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Bill 2, the *Responsible Energy Development Act* and the Enforcement of Private Surface Agreements

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Proposal commented on:

Bill 2, the Responsible Energy Development Act

Bill 2, the Responsible Energy Development Act (REDA) if enacted will afford the Regulator an entirely new jurisdiction over the enforcement of "private surface agreements." This comment discusses the following questions: (1) What is the status quo and what are the problems with the status quo? (2) What will the Bill do? (3) If change was necessary, why was this jurisdiction accorded to the Regulator and not the Surface Rights Board? Focusing on question # 3 my general argument will be that it would be a better "fit" to accord this additional jurisdiction to the Surface Rights Board which already has considerable expertise in these matters.

What is the status quo and what are the problems with the status quo?

Bill 2 defines (unhelpfully) a private surface agreement to mean a "private surface agreement as defined in the rules" (s 62(e)). Under REDA a rule may be made: (a) "by or on behalf of the Regulator" as authorized under REDA or "an energy resource enactment" or (b) by the Lieutenant Governor in Council (LGiC) (see definition of Rule, s 1(1)(r) & s 68). In this case section 64 contemplates that the rules will be made in the first instance by the Regulator. We can expect that the term will be defined to include surface leases and pipeline rights of way and easements as well as similar agreements relating to transmission rights.

How are such agreements enforced now and in what forum? The answer is that they are enforced by way of action in the ordinary courts. Such agreements are contracts and both the Provincial Court and the Court of Queen's Bench might assume jurisdiction (although in the case of the provincial court the maximum amount that might be claimed by way of damages is $25,000 (Provincial Court Civil Division Regulation, Alta Reg 329/1989 *as am.*) and the Provincial Court has no authority to order specific performance or an injunction. For an example of a surface lease matter being taken to Provincial Court see *Muntean v Advantage Oil & Gas Ltd*., 2006 ABPC 318; for an example of a matter proceeding before the Court of Queen's Bench see 1103785 *Alberta Ltd. v Exxonmobil Canada Ltd*., 2008 ABQB 581 (CanLII).

In addition, special remedies are already available where the breach in question is the failure to pay compensation under the terms of section 36 of the *Surface Rights Act*, RSA 2000, c S-24. Under this remarkable provision, the Surface Rights Board may suspend and even terminate an operator's rights under a surface lease (defined to include both surface rights and pipeline and transmission line rights of way) and, if payment is still not forthcoming, authorize payment to the

landowner or occupant out of the General Revenue Fund of the province. In other words, the province acts as an insurer of compensation payments for private agreements at no cost to the land owner or occupant. See, for example, *Pethelen Resources (1973) Limited v Molnar*, 2008 CanLII 88603 (AB SRB) (authorizing an order of some $30,000 against the GRF); *Devon Canada Corp. v Surface Rights Board*, 2003 ABQB 7 (judicial review of an award of $28,000).

However, the Regulatory Enhancement Task Force (see here) was clearly convinced that the combination of laws of general application and the special rules of the *SRA* were inadequate. The Task Force reported as follows (at 19)

> A concern raised by landowners is the lack of an efficient and effective mechanism to obtain redress when a company has either failed to perform or performed poorly with respect to agreements reached with the landowner at the time consent to enter the property was obtained.
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> Landowners enter into agreements with oil and gas companies that allow for the construction and operation of oil and gas projects on their lands. Often they are negotiated strictly between the landowner and the oil and gas company. In the majority of cases, landowner-company agreements are clear and each party understands its rights and responsibilities. However, when misunderstandings arise in regard to these agreements, landowners have expressed frustration in making sure companies fulfil their obligations created by the agreement.
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> It is recommended the Surface Rights Board or another body be given jurisdiction to examine and resolve such disputes through mediation or arbitration. Following the resolution of the dispute, the single regulator would be authorized to enforce the agreement using its regulatory tools.

What will the Bill do?

The Bill provides that the owner or occupant of land for which there is a private surface agreement may register that agreement with the Regulator (s 63), and, where the owner or occupant believes that the "holder of the agreement" is not complying with the agreement, may request the Regulator to make an order directing that person to comply (s 64). Since some such agreements may contain confidentiality clauses, section 65 stipulates that the statute will override any conflict with the terms of the agreement and that any confidentiality undertaking will be unenforceable. Section 64(2) is at pains to preserve "the right of an owner or occupant to pursue any other remedy that the owner or occupant has" in respect of the agreement. Thus, the owner or occupant will still have all the remedies available to it under general law and any special remedies under the SRA as discussed above (and presumably if the alleged breach is non-payment the owner\occupant should proceed under the SRA because of the default liability of the GRF under that statute).

In performing this role the Regulator at a minimum will need to determine the following: (1) Is there a registered private surface agreement in force between the parties? (2) What, properly interpreted, did the holder of the agreement promise to do? (3) Is the holder of the agreement in breach? (4) Have these issues already been raised and dealt with in another forum? (i.e. a possible *res judicata* argument see the recent decision in *Schmidt v Twin Butte Energy Ltd.*, 2012 ABQB 649.

An order of the Regulator may be enforced by way of an administrative penalty (see section 70(b) which may be further enforced as a judgement of the Court (s 75)).

If change was necessary, why the Regulator and not the Surface Rights Board?

If one accepts the premise that it was necessary to create an additional remedy for surface owners affected by energy operations occurring on their lands it is still important to address the question why it was appropriate to give this function to the Regulator and not the SRB? Even the Task Force seemed to think that the single-window mantra was not enough of a justification to give this jurisdiction to the new regulator rather than the SRB. And I think that there are good reasons for thinking that this jurisdiction, if necessary in the first place, should have been conferred on the SRB. After all, it is the SRB that is familiar with the terms of surface leases and easements and the issues facing landowners in their dealings with the energy industry. While the SRB is principally concerned with issuing rights of entry orders and associated compensation orders it does have additional responsibilities. I have already referred above to its remarkable section 36 jurisdiction; but in addition to that it also has concurrent jurisdiction with the ordinary courts to make compensation awards for damage that an operator might cause off the lands for which it has a right of entry (see Nykolaishen and Bankes, "The Jurisdiction of the Surface Rights Board under Section 30 of the Surface Rights Act" (2011), 49 Alta L Rev 1). In sum, the subject matter of "private surface agreements" falls directly within the expertise of the SRB; at the very least the onus should be on the Minister to explain why this matter is being sent to the new Regulator rather than the Surface Rights Board.