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Phase 2 of the Implementation of the Alberta Energy Regulator: The Private Surface Agreement Registry

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Legislation commented on: *Responsible Energy Development Act*, SA 2012, c R-17.3; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25

Regulations commented on: *Enforcement of Private Surface Agreement Rules*, Alta 204/2013.

On November 30, 2013 additional sections of the *Responsible Energy Development Act,* SA 2012, c R-17.3 (REDA) came into force as part of phase 2 of the implementation of the Alberta Energy Regulator (AER). Under this current phase, the AER assumes jurisdiction over Part 8 of the *Mines and Minerals Act,* RSA 2000, c M-17, the *Public Lands Act,* RSA 2000, c P-40, and the Private Surface Agreement Registry. Phase 1 occurred in June 2013 when the REDA largely came into force and established the AER with a new mandate and governance structure. Phase 3, the last one, will occur in Spring 2014 when the AER will take on responsibility for the *Water Act,* RSA 2000, c W-3 and the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 in relation to energy projects. With the implementation of phase 3, the AER will become a full life-cycle regulator for oil, gas, oil sands, and coal developments.

The AER posted two bulletins on its website (AER Bulletin 2013-04 and AER Bulletin 2013-05) describing the main changes and held several sessions to inform stakeholders of those changes. This post focuses on the information and discussion provided at the AER session dealing with the Private Surface Agreement Registry.

What is the Private Surface Agreement Registry?

Part 3 of the REDA and the recent regulations enacted under it (*Enforcement of Private Surface Agreement Rules*, Alta 204/2013) (*Rules*), allow a landowner or an occupant of land to register a private surface agreement (PSA) with the AER. Once a PSA is registered, a landowner or occupant may request the intervention of the AER if a company does not comply with a term or condition of the agreement.

The onus to register a PSA is on the landowner or occupant. The landowner or occupant is also responsible for notifying the AER that the agreement is no longer valid or has been amended. To register a PSA, the landowner or occupier must fill out a registration form (available on the website of the AER, here) and send it with a copy of the PSA to the AER. Once the AER

receives the documents, it will review them and assess whether the PSA is eligible to be registered. If the AER makes a positive determination, a copy of the registered PSA will be sent to the company.

Currently, there is no deadline within which an agreement must be registered after it has entered into force. An agreement can be registered at any time. The landowner or occupier need not wait until there is a concern that the company will default. A PSA is eligible to be registered if the AER determines that three requirements are satisfied.

(1) First of all, the party who seeks to register an agreement must be an "owner or occupant of land" as prescribed under s. 63 of the REDA. The other party to the PSA has no right to register the PSA. For the definitions of "owner" and "occupant", s. 62(1) of the REDA refers respectively to the *Land Titles Act,* RSA 2000, c L-4 and the *Surface Rights Act,* RSA 2000, c S-24. An owner "means a person entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy". An occupant means "(i) a person, other than the owner, who is in actual possession of land, (ii) a person who is shown on a certificate of title under the *Land Titles Act* as having an interest in land, (iii) an operator granted right of entry in respect of land pursuant to a right of entry order, or (iv) in the case of Crown land, a person shown on the records of the department or other body administering the land as having an interest in the land." For the definition of "land", s. 62(1)(b) of the REDA provides that "land has the same meaning as in the *Land Titles Act*, but does not include mines and minerals". Thus, mines and minerals are excluded from the following definition: "land means land, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether the estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any of them are specially excepted".

(2) To be eligible for registration, the agreement must meet the definition of a PSA provided under the *Rules*. The *Rules* define a PSA as "a signed and dated written agreement between a holder and an owner or occupant of land that concerns any aspect of the holder's access to or use of that land for the purposes of an energy resource activity, but does not include an order granted by the Surface Rights Board" (s. 1(d)).

(3) Part 3 of the REDA "applies only to private surface agreements made after the coming into force of this Part" (REDA s. 62(2)). This date corresponds to November 30, 2013. Landowners or occupants who entered into agreements before November 30, 2013 are not eligible to register their PSA. At the information session, the AER clarified that it will be looking at the date in which the agreement was signed to determine whether a PSA is eligible to be registered. Therefore, an agreement that amends an existing PSA signed before November 30, 2013 presumably may be registered if a new PSA is signed after November 30, 2013. The AER has also indicated that a landowner or occupant may be eligible to register just an appendix or a schedule that contains additional conditions to an original agreement that was signed before November 30, 2013, if the parties signed the appendix or the schedule after November 30, 2013. However, it is not clear whether this alternative is practicable because a schedule or appendix without the main agreement may not make sense or be enforceable on its own.

Any agreement that meets the above three requirements may be registered, including a PSA between a city and a company or between a company and a First Nation. Furthermore, as recognized under s. 65 of the REDA, the AER will register an eligible PSA even if it contains a

confidentiality clause in which the landowner or occupant agreed not to register the agreement. However, the AER has indicated that agreements concerning geophysical exploration under Part 8 of the *Mines and Minerals Act* are confidential and not eligible for registration with the AER.

Under s. 5 of the *Rules*, the AER must cancel the registration of a PSA if it is satisfied that the registration was the result of a mistake, an error, or a false or a fraudulent act. Registration of a PSA with the AER does not make the agreement valid or enforceable and the AER does not have the jurisdiction to carry out a substantive review of the agreement or assess either its validity or its merits.

The Enforcement of Private Surface Agreements

The purpose of registering a PSA with the AER is to allow a landowner or occupant to request an order to comply under s. 64 of REDA if that person has a reason to believe that a company is not complying with a term or condition of the PSA. If a PSA is not registered, the AER will require the landowner or occupant to register the agreement before accepting a request for an order to comply.

A request for an order to comply (see here for a section 64 request form) must be submitted to the AER within one year from the date on which the owner or occupant first knew or ought to have known that the company defaulted (*Rules* s. 7(2)). The request must "(a) be in writing, (b) indicate the term or condition of the registered private surface agreement that the owner or occupant believes the holder is not complying with, (c) set out the basis for, and provide information that demonstrates the alleged noncompliance, and (d) indicate the AER registration number" (*Rules* s. 7(1)). Once the AER receives the request for an order to comply and the supporting documents, it will inform the company and seek a response on the alleged noncompliance. The AER may conduct inquiries, direct the parties to provide additional documents or materials, and conduct an examination of the land to which the registered PSA applies in order to understand the alleged noncompliance (*Rules* ss. 8 and 10). Based on this information, the AER will make a decision.

There are five possible outcomes of a request for an order to comply: (1) the AER determines that a company has failed to comply with a term or condition of the registered PSA and issues an order to comply to the company under s. 64 of the REDA; (2) the AER does not issue an order to comply because compliance of the company is achieved after the request is filed but before the AER makes a decision on the request; (3) the AER dismisses the request because it has no merit; (4) the AER dismisses the request under s. 9 of the *Rules* because the landowner or occupant failed to file with the AER further information, documents, or materials within the specified period; and (5) the AER decides under s. 12 of the *Rules* that there is a more appropriate forum to deal with the matter. In this case, instead of deciding the request, s. 12 contemplates that the AER will encourage the parties to settle their dispute through alternative dispute resolution or direct the owner of occupant "to have the matter considered" by a court or the Surface Rights Board. (See post by Nigel Bankes, available here, questioning the decision to give the jurisdiction over the enforcement of private surface agreements to the AER instead of the Surface Rights Board).

If the AER decides to issue an order to comply, it must provide the parties with a copy and publish the decision or otherwise make it available (*Rules* s. 11). The AER does not have the jurisdiction to order specific performance or an injunction. Thus, an order to comply acknowledges in general that the company has defaulted and orders the company to comply with

the PSA. If the company does not comply with the order, the AER does not have the authority to oblige the company to comply with a specific term or condition of the PSA. However, the AER may require the company to pay an administrative penalty for failing to comply with the order (REDA s. 70(b)). The AER may also file the administrative penalty with the Court of Queen's Bench and have it enforced as a judgment of the Court (REDA s. 75). A decision of the AER, including an order, is appealable with leave to the Court of Appeal on a question of jurisdiction or law (REDA s. 45). Therefore, a company presumably may seek relief on these conditions if it believes that no terms or conditions of the PSA have been contravened provided that it is able to show that the AER has made an error of law. This may not always be straightforward. The interpretation of the PSA may give rise to a question of law but the application of the facts to the clause as interpreted is more likely to be classified as either a question of fact or a mixed question of fact and law.

Public Information

Under s. 13(1) of the *Rules*, the AER *may* decide to make public some information concerning a registered PSA. This information may include the name of the holder of the PSA, the date of the agreement, the date of registration, a description of the energy resource activity to which the PSA relates, and the location of the energy resource activity site.

When the AER receives a request for an order to comply, it *must* place on the public record the registered PSA and all the documents or materials filed with respect to the request (*Rules* s. 13(2)). In this case, the AER has no discretion because publication is mandatory. The AER has specified that these materials will be published when a request for an order to comply is received and before the AER has reviewed the request. Therefore, the information becomes public even though the request is subsequently deemed without merit.

At the information session, the AER indicated that the *Freedom of Information and Protection of Privacy Act,* RSA 2000, c F-25 (FIPPA), concerning the right of access of any person to the records in the custody or under the control of a public body, applies to a registered PSA. Therefore, the AER may decide to disclose to any person, upon request, information concerning a registered PSA under s. 6 of the FIPPA. It seems that at least two of the specific exceptions contemplated under the FIPPA may apply to the right of freedom of information concerning a registered PSA: (1) the AER must refuse to disclose to an applicant information that would be harmful to the business interests of a third party (FIPPA s. 16(1)), and (2) the AER must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy (FIPPA s. 17(1)). Could the above exceptions under ss. 16(1) and 17(1) of the FIPPA apply also to s. 13(2) of the *Rules*? In other words, after receiving a request for an order to comply can (or should) the AER refuse to place on the public record the registered PSA or the supporting documents on the basis that this disclosure would be harmful to the business interests of a third party or an unreasonable invasion of a third party's personal privacy? The exception to disclosure under s. 16(1) of the FIPPA does not apply if "an enactment of Alberta or Canada authorizes or requires the information to be disclosed" (FIPPA s. 16(3)). The language of s. 13(2) of the *Rules* is unequivocal and requires the AER to place on the public record the registered PSA and all the supporting documents or materials when a request for an order to comply is received. Therefore, the AER presumably must publish the registered PSA and documents even though the disclosure would be harmful to the business interests of a third party. Possibly, the AER may not publish information that would be an unreasonable invasion of a third party's personal privacy according to the criteria set out in s. 17 of the FIPPA.

However, this protection would apply only to "personal information" as defined under the FIPPA, and the AER would still have to publish the remainder of the registered PSA and documents.

There is no definite answer as to whether the AER may accept for registration a PSA that has been redacted to address privacy concerns. Section 4 of the *Rules* states that the AER may register a PSA if the AER is of the opinion that the PSA "is the current and *entire agreement* between the parties in respect of the energy resource activity on the land for which the agreement was made" (emphasis added). Perhaps, the AER could decide to accept the registration of a PSA containing minor omissions for security or legal purposes. However, following a request for an order to comply the AER may direct the parties to produce the entire PSA if needed to fully understand the alleged noncompliance. In this case, the entire PSA would become public under s. 13(2) of the *Rules*. Consequently, if a PSA contains information that the landowner or occupant do not want to disclose they should probably not submit the PSA for registration.

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