



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Keim-Balderson v Ember Resources Inc., 2023 ABLPRT 900092

Date: 2023-03-29

File No.: RC2020.2813

Decision No.: LPRT2023/SR900092

Municipality: Rocky View 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 ¼-34-28-25-W4M as described in Certificate of Title No. 151 044 367 (the “Land”), particularly the area granted for a well site and access road, Alberta Energy Regulator Well Licence No. 0328925 (the “Site”).

Between:

Ember Resources Inc.

Operator,

- and -

Danielle Keim-Balderson,

Applicant.

Before: Glenn Selland
(the “Panel”)

Appearances by written submissions:

For the Applicant:

Paul Vasseur, Personal Representative

No other parties provided submissions although duly notified of the proceeding.

DEMAND FOR PAYMENT AND ORDERS SUSPENDING AND TERMINATING ENTRY RIGHTS

THE TRIBUNAL DEMANDS that Ember Resources Inc. pay ONE THOUSAND TWO HUNDRED 00/100 DOLLARS (\$1,200.00) (the “Compensation”) to the Applicant within THIRTY (30) DAYS from the date of this decision. If the Operator does not prove to the Tribunal’s satisfaction that the

Compensation has been paid in full to the Applicant, then without further notice the Tribunal may direct the Minister to pay Compensation of \$1,200.00 to the Applicant out of the General Revenue Fund.

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

- Suspension effective from April 13, 2023, lasting 15 days.
- Termination effective from April 28, 2023.

DECISION AND REASONS

[1] The Applicant filed an application on November 16th, 2020, under section 36 of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement dated March 2nd, 2005 (the "Surface Lease"). The Applicant claims Ember Resources Inc. provided partial payment of the \$3,100.00 that was due March 2nd, 2020 and that the amount of \$1,200.00 remains due and owing.

ISSUES

[2] The issues before the Panel are:

- (1) Which person(s) are Operator(s) for the purposes of section 36 of the *Act*?
- (2) Is there money past due that has not been paid by the Operator(s) to the Applicant under a surface lease?
- (3) If money is past due and owing, should the Tribunal direct the Minister to pay the Applicant any of the money past due that has not been paid by the Operator out of the General Revenue Fund under section 36(6) of the *Act*?
- (4) Should the Tribunal suspend and terminate the Operator's entry rights under section 35(5) of the *Act*?

DECISION

[3] The Panel decides:

- (1) For the purposes of section 36 of the *Act*, the Operator is Ember Resources Inc.
- (2) The Compensation in the amount of \$1,200.00 is payable to the Applicant by the Operator for the 2020 compensation year and the written evidence satisfactorily proves that it has not been paid.
- (3) There is no evidence that would direct the Panel to award a reduced amount to be paid by the Minister. Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant by the Operator, then according to the preceding order

the Tribunal may direct the Minister to pay \$1,200.00 to the Applicant for the outstanding balance of the amount due March 2nd, 2020.

- (4) If the Tribunal does not receive satisfactory evidence that the Compensation has been paid in full to the Applicant, then without further notice the Operator's entry rights shall be suspended and terminated according to the preceding Order.

ANALYSIS

Issue No 1. Which person(s) is an operator for the purpose of section 36 of the Act?

[4] For recovery of compensation applications, the definition of the word operator is set by sections 36(1) and (2) of the *Act*. Specifically, sections 36(1) and (2) expand the definition of the *operator* so that it has a broader meaning than in the rest of the *Act*.

[5] 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 0328925 for the Site, is in the name of Ember Resources Inc. ("Ember") The Panel finds that Ember is an operator under section 36(1)(c) on the March 2nd, 2020, due date.

[6] Under s. 36(1)(d) working interest participants are operators. The Panel further finds that Ember is an operator under section 36(1)(d) on March 2nd, 2020, due date for the following reasons:

- a. AER Well Summary Report dated May 13, 2021, for AER Well Licence No. 0328925 shows Ember is a working interest participant on the Site with One Hundred percent (100%) interest.

[7] Under section 36(1)(e) the holder of the Surface Lease or Right of Entry Order for the Site is an *operator*. This includes persons who held the surface lease at the time of non-payment and their successors. The Panel finally finds Ember Resources Inc. is an *operator* for the purpose of section 36(1)(e) on the March 2nd, 2020, due date because:

- a. Land Title Registration No. 051 104 120 registered on the Current Certificate of Title No. 151 044 367 shows that Ember was the holder of a caveat for a surface lease under 20 acres. To support that Ember is an operator, Ember provided a partial, annual payment dated March 3rd, 2020 to the Applicant for the 2020 compensation year pursuant to a Surface Lease dated March 2nd, 2005.

Issue No 2. Is there money past due and has not been paid by the Operator(s) to the Applicant under a Surface Lease?

[8] The current Certificate of Title confirms the Applicant is the owner of the Land and was the owner when the rentals became due, and the compensation is supported by the application and supporting documentation.

[9] Evidence in the form of the Surface Lease Agreement was presented to show that the parties agreed to a rate of compensation of \$3,100.00 per annum. In correspondence dated February 26th, 2020, Ember advised the Applicant that the rate of annual compensation was being varied from \$3,100.00 to \$1,900.00 effective March 2nd, 2020. Ember provided payment to the Applicant in the amount of \$1,900.00. That payment amount is not in dispute. The issue in dispute is whether the amount claimed of \$1,200.00 remains due and owing for the 2020 compensation year under the terms of the Surface Lease.

[10] The Applicant submits it did not agree to a variance in the amount of annual compensation and accepted the payment from Ember as partial payment of the amount due and owing under the Surface Lease. The Applicant subsequently submitted a section 36 Application seeking the unpaid balance of \$1,200.00.

[11] With respect to the Panel's authority to determine compensation within a section 36 proceeding, the Panel takes guidance from *Karve Energy Inc. v Drylander Ranch Ltd.*, 2019 ABQB 298 ("Karve"). Justice Dilts summarized the Tribunal's authority as [47] "*Under s. 36, the Board is only entitled to determine whether compensation is owed under the Lease. It is not authorized to review the rate of compensation or to intervene in or alter the parties' agreement regarding compensation.*"

[12] This Panel adopts and applies the reasoning from *Karve* and decides it does not have authority to review or vary the rate of annual compensation but must only determine if compensation is owing.

[13] The Panel finds that there was not an amending agreement nor was there an order under section 27 of the *Act* varying the amount of annual compensation presented in evidence. The Panel is satisfied that compensation is owed to the Applicant for a portion of the annual payment due under the Surface Lease. The evidence presented confirms that Ember paid \$1,900.00 of the \$3,100.00 compensation due March 2nd, 2020 under the Surface Lease and the sum of \$1,200.00 is outstanding. The Panel finds evidence in the form of a Statutory Declaration signed by the Applicant, which has not been disputed by the Operator, satisfactorily proves non-payment of the \$1,200.00. The Site has not been reclaimed and the Surface Lease remains in effect.

Issue No 3. Should the Tribunal direct the Minister to pay the Applicant any of the money past due that has not been paid by the Operator out of the General Revenue Fund under s. 36(6) of the Act?

[14] The Applicant states that the Land is being used to grow crops. The Site is not fenced, has structures, and the Site is being accessed by workers.

[15] In *Devon Canada Corporation v Alberta (Surface Rights Board)*, 2003 ABQB 7, 337 AR 135 ("*Devon*"), the Court of King's Bench considered the Tribunal's responsibility when considering an order under s. 36(5) and (6) and held at paragraph 29:

... the function of sections 36(5) and 36(6) appears to me to provide the surface owner with some assurance that if they cooperate with providing the oil industry access to their lands, they need not fear the operator will not pay them.

The sections provide a pragmatic solution whereby the surface owner need only prove the existence of a lease and that rent has not been paid. Upon proof of such, in most cases, the province would then pay the rent and the operator would then face the province, seeking reimbursement from the operator.

... if the ... owner's claim is unjustified, is patently absurd, or provides an unjust enrichment, the Board should be able to use its discretion under s. 36(6) to refuse to direct that Alberta taxpayers pay the rental arrears.

[16] According to *Devon*, the Panel's decision to direct the Minister to pay out of the General Revenue Fund is discretionary. This was confirmed by the Alberta Court of King's Bench in *Provident Energy Ltd v Alberta (Surface Rights Board)*, 2004 ABQB 650.

[17] In a recent decision, *Praskach Farms Ltd v Lexin Resources Ltd*, 2020 ABSRB 85 ("*Praskach*"), the Tribunal concisely summarizes the scope of authority under section 36 of the *Act*, the factors to consider

direct the Minister to pay either the full amount of Compensation owing or a reduced amount of payment if the full amount is unjustified. The Tribunal held (at paragraphs 10):

[10] There are two factors particularly important for considering annual compensation and whether directing the Minister to pay the full amount owing is unjustified. ... this is not a review of compensation under section 27, however, the loss of use and adverse effect are components of fair compensation which the Board can consider when determining if directing the Minister to pay the full amount owing is justified.

and this Panel adopts and applies the reasoning from *Praskach*.

[18] There is no evidence to persuade the Panel that payment of the full Compensation owing would result in overpayment to the Applicant. The records show that the well is in active production, and the production equipment is still on the site. The workers are accessing the Site for operational purposes. The Applicant is experiencing continued loss of use and adverse affect due to the presence of an active well and associated activities by Ember staff/contractors.

[19] Unless the Tribunal receives satisfactory evidence that the Compensation outstanding has been paid in full to the Applicant by the Operator, then according to the preceding order the Tribunal may direct the Minister to pay \$1,200.00 to the Applicant for the outstanding balance of the amount due March 2nd, 2020.

Issue No 4. Should the Tribunal suspend and terminate the Operator's entry rights under s. 35(5) of the Act and direct the Minister to pay the Applicant any of the money past due that has not been paid by the Operator out of the General Revenue Fund under s. 36(6) of the Act?

[20] Under section 36(5) of the *Act*, the Tribunal may suspend and terminate an operator's rights to access the Site when appropriate.

[21] Unless the Tribunal receives satisfactory evidence that the Compensation has been paid in full to the Applicant, Ember's entry rights shall be suspended and terminated according to the preceding Order. The Panel finds that the suspension and termination of Ember's right to access the site is a reasonable consequence because of Ember failing to pay the full amount of annual compensation under the Surface Lease as negotiated between the Applicant and the Operator.

Dated at the City of Edmonton in the Province of Alberta this 29th day of March, 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL



Glenn Selland, Member