



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation: Hutterian Brethren Church of Lomond v Houston Oil & Gas Ltd., 2023 ABLPRT 900334

Date: 2023-07-18

File No.: RCR2022.1014

Decision No.: LPRT2023/SR900334

Municipality: Vulcan 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:

SW ¼ -19-17-19-W4M as described in GRL 35055 (the “Land”), particularly the area granted for Alberta Energy Regulator Well License No. 0329693 (the “Site”).

Between:

Houston Oil & Gas Ltd

Operator,

- and -

Hutterian Brethren Church of Lomond

Applicant.

Before: Lana Yakimchuk, Presiding Chair
Barbara McNeil, Member
(the “Panel”).

Appearances by written submissions:

For the Applicant: Kris Bower, Stoney Creek Management Group

For the Operator: No written submissions.

DECISION AND REASONS

BACKGROUND

[1] The title to the Site is in the name of the Hutterian Brethren Church of Lomond.

[2] On March 3, 2022, the Applicant filed a Returning Recovery of Compensation Application (“Application”) under section 36(7) of the *Act* seeking recovery of unpaid compensation due under a surface lease agreement for the above Site dated March 9, 2004 (the “Surface Lease”) for 2021.

[3] On April 18, 2022, the Applicant filed a Returning Recovery of Compensation Application seeking recovery of unpaid compensation due under the same surface lease for the 2022.

[4] The Applicant claims a total amount of \$3,000.00 in unpaid compensation for 2021 and 2022.

ISSUES

[5] The Panel’s decision is confined to the following issues:

- (1) Is the application as submitted, complete as required by rule 14(2) and (3) (d), (e) and (f)?
- (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 Tribunal consider it?

DECISION

[6] The Panel decides:

- (1) The Application, as submitted, is incomplete. It does not meet the requirements of Rules 14(2) and (3) (d), (e) and (f).
- (2) The Tribunal does not have enough information about the condition of the leased site to exercise the discretion granted to it by s.36 of the Act. The Board has the authority to exercise discretion to direct the Minister to pay less than the full amount of compensation owed under a surface lease or compensation order. For that reason, a filled-out COLA (condition of leased area) form that describes both the condition of the well site and any fixtures on the well site is required.
- (3) The Application is dismissed, and the Applicant is invited to file another application containing sufficient information to allow the Tribunal to make a decision.
- (4) No other issues relating to the Application have been considered by the Panel.

FACTORS CONSIDERED

[7] The Tribunal has rules. In considering the Application form under s.36 of the Act, the Panel also considered the following legislation and the Surface Rights Rules:

The *Land and Property Rights Tribunal Act* s.6(1) and (2):

6(1) *In addition to the powers and duties given under the existing legislation, the Tribunal shall have the power to make rules respecting its practice and*

procedures and to regulate its own process.

6(2) The Tribunal has all the powers of a commission appointed under the Public Inquiries Act.

Public Inquiries Act, RSA 200, C P-39:

4. The commissioner or commissioners have the power of summoning any person as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce 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.

[8] The Land and Property Rights Tribunal has prescribed a form for s.36 applications. The application form, as it existed at the time of application requests information on lease and lease information including the condition of the leased area. This required information is referred to as the 'COLA'. The COLA is required to be completed within the application. Rule 14(2) of the Surface Rights Rules says that the application must include a completed form where one is prescribed by the Tribunal. The requirement is mandatory, although the Tribunal has discretion under Rule 6 of the Surface Rights Rules to waive or vary a requirement if there is a reason to do so. Rule 7 outlines the effect of noncompliance with the rules which may include an order dismissing the application or deeming the application to be withdrawn.

[9] The Application form instructions include the COLA section and asks the Applicant to indicate whether: 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 for reclamation work); the site is being used for crops, grazing, or non-farming.

[10] The Panel acknowledges that in the 2021 Application, the Applicant checked "yes" boxes of the description of the COLA indicating that there is equipment such as a wellhead at the site, that the site is still being visited by workers and also indicated that the land is used for grazing. In the 2022 Application, the Applicant also indicated that there is equipment and the site is visited by workers, but checked that the land is 'non-farm'. The Panel finds that this limited information on both Applications fails to provide sufficient information for the panel to make any kind of finding on the condition of the leased area.

[11] The Panel found no evidence of the condition of the leased area included in the Application, nor was any detail provided, regarding the extent of the equipment or worker activity on the Site, including reclamation work.

[12] The Panel found the space in Application used to describe the condition of the leased area and any facts about the land that are important for the Tribunal to know, provided limited information regarding the losses suffered because of the existence of the lease itself or because of activities on the leased area. Rather, the opportunity for description was used to state, without evidence, that:

No rental is paid for 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 statutory forced taking akin to expropriation. The annual payment is for loss of use, adverse effect, (both tangible and intangible), nuisance, inconvenience, and noise among other criteria. Some impacts have increased including the need to deal with regulatory and environmental officials and crews accessing the land creating concern of open gates. Weeds have continued to be an issue. The losses and impacts of this well site are the same as when the energy company was in operation. No reclamation certificate has been issued. Additional loss

of use from compaction on the Access Road. The Access Trails open up land for hunters on site. Concerns with soil erosion and around the wellhead. Potential for spills or contamination.

There were no arguments provided, as requested, about whether payment of the full rental amount is still justified. Although long, the above description is generic and not specific to the site. The Tribunal is assisted by knowing how much and what type of equipment is on the land and how it affects the ability to farm or to use the land in a fashion comparable to the surrounding land. With detailed and specific information, the Tribunal is able to determine the amount of payment to direct the Minister to pay.

[13] The COLA portion of the Application provides the following explanation:

WHY IS THE BOARD ASKING THIS? When a landowner applies for recovery of rentals, the Board must decide whether to direct the Minister to pay the full amount claimed, a lesser amount, or to not direct any payment. The Board may choose to direct the Minister to pay a reduced amount if payment of the full rentals would over-compensate the landowner. One of the factors the Board can use to make this decision is the condition of the leased area, how you are using it, how it is affecting the rest of your land, and what losses you are suffering because of it.”

[14] Although Tribunal Administration will review the applications, the applicant’s responsibility is to ensure that their application is complete, accurate, and complies with the Tribunal’s requirements (Rule 16 (2)). The application forms prescribed for in s.36 provide the Tribunal with the information and documentary evidence necessary to make a decision, and all affected parties are given an opportunity to participate.

[15] The Panel considering an application will determine who the operator is, whether there is any money payable by an operator under a compensation order or surface lease that has not been paid, whether to suspend or terminate the operator’s rights and finally, whether to direct the Minister to make the payment to the person entitled from the General Revenue Fund. Section 36(4) of the *Act* requires the Tribunal to send a written notice to the operator demanding payment in full, however the remaining provisions require the Tribunal to exercise discretion.

[16] Sections 36 (6) and (7) specifically say the Tribunal *may* direct the Minister to pay unpaid compensation. Other than s.36(4) the words “must” or “shall” do not direct the Tribunal in this section. A decision to direct the Minister to pay a lesser amount does not alter or change the agreement between the parties, nor does it absolve the operator of its liability to pay the full amount.

[17] The Panel notes that in *Devon Canada Corp. v. Surface Rights Board, 2003 ABQB 7 (“Devon”)*, the Court clearly found that the wording of s.36(6) entitles the Tribunal to exercise statutory discretion. Honourable Justice D.A. Sirrs stated that the function of s.36 is to intentionally favour the surface owner, however, that must be considered in the context of the entire decision. The Court found at paragraph 28 that to read s.36 as providing a blanket guarantee is to permit the Tribunal to overcompensate in certain circumstances and went on to say at paragraph 29:

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.

To ensure the function of these sections of providing a pragmatic, inexpensive solution to the surface owner when rent under a surface lease is not paid, the Board should be afforded much deference.

[18] The Tribunal must go beyond simply directing payment and find a factual basis for directing payment. In *APF Energy Inc. v. Alberta (Surface Rights Board)*, *Court of Queen's Bench*, it was found that the Tribunal properly exercised their discretion in accordance with *Devon*.

[19] Following *Devon*, there are numerous Tribunal decisions, and the Court of Queen's Bench has considered the Tribunal's discretion under section 36(6) and whether an owner's claim is unjustified, absurd or provides an unjust enrichment. Although the circumstances vary with each case, the underlying principle remains fundamentally the same. *Devon* was followed in *Provident Energy Ltd. v. Alberta (Surface Rights Board)*, 2004 ABQB 650 (CanLII) ("*Provident*"), where the Court found that the Tribunal was reasonable in exercising its discretion to reduce the payments due to the owners in an amount reflecting the loss incurred. *Provident* confirms that the exercise of the Tribunal's discretion to pay what the actual loss to the landowner was during the period, rather than the full amount, is a reasonable approach supported by the evidence.

[20] The Tribunal has authority to exercise discretion when directing the Minister to pay out taxpayer dollars. The Tribunal must be reasonable and fair when it exercises discretion. It is for that reason that the Tribunal requires that a condition of leased area be submitted with s.36 applications.

[21] The Panel considered previous decisions of the Tribunal:

- *Randle Farms Ltd et al v Lexin Resources Ltd*, 2020 ABSRB 1015
- *Hutterian Brethren of Armada v Houston Oil & Gas Ltd.*, 2021 ABLPRT 557

[22] Because the Panel is unable to render a reasonable and fair decision with the information provided, the Panel dismisses the Application and will not consider it. The Applicant is invited to file another application containing sufficient information to allow the Tribunal to render a decision under section 36 of the Act.

Dated at the Town of Banff in the Province of Alberta this 18th day of July 2023.

LAND AND PROPERTY RIGHTS TRIBUNAL

Barbara
McNeil

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Barbara McNeil
Date: 2023.07.20
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Barbara McNeil