

## **Update to Landowners regarding the Bill and Connie Fulton v Lynx Energy ULC Judicial Review**

This letter is to present to interested landowners, an update regarding the Judicial Review in the Court of King's Bench of Alberta between Lynx Energy ULC (Plaintiff) and Land and Property Rights Tribunal, William Bernard Fulton and Connie J. Fulton (Defendants). As many of you know, Lynx Energy ULC (Lynx) applied to the Land and Property Rights Tribunal (LPRT) in July of 2020 to hold a Review of Annual Compensation Hearing for a surface lease on land owned by Bill and Connie Fulton. The compensation review "Notice" letter provided to the Fultons was not in compliance with information required by Section 27 of the Alberta Surface Rights Act. It did not advise the Fultons, within 30 days of the fourth anniversary of the lease date, that Lynx itself was requesting a review of the compensation for the lease. It merely stated that the landowners were entitled to a review of the compensation. As such, after submissions were provided to the LPRT by the Fultons' representative, My Landman Group Inc., the application by Lynx for the review of the compensation was dismissed.

Lynx disagreed with the LPRT decision and, subsequently in August of 2021, applied to the LPRT under Section 29 of the Act for 'Request for Review of Order or Decision'. Legal counsel for Lynx, in the application, suggested that the LPRT decision shows obvious and important errors in law or jurisdiction, was based on a process that was obviously unfair or unjust, and was inconsistent with binding judicial authority. The LPRT studied all of Lynx's submissions and, in October of 2021, found there were no errors or inconsistencies in its initial decision. It thus dismissed Lynx's application for Review of the Decision.

Lynx disagreed with this LPRT decision as well, and in March of 2022 it applied to the Court of Queen's Bench of Alberta for a Judicial Review of the LPRT's decision. Keith Wilson of Wilson Law Office agreed to represent the Fultons in this legal case. At that time, we began soliciting financial contributions from landowners to assist the Fultons with the funding of this legal challenge which had been brought upon them by Lynx Energy ULC. (Thank you to all the landowners who contributed to this cause. It is truly the only way that landowner's rights can be upheld and protected.)

The case was heard before a Judge in December of 2022. The Honourable Justice Hall concluded:

*The intention of the Act is to require the operator to tell the owner of the owner's rights and section 27(5)(a) provides that the operator is to advise the owner if the operator wishes to have the right to compensation received and must do so within the notice period. The operator cannot explain to me or the Tribunals what purpose section 27(5)(a) served at all if the operator's interpretation was correct. Counsel even went so far as to say that section 27(5)(a) was superfluous. However, the principles of statutory interpretation do not permit me or the Tribunals to treat the provisions as superfluous. The provision must be given meaning. The Board has given the provision meaning. The reasoning and results are both reasonable. Indeed, were the results the other way I would be inclined to find such an interpretation to be unreasonable as giving no force or effect to the provisions of section 27(5)(a). Accordingly, and without -- I recognize that I have not gone through each argument in detail, but what I have done is reviewed each decision for reasonableness. I am satisfied that the decisions and the reasons provided are reasonable in each case and, accordingly, the application of the applicant is denied.*

With respect to the Fultons' legal costs for having to defend themselves in this Judicial Review, Justice Hall concluded that the Operator was charged with paying the full costs incurred by the Fultons and stated:

*In this matter, the respondent owners have been put to a great deal of legal expense to interpret a provision that had already been interpreted by the Board against their position in at least one previous decision. The amount that is in issue is, I am sure, far less than the amount of the legal fees being expended at the instance of the applicant and it is not to my way of thinking fair at all to the owners that they should lose money simply by virtue of defending the position that had already been found in their favour on two previous occasions. They should not be left with a legal bill as their -- as their prize for having disputed the position of the operator. Accordingly, I award solicitor's charges on a full indemnity basis to be paid by the operator to the owners as costs of this proceeding.*

Having lost, yet again, this time at the Court of King's Bench of Alberta, Lynx notified the Fultons in January of 2023 that it was filing to appeal the Court's decision! The Fultons and Keith Wilson began preparations to defend against this appeal but suddenly, at the end of January, Lynx notified Keith Wilson that it was abandoning its appeal. Finally, the saga has concluded. **(To receive a transcript of the proceedings contact [patricia@mylandmangroup.ca](mailto:patricia@mylandmangroup.ca) or at 403-601-7227.)**

Keith Wilson is doing the final compilation of the costs to be paid by Lynx. If necessary, the assistance of the Court will be sought to determine the legal fees payable by Lynx. As the contributions made by landowners to the Fulton's legal fees will no longer be required for that purpose, we are making a special request to all the contributors of those funds. There is another Judicial Review file going before the Court in March of 2023. The landowner in this case, Wayne Bateman, would greatly appreciate financial help in taking this file forward. In this instance it is the landowner making the application to the Court for a Judicial Review of an LPRT decision. This case is fully explained in the letter that accompanies this update, however the issue at hand could affect all landowners with surface leases on there lands, particularly if that lease falls into the hands of a weak operator which eventually stops paying the annual compensation to a landowner. We are asking if the contributors to the Fulton legal fees would consider having their contributed funds now set aside to help fund the Bateman Judicial Review.

In summary, Wayne Bateman was forced to apply to the LPRT to recover the compensation that was owed to him for a Lexin Resources Ltd. lease on his land. This was done by an application under Section 36 of the Surface Rights Act that states, if the operator does not pay the annual compensation owed, the landowner can apply to the LPRT and, if the proper evidence is provided, the LPRT will direct the Government of Alberta to pay the landowner the compensation owed. In Mr. Bateman's case, the lease hosted the standard equipment seen on a gas well lease in southern Alberta. In thousands of applications of this very nature, the LPRT directed the Government of Alberta to pay the landowner the full amount owed by the defunct operator, even if the landowner was farming a portion of the lease (as most are). In Mr. Bateman's case, however, the LPRT only directed the Government of Alberta to pay him 50% of the already modest annual compensation. The decision stated that paying the landowner the full amount of the compensation would "overcompensate" him, as he was farming a portion of the lease. We feel the decision to reduce the compensation paid to Mr. Bateman by 50% is in error and is unfair. Please see the accompanying document for a fuller account of the Bateman situation. Keith Wilson of Wilson Law office will again be leading the legal group representing Mr. Bateman for this Judicial Review at the Court of King's Bench.

Again, we are hoping that landowners who contributed to the Fultons legal fees, as well as other landowners who are just now finding out about the challenges faced by landowners when the LPRT issues unjust decisions, will offer their help with the funding of the Judicial Review for Mr. Bateman. Any contributed funds will be held in a separate account for this purpose by the Action Surface Rights Association, which is based in Taber, Alberta. A legal fee contribution form can be found on the last page of the letter accompanying this update.

# Request for Financial Contributions for the Legal Fees Associated with the Judicial Review of Land and Property Rights Tribunal Decisions

Dear Landowners

Recently, the Land and Property Rights Tribunal (LPRT, formerly the Alberta Surface Rights Board, SRB) has issued some decisions which stray far from the norm with respect to precedent in similar situations decided in past years. We will identify two such problems here and are requesting that landowners make a financial contribution to fund the legal fees associated with challenging these decisions at the Court.

## **1) Tribunal reducing the amount of past rent owed that it will direct the Government of Alberta to pay to a Landowner for a Recovery of Compensation application (Section 36 of the Surface Rights Act)**

One of the most concerning ones is the LPRT's decisions for Section 36, Recovery of Annual Compensation applications. As you may be aware, these applications are to recover the annual compensation that a defunct (or simply "cheap") operator company owes (but has not paid) to a landowner for a surface lease on their land. In the past, the SRB/LPRT directed the Government of Alberta to pay the entire amount of the compensation owed to the landowner. **Some recent decisions see the LPRT, while telling the Operator to pay the landowner the full amount owing, directing the Minister of Finance to pay only a portion of the amount owed (we have seen reductions of 25-75% ordered).**

Lately, the Tribunal has been placing a great deal of emphasis on *Devon Canada Corporation v Alberta Surface Rights Board, 2003, ABQB 7, 337 AR 135* ("Devon"). As a background to this issue, in 2001, a landowner applied to the SRB to recover 24 years of compensation for a lease that he had farmed over for all those years (and had even signed a release for 24 years ago). There had been no reclamation certificate issued for the site, however, and that is why he applied to the SRB. The SRB decided he was owed the money, i.e. \$28,800, and told the operator, Devon Canada Corporation, which is still an active company, to pay the landowner. Devon thought this was unfair so applied to the Courts for a Judicial Review of that SRB decision. The judge in the case concluded:

*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.***

*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.*

The judge then quashed the SRB's decision and referred the case back to the SRB for a re-hearing of the matter. (The matter was subsequently settled privately by the landowner and Devon.)

### **Lexin Resources Ltd. vs Wayne Bateman case**

Recently, the SRB/LPRT has been bringing up the issue of Devon and stating that the Courts have given SRB/LPRT Panels *discretion* to consider whether to direct the Minister to pay the full amount of money owing *or a reduced amount if it finds that the payment of the full amount is unjustified, patently unreasonable, or constitutes unjust enrichment*. This discretion is what the Panel claimed it used in the Lexin Resources Ltd. vs. Wayne Bateman case (Mr. Bateman was represented by My Landman Group Inc.) when it decided to reduce, by 50%, the annual compensation the Government of Alberta was instructed to pay to him. In this case, the modest annual compensation of \$2700/year was applied for by Mr. Bateman with respect to the 2015 and 2016 years. This application was submitted in February of 2017. It took the SRB over three years, i.e., until July of 2020 to make a decision on the application. In the decision the SRB agreed that the full amount of the requested compensation was owed by the operator, **but it directed the Minister to pay only 50% of that amount** to Mr. Bateman as paying the full amount would *“result in overpayment or unjust enrichment to the extent of 50% of the Compensation and the Panel directs the Minister to pay only 50% of the Compensation to the Applicant”*.

The Bateman lease consisted of a well site and access road on cultivated land. The landowner farmed over most of the access road because it was not developed, aside from about the first portion which was developed and graveled. The balance of the road experienced soil compaction. The well site hosted a well head, fibreglass shack and a valve riser system. This equipment sat on an above grade graveled pad and a four large steel corner posts surrounded the equipment area. The landowner had to farm around this equipment.



In the decision, the Panel stated the landowner *“does not have full use of the Site for high quality agricultural purposes but does farm the Site with underperforming crops as well as performs weed control on the Site.”* It also stated *“the Applicant does not have the full use of the site but does raise crops on most of the Site. The Panel has no evidence for the income the Applicant earns from farming over the Site. Although the Applicant raises some income from the underperforming crops, the Panel finds this is somewhat offset by the Applicant performing*

*weed control on the Site, which is the Operator's responsibility.*” It continued saying, *“There is some Operator equipment on the Site requiring the Applicant to farm around the Site. Therefore, on the balance of probabilities, the Panel finds the Applicant has use of most of the Site but not full use because of the presence of some equipment and compaction on the access road, and earns some income from the ability to farm over most of the Site.”*

Having said all of this and after the SRB/LPRT having issued thousands of decisions where the full amount of the annual compensation owed was directed to be paid to the landowners for exactly the same types of leases (whether they were farming a portion of them or not), the SRB reduced the compensation the Government was directed to pay to Mr. Bateman by 50%. The Panel referred to Devon and two previous decisions to come up with this 50% value for the Bateman lease.

1) Praskach Farms Ltd vs. Lexin (2020 ABSRB 85), which was decided in 2020. The landowner had applied for the 2016 and 2017 annual compensation on this lease. The well head had been abandoned and all equipment removed in 2015 and the landowner had been farming the entire lease since then. The SRB directed the Government of Alberta to pay only 25% of the amount owing to the landowner.

2) Wildboer vs Goldenrod Resources Inc. (2019 ABSRB 639) was decided in 2019. The landowner had applied for the 2015 annual compensation on the lease. The well head had been abandoned and all equipment removed in 1998 and the landowner had been farming the entirety of the lease since then. The SRB directed the Government of Alberta to pay only 25% of the amount owing to the landowner.

We believe the above two cases bear no similarity to the Bateman lease. (Not only that, but two years after the decision, the Bateman lease was subsequently accessed on numerous occasions by the Orphan Well Association in order to perform abandonment and reclamation activities. Clearly the adverse effect and loss of use associated with the lease was ongoing.)

In October of 2020, My Landman Group Inc., on behalf of Mr. Bateman, submitted to the SRB, a Section 29 *“Request for Reconsideration of an SRB Decision”* application. It was believed when it was demonstrated to the SRB that this decision was so far offside from thousands of other decisions for similar leases that it would change its mind and award the full amount of the compensation to Mr. Bateman. In the Reconsideration Hearing submission, a list of 34 SRB decisions was provided where the lease was very similar to Mr. Bateman's and 100% of the compensation had been paid to the landowners. A thorough discrediting of the LPRT's argument of the legal term, “unjust enrichment” was also made (to the point that the LPRT no longer uses the term in its subsequent decisions). Over one year after the application was submitted, the LPRT, in December of 2021 requested a further submission from the landowner asking for a response to three questions:

- 1) Is there a longstanding practice or established internal authority with respect to cases where the facts establish that the landowner is using all or some of the Site for farming?*
- 2) Does the original decision (based on the facts that were presented) demonstrate a departure from the range of established decisions?*
- 3) If so, is the departure justified based on the evidence that was presented?*

In response to the LPRT's questions, **My Landman Group Inc. provided the details regarding 200 leases which were very similar to Mr. Bateman's and for which the LPRT directed 100% of the compensation to be paid to the landowners.** The submission claimed this was evidence, indeed, of a long standing practise of the LPRT awarding full compensation to landowners who were using all or some of the site for farming. As such, we claimed the Bateman decision certainly did demonstrate a departure from this range of established decisions. Finally, we stated that this departure was not justified based on the evidence that was presented and the LPRT provided no analysis of the 50% reduction.

In May of 2022, the LPRT issued its decision on this Reconsideration application. In it the LPRT cited 28 decisions where the LPRT had reduced the amount it directed the Government to pay the landowner by from 10%-100%. **In almost all of these, there was no equipment on the site and the landowner was farming/grazing the entire lease.** They were by no means similar to the Bateman lease.

It also cited 26 cases where the amount directed to be paid by the Government was **not** reduced. In almost all of these cases, there was equipment on the lease and the landowner was farming/grazing at least a portion of it (or the applicant had not submitted enough information for the LPRT to know for sure). **These leases would have been similar to the Bateman lease.** (The LPRT stated that the Devon and Praskach decisions were referred to in these decisions.)

In any case, the LPRT dismissed the Application for Reconsideration and concluded that:

*The Applicant has not met any of the basic requirements for re-consideration under Rule 37(3) and accordingly the application is dismissed.*

*I The cases reveal that there are a variety of outcomes. The Tribunal exercises discretion under s. 36(6) based on a variety of factors and the outcome varies depending upon the evidence presented. The longstanding practice is that the Tribunal excises discretion based on a consideration of factors within the Tribunal's expertise such as the loss of use and adverse effect, nuisance, inconvenience and noise, which includes whether the landowner is using all or some of the Site for farming.*

*II The original decision (based on the facts that were presented) did not demonstrate a departure from the range of established decisions.*

*III In light of the decision above, it is not necessary to consider the question of justification for a departure from an established range of decisions.*

So, basically, the LPRT is saying, look we have this huge “soup to nuts” range of decisions we have made for very similar leases. For most we directed full payment of the annual compensation and for some we reduced it. So, because of that, the Bateman decision is NOT outside of that “range” so they say the original LPRT Panel made a reasonable decision. **AND, it concludes, since the LPRT has made a reasonable decision, they don't have to justify anything.**

The LPRT also stated in the decision:

*If a decision is inconsistent with binding judicial authority, that clearly is an error, however it is the earlier Tribunal or Board decision that is the issue here. The reconsideration power does provide the Tribunal with an opportunity to address the inconsistency when decisions are made by numerous different panels of the Tribunal. **However, consistency does not mean that decisions are indistinguishable and this threshold does not require decisions to be identical. Rather, consistency means that generally a Panel of the Tribunal will not depart from a longstanding practice without justification or explanation. Decisions from an earlier Panel can be reasonable even if the Panel conducting the review would decide the matter differently given the same arguments. In other words, there can be more than one reasonable result.***

This statement seems to indicate that the LPRT can decide whatever it wants, without justification, and all are “reasonable”! We do NOT believe that the payment of the full amount owed to Mr. Bateman would be unjustified, patently unreasonable, or constitute unjust enrichment. The Tribunal is just taking overzealous liberties with the “discretion” the judge in Devon provided to it. The decision for Mr. Bateman's application is simply an irresponsible and unaccountable use of that discretion. The only way to rein in the Tribunal is to go to the Court and have this decision Judicially Reviewed by a judge. Otherwise, the Tribunal will ramp up its

attempts to save the Government of Alberta money and issue many more of these decisions and reduce the amounts it will direct the Government pay landowners when there is still equipment on the lease (and we have just recently seen this begin to happen.) Now, even active operators are referring to the cases where the LPRT has directed the Government to pay less than what is owed and using that as justification for the active operator to be able to short change the landowner on rent.

The application for a Judicial Review of the Bateman LPRT decision has been made to the Courts and it will be heard by a Judge in March of 2023. **Mr. Bateman would appreciate funding contributions to assist with the payment of the legal fees for the proceeding. It is a very important issue that affects all landowners.**

## **2. Tribunal limiting the number of years of compensation it will direct the Government to pay a landowner.**

A second issue of great concern is some recent decisions by the Land and Property Rights Tribunal with respect to limiting the number of years of compensation it will direct the Government of Alberta to pay for a Recovery of Compensation application. First of all, the Courts have stated there is NO statute of limitations for these applications so **there should be no limit** to the number of years for which a landowner can apply for in an application, or to the number of years the LPRT can direct the Minister to pay the landowner based on that application.

My Landman Group Inc. represented Clare Land Ltd. and in April of 2020 it submitted an application for Recovery of Compensation for the 2016-2019 rent years (i.e. 4 years). As the LPRT took so long to process the application, subsequently the 2020 and 2021 rental payments were added to that application as they came into arrears. Thus a total of 6 years compensation was requested by the landowner in total. In its decision dated May 3, 2022, (Clare Land Ltd. v Lexin Resources Ltd., 2022 ABLPRT 580), the LPRT demanded that Taqa North Ltd (which had a working interest in the well on the lease) and Lexin Resources Ltd. pay the land owner **the full 2016-2021 years compensation owed. However** the decision also stated that if these operators did not make the full payment then the **LPRT would ONLY direct the Government of Alberta to pay the landowner for 5 years of compensation owed.** The LPRT suggested:

*"The Tribunal may deny payment of unpaid past compensation that became due more than five years before the application was received.*

This application does not even fit into that unfounded "rule" because it was received by the LPRT in April of 2020 and the first year of compensation requested was the June 15, 2016 rent.

The Panel discusses in its decision that it is mindful of another past application (Nelson) wherein 24 years of compensation requested was requested. In that application, there was no equipment on the lease and the landowner had been farming it for all those 24 years.

The Panel concluded:

*"Considering the significant challenges caused by a delay advancing a claim for unpaid rent, the Panel finds that a period of five years is reasonable as a benchmark for considering unpaid compensation under section 36 of the Act".*

Then the Panel concluded for the Clare Land Ltd application:

*"This Panel agrees with the reasons in Nelson. The Panel limits this decision to five (5) years being 2017 to 2021.*

In point of fact, there are NO "significant challenges" caused by a delay for the Clare Land Ltd file when the initial application was only for 4 years and there was a full complement of oilfield equipment on the lease. (In another decision where the payment was limited to five years, the Panel's only justification for picking a 5 year limit is because it stated that is the period for which compensation reviews can be done so that should be relevant to this situation. That is a very weak, unjustifiable argument.) The only reason the Clare Land Ltd. application included 6 years of compensation, in total, was that it took the LPRT over 2 years to make a decision on it.

Shortly after this decision was issued for Clare Land Ltd., another one for another landowner represented by My Landman Group Inc. with almost exactly the same circumstances was received. The application was submitted in November of 2020 for five years of compensation (2016-2020). Later, the 2021 rent was added to the application when it came into arrears. Thus a total of 6 years compensation was applied for (exactly like the Clare Land Ltd file). In this decision, the LPRT directed the Government of Alberta to **pay the landowner the full 6 years payments owed!** Its rationale in the decision was:

*The Panel is satisfied that Compensation is owed by the Operators, jointly to the Applicants for annual payment due under the Surface Lease or Compensation Order. This amount is calculated as six payments of \$4,274.00 for June 25, 2016, 2017, 2018, 2019, 2020 and 2021. **Because the initial application was made when only five years of compensation were owed, and the Applicant filed a Condition of Land statement on November 7, 2020 confirming that the Site is fenced and has a well head and valve riser with above ground piping on a gravel pad as well as a packed roadway, the Panel finds that the Applicants are eligible for six years of compensation. The Site has not been reclaimed, and the Surface Lease or Right of Entry Order remains in effect.***

The Clare Land Ltd application was submitted when only 4 years of compensation was owed (and was submitted prior to five years time from which first missed payment came due) and had a full complement of oilfield equipment on it but the LPRT did not find its application "eligible" and would not direct the Government of Alberta to pay the full 6 years of compensation owed. To make matters worse, with the time period allowed for applying for a Judicial Review of a Tribunal decision recently reduced from 6 months to 30 days, we quickly ran out of time to file an application for a Judicial Review with the Court. This landowner has been done a great injustice by the LPRT decision and we have submitted an application under Section 29 of the Surface Rights Act for "Request for Reconsideration of an SRB Decision". Should this decision not be amended to require the Government of Alberta to pay the Clare Land Ltd. the full six years of compensation applied for, there is now a lawyer available and at the ready to lead a Judicial Review of such decisions.



# **Request for Contributions to the Legal Fund of the Action Surface Rights Association**

The only way to ensure that the Land and Property Rights Tribunal acts in a fair and just manner is to challenge decisions it makes that are unjust and wrong. We are asking that landowners make a financial contribution to the Action Surface Rights Association “*Fund for Landowner Legal Costs of Judicial Reviews of Land and Property Rights Tribunal Decisions*” in order to help fund landowners’ legal fees for Judicial Reviews of such unfair and unjustified LPRT decisions. These monies will be held in a separate account by ASRA to be used for Judicial Review costs only. Action Surface Rights Association will provide updates to contributors regarding the use and progress of Judicial Review cases. Cheques, in any amount you may wish to contribute can be made out to:

**Action Surface Rights Association  
P.O. Box 4593  
Taber, Alberta  
T1G 2C9**

**www.actionsurfacerights.ca also has a PayPal link that can be used for contributions.**

*Thank you for helping to protect your and all landowners’ Property Rights!!!*

Please use the form below when submitting contributions.

*I wish to make a Financial Contribution to funding of Landowner Legal Costs for Judicial Reviews of Land and Property Rights Tribunal Decisions*

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

Email Address: \_\_\_\_\_

Amount Contributed: \_\_\_\_\_

Method of payment (Cheque or PayPal): \_\_\_\_\_