LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Tees v Ember Resources Inc., 2023 ABLPRT 900081

Date: 2023-03-20
File No.: RC2020.1648
Decision No.: LPRT2023/SR900081
Municipality: Lacombe County

In the matter of a proceeding commenced under section 36 of the *Surface Rights Act*, RSA 2000, c S-24 (the "*Act*")

And in the matter of land in the Province of Alberta within the:

NW ¼-30-40-23-W4M as described in Certificate of Title No. 052 191 560 (the "Land"), particularly the area granted for well site and access road, Alberta Energy Regulator Licence No. 0335623 (the "Site").

Between:

Ember Resources Inc.

Operator,

\- and -

Matthew Philip Tees
and
Ronda Mae Tees

Applicants

Before: Andreea Bandol
(the "Panel")

APPEARANCES BY WRITTEN SUBMISSIONS:

For the Ember Resources Inc.: No response.
For the Applicants: S. Smith, Stringam LLP

DEMAND FOR PAYMENT

THE TRIBUNAL DEMANDS that the Operator pay ONE THOUSAND FIVE HUNDRED TWENTY-FOUR and 00/100 DOLLARS ($1,524.00) (the "Compensation") to the Applicants within THIRTY (30) DAYS from date of this decision.

IT IS ORDERED that if the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicants, then without further notice, the Operator's right to enter the Site shall be suspended and terminated under section 36(5) of the *Act* at 4:30 p.m. on the dates below. This shall not affect any of the Operator's obligations in regard to the Site, nor any other person's rights against the Operators. The Surface Lease remains in place for purposes of shutting-in, suspension, abandonment, and reclamation.

- Suspension effective from April 4, 2023, lasting 15 days.
- Termination effective from April 19, 2023.

DECISION AND REASONS

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[1] The Applicants filed an application under s. 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement ("Surface Lease") dated May 6, 2005 for the above Site (the "Application"). The Applicant sought recovery of unpaid compensation for the year 2020 in the amount of $1,524.00.

ISSUES

[2] The issues before the Panel are:

1. Is there money past due that has not been paid by the Operator to the Applicants under the Surface Lease?

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

3. Should the Tribunal direct the Minister to pay the Applicants any of the money past due that has not been paid by the Operators out of the General Revenue Fund under s. 36(6) of the *Act*?

DECISION

[3] The Panel decides:

1. The Compensation is payable to the Applicants by Ember. The written evidence satisfactorily proves that it has not been paid.

2. Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, Ember's entry rights shall be suspended and terminated on the dates in the preceding order.

3. If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicants, then, without further notice, the Tribunal may direct the Minister to pay Compensation of $1,524.00 out of the General Revenue Fund.

ANALYSIS

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

[4] The Applicants provided a copy of the survey plan for the Site, a copy of caveat 062 284 041 registering the Surface Lease on Certificate of Title 052 191 560, and a copy of a letter from Ember dated April 8, 2020.

[5] The April 8, 2020 letter informed the Applicants of the upcoming rental review of the Surface Lease. In the letter, Ember acknowledged its interest in the Site and proposed a reduction in the annual rate of compensation from $3,910.00 to $2,386.00. The letter also stated:

> If you are in agreement, please acknowledge by dating, signing, and returning the duplicate copy of this letter to our attention in the self-addressed envelope. In anticipation of your acceptance, your upcoming rental payment will be in the amount of our proposed offer, by whichever form of payment you previously arranged. Please note that any payment directed into your account, including the cashing of any cheques, is NOT deemed as acceptance of this offer. [Emphasis in original].

[6] According to Certificate of Title 052 191 560, the Applicants have owned the Land since May 17, 2005 and were owners when the 2020 payment became due.

[7] The Panel finds that Ember was the Operator under ss. 36(1)(c), 36(1)(d), and 36(1)(e) of the *Act* when the Compensation became due. The Alberta Energy Regulator Well Summary Report dated May 13, 2021 shows that Ember held Well License No. 0335623 for the Site (s. 36(1)(c)) and was a working interest participant on the Site effective May 14, 2014 (s. 36(1)(d)). Ember held the Surface Lease registered by caveat 062 284 041 on the Certificate of Title (s. 36(1)(e)). Furthermore, Ember acknowledged its interest in the Site in the April 8, 2020 letter.

[8] The annual rate of $3,910.00 and the partial payment of $2,386.00 are confirmed by the April 6, 2020 letter. The Applicants swore a Statutory Declaration dated July 15, 2020 that the Compensation of $1,524.00 was not paid for 2020.

[9] Ember's April 6, 2020 letter contained a proposal to reduce the compensation under the Surface Lease by $1,524.00. The Panel finds that the Compensation claimed the Applicants represents the difference between the annual rate ($3,910.00) and the reduction proposed by Ember ($2,386.00).

[10] In *Karve Energy Inc. v Drylander Ranch Ltd*, 2019 ABQB 298, the Court of King's Bench held 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*": para. 36. Furthermore, a party to contract cannot unilaterally change a term of the contract and impose a new term on the other party. Nonetheless, parties to a surface lease can agree to vary the compensation payable under the lease: see para. 37.

[11] There is no evidence that the Applicants accepted the reduction proposed by Ember. Nor is there evidence that the Tribunal reduced the rate of compensation pursuant to s. 27 of the *Act.*

[12] Based on the foregoing, the Panel is satisfied that Ember owes $1,524.00 to the Applicants for the 2020 payment due under the Surface Lease. There is no evidence that the Site has been reclaimed and the Surface Lease remains in effect.

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

[13] Under s. 36(5) of the *Act*, the Tribunal can suspend and terminate an Operator's rights to access the Site when appropriate.

[14] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, Ember's entry rights shall be suspended and terminated according to the preceding order and the Minister may be directed to pay.

3. Should the Tribunal direct the Minister to pay the Applicants any of the unpaid money past due out of the General Revenue Fund under s. 36(6) of the *Act*?

[15] The Panel has discretion to direct the Minister to pay out of the General Revenue Fund any unpaid compensation past due to the Applicants: see s. 36(6). In *Devon Canada Corp v Alberta (Surface Rights Board)*, 2003 ABQB 7, the Court of King's Bench considered the purpose of sections 36(5) and 36(6) and held, at para. 29:

> As previously indicated, the function of sections 36(5) and 36(6) appears to me to provide the surface owner with some assurance that if they cooperate with providing the oil industry access to their lands, they need not fear the operator will not pay them.
>
> The sections provide a pragmatic solution whereby the surface owner need only prove the existence of a lease and that rent has not been paid. Upon proof of such, in most cases, the province would then pay the rent and the operator would then face the province, seeking reimbursement from the operator.
>
> The function of the sections intentionally favour the surface owner; In most cases, the Board will direct the province to pay the back rent to the surface owner; however, 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.

[16] The Panel took guidance from *Praskach Farms Ltd v Lexin Resources Ltd*, 2020 ABSRB 85 ("*Praskach*"), which summarized the scope of authority under s. 36(6). In that case, the Tribunal identified the relevant factors and the type of evidence needed to direct the Minister to pay the full amount owing or a reduced amount if payment of the full amount would be unjustified: see paras. 10-12. At para. 13, *Praskach* provides the following guidance when assessing the loss of use of the leased area and the adverse effect on the remaining lands:

> [13] The Board may determine the amount the Minister is directed to pay by considering of a combination of factors relevant to loss of use and adverse effect. Some compelling factors include facilities, fencing, and equipment remaining on the lease; operator activity on the lease; the condition of the land within the lease, including compaction, foreign materials, and changes of elevation; how the remaining land is used and how the site impacts this use; if and to what extent the owner is using the lease for production, including cropping and grazing; and the existence and extent of nuisance, inconvenience, and noise.

[17] The Applicants submitted a condition of leased area form (COLA) with the Application, noting that: (1) the Site is fenced; (2) there is equipment or structures on the Site; and (3) the Site is still being

visited by workers; and (4) the Land is being used for grazing. They also provided additional details about the condition of the Site:

> The well is in production, regularly attended by operators and maintenance staff.
>
> The lease on land title continues to limit our develop's [sic] and use of our private land.
>
> Full payment is appropriate as the company retains use and access to the full lease area.

[18] The Panel accepted the Applicants' evidence about the condition of the Site and applied the reasoning in *Praskach*. The Panel finds that the Applicants suffered total loss of use of the leased area due to the presence of wells on the Site and the fencing around the Site. With respect to adverse effect, the Panel considered the impact on the remaining lands. The Panel gave significant weight to the evidence that the Site is still in production and it is visited by workers. The Panel finds that there is likely nuisance, inconvenience, or noise caused by the operations on the Site.

[19] Based on the foregoing, the Panel finds there is no evidence that payment of the full Compensation would result in overpayment to the Applicants or that directing the Minister to pay the full amount is unjustified.

[20] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicants, then, according to the preceding order, Tribunal may direct the Minister to pay a total of $1,524.00 to the Applicants out of the General Revenue Fund under s. 36(6) for the year 2020.

Dated at the City of Calgary in the Province of Alberta this 20th day of March, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL

Andreea Bandol, Member