



LAND AND PROPERTY RIGHTS TRIBUNAL

Citation:

Allison v Ember Resources Inc., 2024 ABLPRT 904367

Date: 2024-08-23
File No: RC2021.1289
Order No.: LPRT904367/2024
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 20-39-23 W4M as described in Certificate of Title No. 142 222 576 (the “Land”),
particularly the area granted for Alberta Energy Regulator Licence No. 0338876 (the “Licence”),
collectively (the “Site”).

Between:

Ember Resources Inc.,
And
Southern Cross Petroleums Limited,

Operators,

- and -

Allon Brock Allison,
and
Diane Oldach,

Applicants.

Before: Janet Mitchell (“the Panel”)

Appearances by written submissions:

For the Applicants: Paul Vasseur

For the Operator: Tara M. Rout, Owen Law

**DIRECTION TO PAY PURSUANT TO
SECTION 36(6) OF THE ACT**

The Tribunal directs the Minister to pay out of the General Revenue Fund the sum of SIX HUNDRED EIGHTY TWO and 00/100 DOLLARS (\$682.00) (the “Compensation”) jointly to Allon Brock Allison and Diane Oldach of Sherwood Park in the Province of Alberta for compensation that became due in the years 2020.

DECISION AND REASONS

[1] The Applicants filed an application dated April 28, 2021 under section 36 of the *Act* (the Application) seeking recovery of unpaid compensation due under a surface lease agreement, consent of occupant agreement, or Compensation Order for the above Site (the “Right-of-Entry Instrument”). The Applicants claims \$2,700.00 annually, less amount received of \$2,018.00 for a total amount of \$682.00 under the Application for 2020.

[2] Southern Cross Petroleum Limited was dissolved as a corporation on March 5, 2021 as per the Government Alberta Corporate Registry System.

[3] In a letter dated April 28, 2020, from Ember Resources Inc. (“Ember”) indicates that Ember considers the site to be an Abandoned Well site.

[4] The Panel acknowledges the Operator’s letter dated April 28, 2020, outlining their to attempts renegotiate the Right-of-Entry Instrument with the Applicants for a decrease in the compensation rate from \$2,700.00; an annual decrease of \$2,018.00. The Panel is guided by the Court of Queen’s Bench decision in *Karve Energy Inc v Drylander Ranch Ltd*, 2019 ABQB 298 – Justice Dilts. That decision held:

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.

[5] The Panel finds it cannot consider a variance in the rate of compensation established in the right of entry instrument.

[6] The Tribunal received a letter dated August 9, 2021 from Ember requesting that the Tribunal “...reconsider the decision to issue notices and demands for payment...” for 40 Tribunal matters, including this Site. In its August 9, 2021 letter, Ember submits that its reconsideration application is made under section 29(1) of the *Act* and Rule 37(3)(a) and (c). Also, Ember seeks the opportunity to make further submissions regarding the exercise of the Tribunal’s discretion under s.36(5) and s.36(6) of the *Act*.

PRELIMINARY ISSUE

The issue before the Panel is:

- (1) Does section 29(1) of the *Act* apply to the notice and demand for payment?

DECISION

[7] The Panel decides:

- (1) No - section 29 (1) of the *Act* does not apply to the notice and demand for payment. Neither reflect a final decision by the Tribunal, both are issued in advance of the merits of the application being considered. Ember is not prejudiced because they have had an opportunity to provide submissions in response to the notice and demand for payment since July 23, 2021, and there will be full consideration of all submissions received at a written hearing.

ANALYSIS

[8] The Section 29 of the *Act* gives the Tribunal the discretion to rehear an application, or review, rescind, amend or replace a decision or order made. This is a discretionary remedy, not a right to appeal as the Court of King's Bench is the appropriate forum for an appeal or judicial review. In a series of cases including *McAllister v Long Run Exploration Ltd*, 2018 ABSRB 603 the Tribunal has described the process in these terms:

A reconsideration threshold is not an appeal, but rather a further review of a decision where the [Tribunal] decides whether to reconsider its original decision due to extenuating circumstances. The threshold which must be met in the reconsideration process requires the [Tribunal] to be satisfied that the original decision should be reopened. It is not sufficient that the party simply disagrees with a decision. Nor is the purpose of the reconsideration process for a party to simply repeat its arguments or bolster the portions of its case which did not persuade the original panel.

[9] In its August 9, 2021 letter, Ember submits that the Tribunal reconsider the decision to issue the notices and demands for payment because:

- (1) The Tribunal made an important error of jurisdiction, based on Rule 37(3)(a), and breached the rules of natural justice by failing to give Ember any notice of the section 36 applications before making its decision to issue the notices and demands for payment (Demands). Ember argues that by not providing notice of the section 36 applications, before issuing the Demands, the Tribunal denied Ember any opportunity to make representations or submissions before issuing the against them. Ember submits that this is a breach of natural justice.
- (2) The Tribunal by not giving notice of the section 36 applications against it, the decision to issue the Demands was based on an unfair process. Ember did not have the opportunity to know the case against it nor did it have the opportunity to make submissions before the decision was made to demand payments. Ember submits that this lack of notice constitutes an unfair process pursuant to s.37(3)(c) of the Rules such that the Demands should be rescinded.

[10] The Panel considered Ember's arguments. The question as to whether a notice and demand for payment can be challenged under section 29 has been the subject of several decisions by this Tribunal. Please refer to *Ember Resources Inc v Buckland*, 2021 ABLPRT 846 (CanLII), 1135391 Alberta Ltd v Terra Energy Corp, 2022 ABLPRT 900553 (CanLII), 840586 Alberta Ltd. v Suddaby, 2022 ABLPRT 1268 (CanLII), *Clearvalley Farms Ltd v Ember Resources Inc*, 2022 ABLPRT 1134 (CanLII), *Hutterian Brethren Church of Huxley v Trident Exploration (Alberta) Corp*, 2022 ABLPRT 595 (CanLII), *Harvey v Ember Resources Inc*, 2022 ABLPRT 594 (CanLII), and *Ember Resources Inc v 599055 Alberta Ltd*, 2022 ABLPRT 913 (CanLII).

[11] These recent Tribunal decisions confirm that:

- (1) Section 29(1) of the *Act* does not apply to the notice and demand for payment. Neither reflects a final decision by the Tribunal, both are issued in advance of the merits of the section 36 application being considered.
- (3) Alternatively, if the notice and demand for payment could be characterized as a “decision” of the Tribunal, then it would be an interlocutory or interim decision and the test provided for in *689799 Alberta v. Edmonton (City)* 2018 ABCA 212 (CanLII), which would allow for a review, has not been established.

[12] In applying the reasoning from these decisions, the Panel finds that the *Act* establishes the process by which section 36 applications shall proceed. Following receipt of a completed section 36 application in the prescribed forms, the Tribunal is required to provide notice to the operators. The Tribunal has no discretion about providing notice to the operators (per: *Weleschuk v Sequoia Resources Corp*, 2021 ABLPRT 398 (CanLII)). However, the issuance of the notice and demand for payment is a trigger for other actions to follow and no immediate consequences flow in relation to Ember. Issuing the notice and demand for payment to the operator (as defined in section 36(1)) is a step in the procedure that is long-standing and equally applicable to all operators.

[13] In summary, the notices and demands for payment are statutory prerequisites to have the matter put before the panel (e.g., see *1135391 Alberta Ltd v Terra Energy Corp*, 2022 ABLPRT 900553). Ultimately, the panel hearing the section 36 application may determine that the evidence establishing non-payment or identifying the operator as Ember is not sufficient. The notice and demand for payment is not a decision that impacts the rights of parties, in this case Ember.

[14] In other words, the notice and demand for payment are part of the legislated process required for a section 36 application, to be followed in advance of a decision that will affect the rights of the parties. The panel hearing the section 36 application may conclude based on the evidence presented that the statutory pre-requisites have not been met. The notice and demand for payment invite operators to make submissions. Here, Ember is not prejudiced because they have had an opportunity to provide submissions in response to the notice and demand for payment since July 23, 2021 and there will be full consideration of all submissions received at a written hearing.

[15] The Panel also considered Ember’s request that they make further submissions regarding the exercise of the Tribunal’s discretion to suspend Ember’s rights of access to the Site under section 36(5) and to direct the Minister to pay under section 36(6) of the *Act*.

[16] Section 36 provides a scheme of due process and clearly outlines the possible consequences. If the notice and demand for payment is not complied with, the Tribunal may by written order served on the operator take steps to suspend the operator’s right to enter the site. Only after suspension and “after giving the operator written notice of its intention to do so”, is termination an option. The operator has a further 30 days after the notices and demands for payment are sent to prove to the Tribunal that full payment has been made (see section 36(6)).

[17] In the Panel’s view, Ember’s remaining arguments deal with the Tribunal’s discretionary powers under section 36(5) and (6) of the *Act* and are not responsive to Rule 37(3)(a) and (c). However, these arguments will be considered in connection with the section 36 application.

[18] Having regard to the above, the Panel dismisses Ember’s request for a section 29 review. The Tribunal will proceed to consider the merits of the Landowner’s original section 36 application, as amended.

ISSUES

1. Who is an Operator for the purpose of section 36 of the *Act*?
2. Is there money past due and unpaid by the Operator to the Applicants under a Right of Entry Instrument?
3. Should the Tribunal direct the Minister to pay the Applicants any of the money past due under section 36(6) of the *Act*?
4. Should the Tribunal suspend and terminate the Operator's rights?
5. Should the Tribunal award costs under section 39 of the *Act*?

DECISION

1. For the purposes of section 36 of the *Act*, the Operators are Ember and Southern Cross Petroleum Limited.
2. The written evidence proves compensation in the amount of \$682.00 is payable jointly to the Applicants by the Operators.
3. Without further notice, the Tribunal directs the Minister to pay the Applicants Compensation in the amount of \$682.00 from the General Revenue Fund.
4. The decision to suspend or terminate the Operators' rights is reserved.
5. The Operators shall jointly pay costs to the Applicants in the sum of 131.25 including GST.

ANALYSIS

1. Who is an operator for the purpose of section 36 of the *Act*?

[19] The Tribunal gave notice pursuant to s. 36(4) to Ember and the Panel is satisfied that the demand for payment and notice meets the requirements of the *Act* pursuant to s. 36(4) and the Interpretation of Section 36(4) *Surface Rights Act* Guideline, ABSRB 2020-1.

[20] Section 36(1) and (2) expands the definition of *operator* so that it has a broader meaning than in the rest of the *Act*.

Section 36(1)(c) – Alberta Energy Regulator (“AER”) Licence Holder

[21] Under section 36(1)(c) the holder of a licence issued by the AER and its successors, is an Operator. The Licence for the Site is in the name of Ember as of November 15, 2013 therefore, the Panel finds this party is an Operator under section 36(1)(c) for the year 2020.

Section 36(1)(d) – Working Interest Participants

[22] Under s. 36(1)(d) working interest participants and successors are Operators. The Panel finds that Southern Cross Petroleum Limited an Operator under section 36(1)(d) for the year 2020 because the AER Well Summary Report dated May 31, 2021 for the Licence shows it was a working interest participant on the Site as of November 26, 2013. On July 29, 2021, Ember became the only Working Interest Participant.

2. Is there money past due and unpaid by the Operator to the Applicants under a Right-of-Entry Instrument?

[23] The Certificate of Title confirms the Applicants is the owner, therefore, the Panel finds the Applicants is entitled to receive the money. The Applicants provided evidence of a Right-of-Entry Instrument and the compensation is supported by the Application and supporting documentation. The Applicants declared in writing that the Compensation has not been paid for the years claimed.

[24] The Panel is satisfied that compensation is owed to the Applicants for annual payment due under the Right-of-Entry Instrument. This amount is calculated as one payment of \$2,700.00, less the amount received of \$2,080.00 due for 2020 for a total amount owing of \$682.00. The Site is not reclaimed, and the Right-of-Entry Instrument remains in effect. The Panel finds that at the time the Compensation became due, the Operators are jointly liable for the Compensation due to the Applicants.

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

[25] *Bateman v Alberta (Surface Rights Board)*, 2023 ABKB 640 specified that under s. 36 of the *Act*, the Applicants need only prove there is a Right of Entry Instrument and there is default on the payment, therefore, the Panel directs the Minister to pay the full amount owing. The Panel determined there is a right of entry instrument and money is owing, accordingly the Minister is directed to pay the Applicants \$682.00 from the General Revenue Fund.

4. Should the Tribunal suspend and terminate the Operator's rights?

[26] The Tribunal can suspend and terminate an operator's rights to access the Site when appropriate. The Panel reserves its decision to suspend and terminate at this time to avoid delay in payment to the Applicants, however, if the Operator attempts to access the Site but still does not pay compensation, the Tribunal may issue a suspension/termination order.

5. Should the Tribunal award costs under section 39 of the *Act*?

[27] The Applicants filed an invoice for costs in the sum of \$525.00 for four applications, or \$131.25 per application. Section 39(1) of the *Act* puts costs of and incidental to proceedings under the *Act* in the discretion of the Tribunal. Rule 31(2) the *Surface Rights Board Rules* provides guidance as to the factors the Tribunal may consider when awarding costs.

[28] In *Bear Canyon Farms Holdings Ltd v Apex Energy (Canada) Inc*, 2018 ABSRB 64, ("*Bear Canyon*") the Tribunal held:

A factor weighing towards a lower costs award is the low complexity of the proceedings. Board administration provides a reasonably short application form (2 pages) for section 36 applications and drafts the required statutory declaration for Applicants. The vast majority of the information requested on the form, such as Applicant's name, land description, rate of annual compensation, and year(s) claimed for unpaid compensation are generally within the knowledge of Applicants. The proceedings are entirely by writing and are usually unopposed by the Operator. In the majority of these kinds of straightforward section 36 applications, Applicants are able to file all paperwork by themselves and do so correctly.

Board administration performs all necessary searches, including searches for the responsible operator and its insolvency status; Board administration prepares a statutory declaration which the Applicants is requested to swear before commissioner of oaths; and

the Board convenes a Panel to make a determination, generally without an in-person hearing."...

...in the opinion of the Panel, an experienced professional should usually be able to file a section 36 application within one hour or less.

[29] This Panel applies the reasoning in *Bear Canyon* and awards costs for one hour of professional assistance at a rate of \$125 per hour plus 5 percent GST 6.25, for a total cost award of (\$131.25).

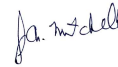
[30] Costs in the amount of \$131.25 are payable jointly by the Operators to the Applicants.

COSTS ORDER

[31] IT IS ORDERED that costs in the amount of ONE HUNDRED AND THIRTY ONE and 25/100 DOLLARS (\$131.25) are payable jointly by the Operators to the Applicants.

Dated at the City of Edmonton in the Province of Alberta this 23rd day of August 2024.

LAND AND PROPERTY RIGHTS TRIBUNAL



Janet Mitchell, Member