being paid for.
>
> A letter on the operator's letterhead that mentions the rental rate and makes it clear which agreement, wellsite or facility that rate is for.

It is clear that the application form contemplates various types of evidence and where the listed documentation is not provided, there is an option for the Landowner to explain.

[126] In suggesting that there something "notable" in the obscured sections in the surface lease, CNRL would seem to suggest some purpose or intent to hide the original rate of annual compensation. However, this is a document that was not signed by the current landowners. It was signed by the original lessor Dolores, Ethel Jennings. It is a document that was signed thirty-seven years ago. One would expect the parties and the rate of compensation to have changed in that time. In any event, if the original document had been highlighted, photocopying may have obscured the original text.

[127] Evidence that the surface lease remains in effect is found in declarations that form part of

the Request to Amend. CNRL does not challenge this.

[128] Evidence that money is payable and remains outstanding is found in the executed application, the statutory declaration and the declarations that form part of the Request to amend. CNRL has made a partial payment as reflected in the request by the Landowners to amend their application to account for a payment of $6,300.00. CNRL does not challenge this.

[129] Evidence that the due date has passed is found in the surface lease, the executed application form, the statutory declaration and the declarations that form part of the Request to Amend. CNRL does not challenge this.

[130] Evidence as to the rate of annual compensation is found in the executed application form, statutory declaration and the cheque stubs and acknowledgement form. CNRL does challenge the sufficiency of that evidence.

In reviewing the evidence that was presented, this panel finds that there is no question that the annual compensation rate in 2016 was $4200.00. The cheque stub for 2016 from Chinook identified the landowners and the specific Lease. The Attachment Form bears that same file number, legal land description, well identification number, date of surface lease and rental period, all of which correspond to the AER records.

As to the rate of compensation in 2017, the cheque stub for 2017 from Manitok does not specifically reference the site, but it does identify the Landowners. The Landowners have sworn a statutory declaration to the effect that the rate of compensation is as stated. This Panel is entitled to rely upon a statement made under oath.

[131] But there is further support. According to the Alberta One Stop record, there is only one well site on the quarter section that is also identified in the survey plan.

Further support is to be had in the timing of the 2017 cheque. As stated in Karve Energy Inc. v. Drylander Ranch Ltd. 2019 ABQB 298:

> 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.*

There is no record of a successful section 27 application before the Tribunal. Nor given the date of the original surface lease as June 20, 1985, the 5 year cycle for review would be 2015 and 2020, not 2017.

The only other mechanisms by which an amendment could be made is by the consent of the parties. The Landowners have conscientiously declared that nothing has changed.

CNRL as a working interest participant would certainly know whether the holder of the surface lease had entered into a new agreement with the Landowners.

[132] It is also highly unlikely that a corporation in the midst of insolvency proceedings would be negotiating with the Landowner as the Receiver was in charge.

How much information is captured on the cheque stub is not within the control of the Landowners. It would be patently unfair to suggest that a lack of detail provided by the operator could result in a failed section 36 application.

Finally, the standard of proof in these proceedings is on a balance of probabilities. All of the evidence is consistent with the finding that the annual compensation rate for 2016 and 2017 and thereafter was $4200.00, and is inconsistent with any other conclusion.

[133] Accordingly, the panel finds that the annual rate of compensation for 2018, 2019 and 2020 is $4,200.00 for a total of $12,600.00. Based on the partial payment of $6,300.00 the amount outstanding is now $6,300.00.

[134] Evidence that the applicants are the persons entitled to payment is found in the certificate of title, the executed application, the statutory declaration, the declarations that form part of the Request to Amend and the cheque stubs and attachment provided. CNRL has not challenged this evidence and indeed, concedes that the applicants are the persons entitled in making the partial payment to the Landowners.

If money is past due and unpaid, is there any reason why the Board should direct the Minister to pay a reduced amount?

[135] The Panel's decision to direct the Minister to pay out of the General Revenue Fund is discretionary, per Devon Canada Corp v Alberta (Surface Rights Board), 2003 ABQB 7. In Devon, the Court described the purpose of the legislation in these terms:

> …the function of section 36(5) and 36(6) appears to be 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.
>
> The function of the sections intentionally favor the surface owner. In most cases, the Board will direct the province to pay the back rent to the surface owner.

[136] The Court went on to say:

> …section 36(6) seems to me to leave the Board with some discretion in this regard. In my opinion, if the operator satisfies the Board that the surface 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. [Emphasis added]

[137] As the Alberta taxpayer is the ultimate payee in the case of a successful section 36 application, the panel has a duty to review the evidence before it and determine whether payment would be unjustified, patently absurd or provide an unjust enrichment.

[138] In Praskach Farms v Lexin, 2020 ABSRB 85, the Tribunal concisely summarizes the scope of its authority under section 36 of the *Act*. Praskach also lays out the factors to consider when directing the Minister to pay either the full amount of Compensation owing, or a reduced payment if the full amount is unjustified. The Tribunal held that there were two critical factors to consider: loss of use and adverse effect on the remaining land:

> When considering the loss of use of the lease area, the Panel examine the status of the area taken and whether the Applicant is using the site to generate income or otherwise. The Panel also considers the adverse effect on the remaining land or the nuisance, inconvenience, and noise that might be caused or arising from or in connection with the operations of the operator…
>
> Where, at the relevant time, there is ongoing loss of use or adverse effect; equipment, fencing and facilities remain on site; the site is compacted preventing production; or there are reclamation activities or other damages, it is less likely that there would be a reduction in the amount that the Minister is directed to pay. On the other hand, if the site is near reclamation and the owner has full use of it, the loss of use and adverse effect would be almost nonexistent and directing the Minister to pay the full amount owing under the lease would not be justified. (Para 11, 12)

In Praskach, the Panel reduced the amount directed to be paid by 75% on the basis that the well was inactive and that there was no equipment or fencing on site. The Panel in that case did recognize that there was soil compaction which would have an impact on seeding and harvesting, but noted that the Landowner had not be able to estimate the reduction in yield.

[139] The information provided in the original application form was limited. The Applicant Landowners checked off one box on the application form. Following a direction in the form as to why information as to the condition of the land was important, the entry was limited to "This lease contains a pump jack and shack."

[140] However what is unusual in this case is that the application included a photograph of the Site.

The photograph, which is dated February 5, 2019, does show the access road, the structures and that the site still must be farmed around. The application also included the survey plan which is dated May 24, 1985. In comparing the survey plan to the photo, the area still affected has not been reduced substantially from the area that was granted.

The original application dealt with the years 2018, 2019 and 2020 so that a picture in the middle of that time frame is something that this Panel can reasonably rely upon.

The timing is also helpful. This is a photo of the quarter section in winter conditions. The resolution is clear enough that one can see that the fields outside the quarter section are being farming continuously while the farming operations on the quarter section are truncated. It is also clear that there is a difference between the area being farmed and the area where the well site is located.

While this Panel does not find the Landowner's argument supporting full payment to be persuasive as it does not relate to this particular site, this Panel is of the view that there is no evidence to suggest that directing the Minister to pay the full amount would result in overcompensation.

Should the Board suspend and terminate the Operator's entry rights and direct the Minister to pay the Applicants out of the General Revenue Fund under section 36(6) of the Act?

[141] Amendments to the legislation have given the Tribunal discretion as to whether or not to order suspension and termination of the access rights of the operator. But as previously noted, discretion must be exercised on a principled basis.

[142] With respect to Manitok, under section 36(5) of the Act, the Tribunal can suspend and terminate this Operator's rights to access the Site when appropriate. There is no reason to delay this application by doing so here because Manitok is insolvent and is not accessing the site. Although not insolvent, Whitecap is not longer accessing the site. Accordingly, the Panel decides that the Tribunal will not suspend and terminate the rights of Manitok and Whitecap to access the Site. However, if Whitecap in the future should attempt to access the Site but still has not paid the compensation, the Tribunal may reconsider its decision and issue an Order.

[143] As to CNRL, BTG Energy and Certus Oil, the purpose of section 36 is to ensure that the landowners are paid. Suspension and termination is the enforcement mechanism by which operators are encouraged to honor their contractual obligations to pay. It would be contrary to the intent of the legislation not to use the powers that exist under the legislation.

It would not be in the public interest to allow a solvent operator to continue to enjoy access to the Site for profit, notwithstanding that full payment has not been made. To accept that argument would be to permit indirectly what cannot be done directly; that is, the unilateral reduction of compensation.

Context is also important: the annual compensation in this case is $4,200.00 per year. To suggest that the Tribunal not use its only enforcement mechanism and allow the Operator to continue to profit from the activity would work an injustice to the landowner.

[144] Accordingly, if the Operators do not pay the full amount owing to the Applicants, the entry rights of CNRL, BTG and Certus will be suspended and terminated according to the schedule indicated at the beginning of this decision.

DECISION ON THE PRELIMINARY ISSUE AS TO COMPLETENSS OF THE APPLICATION: FILE RC2018.0645

[145] The situation with respect to the repeat application is very different: save for a single check mark, there is no evidence as to the condition of the land.

[146] On August 18, 2021 the decision in Fairwest Energy Corporation v. 1717868 Alberta Ltd. 2021 ABLPRT 387 was issued. The decision in 171868 has been followed in fifty different cases to this point including decisions by this panel. The Panel in 171868 was dealing with three issues:

1. Is the application form, as submitted, complete as required by Rule 14(2) and (3) (e)?
2. Does the Tribunal have enough information about the condition of the leased site to exercise the discretion granted to it by S.36 of the Act?
3. If the Application is incomplete, should the Board consider it?

As in this case, the only information provided was a check mark at the beginning of the Condition of Land part of the form.

In considering the legislation and the Surface Rights Rules, the panel determined that a simple check mark did not provide sufficient information for the panel to draw a conclusion.

[147] However, every decision is based on the evidence that is presented and while discretion must be exercised on a principled basis, it also must be exercised based on evidence.

In some cases, this Panel has not applied the reasoning in 171868 on the basis that the applicant is a landowner who may not be familiar with the developing case law. In other cases, there is enough independent evidence as to the condition of the land that the Tribunal has accepted the application, though it may direct the Minister to pay a reduced amount. One example of independent evidence is documentation from the AER indicating that the well is still producing. In other cases, the configuration of the well site and access road are clearly a major and continuing impediment to farming operations. Alternatively, information may have been provided by the operators that there is continuing activity on the land in connection with remediation work.

[148] But in this case, there is no independent evidence. The Landowners in the application for RC2018.0645 provided more detailed information. The Landowners were alerted to the concerns that the Panel had as to the lack of evidence and given the opportunity to provide submissions, including more information as to the condition of the site, on two occasions. They were aware that CNRL was challenging the sufficiency of the evidence as to condition of land and had invited the Tribunal to reject the application.

The Landowners did not reply.

Accordingly, this Panel does apply the reasoning in 1717668 Alberta Ltd. to the circumstances in

this case and finds that the application, as submitted, is incomplete, that the Tribunal does not have enough information about the condition of the land to appropriately exercise its discretion and that the Tribunal will not consider the incomplete application.

[149] In other cases, the Tribunal has given leave to the Landowner to re-apply. In this case, leave has already been provided. Accordingly, the Tribunal will only consider a re-application within a reasonable time if it includes information as to why the Landowners did not provide submissions or evidence in response to the earlier requests.

Dated at the City of Edmonton in the Province of Alberta on September 27, 2022.

LAND AND PROPERTY RIGHTS TRIBUNAL

Susan McRory, Chair