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The Implementing Regulation for Bill 12: The *Liabilities Management Statutes Amendments Act, 2020*

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Matter Commented On: *Orphan Fund Delegated Administration Amendment Regulation*, OC 174/2020

Bill 12, the *Liabilities Management Statutes Amendments Act, 2020*, amongst other things, authorized the delegation of additional responsibilities to the Orphan Well Association (OWA). I provided commentary on Bill 12 in a previous post here. The entry into force of Bill 12 is set for June 15, 2020, and this amendment to the *Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001 (Delegation Regulation), effective the same day, implements that incremental delegation and clarifies some additional issues.

This post draws attention to four elements of the amendment: (1) the definitions of "holder of the mineral rights" and of "person who has the right to win, work and recover a mineral"; (2) the limitation of liability provisions of the Delegation Regulation; (3) the applicability of the audit and inspection provisions of the *Government Organization Act*, RSA 2000 c G-10 (*GOA*); and (4) the enhanced authority of the OWA to enter into and expend funds pursuant to "agreements" with other parties.

New Definitions

Bill 12 contemplates (by amendments to sections 11 and 12 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (*OGCA*)), that the OWA may, under certain circumstances continue operations at a well or facility where it has been authorized to take over management or control. However, Bill 12 made this power subject to the caveat that the OWA required "the consent of the owner or holder of the mineral rights *and* the person who has the right to win, work and recover the minerals" (emphasis added). In my previous post on Bill 12, I suggested that this was unusual insofar as it seemed to require not just the consent of the working interest owner (i.e. the person with the right to win, work and remove) but also the consent of the owner of the corporeal estate in the minerals.

The drafter of the regulation, appears to have side-stepped the need for a double consent by defining "the *holder* of mineral rights" (according to Bill 12, a person who can provide the equivalent of the owner's consent) in a manner that seems to equate that person with the working interest owner. The result looks circular to me. To put it another way, the "holder of the mineral rights" as defined in the regulation, and the "person who has the right to win, work and recover the minerals" look to be one and the same – but perhaps others have a different view. In any event, here are the new definitions:

(2) For the purposes of sections 11(2.1) and 12(2.1) of the Act,

(a) "holder of the mineral rights" means a person to whom the owner of mineral rights has given the right to win, work and recover a mineral pursuant to an agreement;

(b) "person who has the right to win, work and recover a mineral" means a person to whom the holder of mineral rights has given the right to win, work and recover a mineral.

The Limitation of Liability Provisions of the Delegation Regulation

If I were a member or director of the OWA, or a key decision-maker within the OWA, I think that I would want a rock solid indemnity, barring (gross) negligence or bad faith, in case abandonment or other related operations went sideways, or in case there were third party claims in relation to OWA activities or OWA authorized activities. As the delegation of authority to the OWA grows, so would my concerns as to the scope of any indemnity.

The *current* regulation, however, takes a different route to protecting the OWA and its directors, employees, etc. Instead of an indemnity, the regulation purports to provide an immunity from suit in the following broad terms:

Limitation of liability

9(1) No action or proceeding may be brought against

(a) the Association,

(b) the Association's employees, agents, directors or officers, or

(c) a member of a committee

in respect of any act or thing done or purported to be done when they are carrying out the delegated powers, duties and functions of the Association.

(2) The Association and its directors, officers, employees and agents are not liable for any damage caused by any information, advice or recommendation given or made to the Regulator.

The drafting of this limitation on liability evidently draws on section 43 of the former *Energy Resources Conservation Act*, RSA 2000, c E-10 (archived here) which was the subject of litigation in *Ernst v Alberta Energy Regulator*, 2017 SCC 1 (CanLII). (For Jennifer Koshan's post on that decision as well as links to earlier posts by colleagues on this litigation see Die Another Day).

There are several questions we might raise about this approach. For example, we might ask why an immunity that is conventionally conferred on a public regulatory authority should be extended

to a private society like the OWA that is engaged in activities which, if carried out by anybody else, would not ordinarily attract any immunity. Second, we might note that while an immunity may deliver much of what an OWA director would seek by way of comfort and assurance, such an immunity would not, for example, cover expenses incurred in vindicating that immunity in a case like *Ernst*. In other words, putting aside the policy issue of conferring an immunity on a society and its officers, were I an OWA Director I might well want to have both an immunity *and* an indemnity. For examples of statutory provisions that confer both, see the immunity and indemnity provisions in the *Electric Utilities Act*, SA 2003, c E-5.1 (*EUA*) protecting the Alberta Electric System Operator (s 90) and the Balancing Pool (s 92). But my focus here is on a third question, and that is the question of whether or not an immunity *can* be conferred by way of regulation.

While the conferral of an immunity is a serious matter and should not lightly be undertaken, there is no doubt, as *Ernst* demonstrates, that a provincial legislature can confer an immunity from private suit. It cannot confer complete immunity from judicial review (see *Ernst* at para 33, per Cromwell J, referencing *Crevier v Quebec (Attorney General*), 1981 CanLII 30 (SCC), [1981] 2 SCR 220), and *Ernst* itself leaves open the question of whether or not a legislature can provide an immunity against a claim for *Charter*-based damages. But a decision to confer an immunity necessarily affects the legal entitlements of others (as per Hohfeld, an immunity creates a disability in others; see Wesley Newcomb Hohfeld, "Some Fundamental Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale Law Journal 16) and therefore requires express statutory sanction. It is no coincidence that the immunity of the AESO and the Balancing Pool is conferred by statute. The same goes for the Market Surveillance Administrator under Part 5 of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2. And section 27 of the current *Responsible Energy Development Act*, SA 2010, c R-17.3 (*REDA*) confers an immunity on the AER itself in the following terms:

> No action or proceeding may be brought against the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator, *or a person engaged by the Regulator*, in respect of any act or thing done or omitted to be done in good faith under this Act or any other enactment. (emphasis added)

[And see also the narrower predecessor provision in s 43 of the *ERCA* at issue in *Ernst*.]

It is evident that neither the OWA, nor its officers or employees, fall within the terms "the Regulator, a director, a hearing commissioner, an officer or an employee of the Regulator" except perhaps for the Director appointed to the OWA by the AER. It might be possible to argue that the OWA itself would be entitled to the benefit of the immunity conferred by section 27 on the basis of the italicized text, but any such immunity would not extend to the employees and directors of the OWA. In any event, the drafters of the OWA scheme considered it necessary to provide a bespoke immunity provision for the OWA. But in this case, contrary to the practice referenced above of conferring immunity by statute, the decision was made to confer the immunity by way of regulation. The question is whether the enabling statute, in this case the *OGCA*, allows the Lieutenant Governor in Council to confer immunity for suit on the persons mentioned in section 9 of the Delegation Regulation, either in its current form or as it will be

amended. Given what I have said thus far, I think that any conferral of the power to grant an immunity from suit must be explicit.

Section 77 of the *OGCA* is the principal regulation-making power in the *OGCA* dealing with the delegation of authority to the OWA. There is nothing in section 77 itself that expressly addresses the power to make regulations conferring an immunity from civil suit. Bill 12 does not change this, even with the additional regulation-making powers established by the new section 77(1.1).

Section 77(1) clauses (g) and (f) of the current (i.e. pre-Bill 12) *OGCA* do, however, confer the authority to invoke the terms of Schedule 10 (confusingly headed "Labour Statutes Delegation") of the *Government Organization Act* in the following terms:

> The Lieutenant Governor in Council may make regulations
> …
>
> g) respecting, in regard to the delegation of authority, with necessary modifications, any matter in respect of which the Lieutenant Governor in Council may make regulations under section 2 of Schedule 10 to the *Government Organization Act* in regard to a delegation under that Schedule;
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> (h) making applicable, in regard to the delegation of authority, any of the other provisions of Schedule 10 to the *Government Organization Act*, with necessary modifications.

Section 2 of Schedule 10 in turn confers on the Lieutenant Governor in Council the power to make regulations:

> (d) respecting limiting the liability of a delegated person and the delegated person's employees, agents, directors or officers or the members of a committee in an action for negligence with respect to the delegated power, duty or function when the delegated person, employee, agent, director, officer or member of a committee acts in good faith pursuant to the delegation;
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> (d.1) providing that any limitation of liability applicable to an official may be made applicable to a delegated person and the delegated person's employees, agents, directors and officers and members of a committee when they are carrying out the official's power, duty or function;

It would seem therefore that this provision might be used to confer on the OWA and its employees and agents, directors or officers, some level of immunity, at least with respect to an action in negligence where the relevant party is acting in good faith. Presumably, it is not necessary that a regulation relying on paragraph (g) of section 77(1) of the *OGCA* mention that it is drawing upon the provisions of the *GOA* even though the absence of such a reference makes the statutory scheme far from transparent (the drafting equivalent of hiding the ball).

In any event, it will be noted that the immunity granted by the current section 9 of the Delegation Regulation, while evidently drawing upon the language of Schedule 10, exceeds that authorization in two ways. First, while section 2 of Schedule 10 offers immunity to an action in negligence, section 9 of the Delegation Regulation purports to confer immunity in relation to any action or proceeding. Second, whereas the immunity of section 2 of Schedule 10 is available where the relevant party acts in good faith, section 9 of the Delegation Regulations makes no reference to this requirement.

This brings me, finally, to the amendments to section 9. They are two-fold. First, section 9(1) is amended to strike out the language immediately following paragraph (c) (quoted above) and to substitute the following text:

> … in respect of anything done, not done or purported to be done in good faith when they are carrying out any order or direction of the Regulator, exercising and carrying out delegated powers, duties and functions or taking over management and control of a well, facility, well site or facility site…

This new text does two things. First, it clarifies the scope of the immunity and includes within it the new responsibilities that the OWA may assume through delegation pursuant to Bill 12. And second, it confines the immunity to those things done (or not done) in good faith. (The amendment will also add the good faith proviso to section 9(2).) The amendment does not, however, confine the immunity to actions in negligence and so, to that extent, the immunity provision of the Delegation Regulation still overreaches the immunity conferred by the *GOA*.

Enhanced Audit and Inspection Powers

Relying on section 77(1)(h) of the *OGCA*, the amendments will make the audit and inspection provision of the *GOA*, Schedule 10 applicable to the OWA through a new section 7.1 which will, "with necessary modifications", then read as follows:

> 7.1 For the purpose of ensuring that the *Oil and Gas Conservation Act* and the regulations and rules under that Act are complied with, the Alberta Energy Regulator may, without a warrant, at any reasonable time, enter premises, other than a private dwelling, where a delegated person or the person's employee, agent or officer or member of a committee is carrying out a delegated power, duty or function and
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> (a) may inspect and make copies of any document related to the carrying out of the delegated power, duty or function, and
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> (b) may carry out an audit of the delegated person with respect to the delegated power, duty or function.
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> (2) On entering premises described in subsection (1), the Alberta Energy Regulator shall, on request, produce identification and provide advice on the power to carry out an inspection or audit.
>
> (3) The Alberta Energy Regulator may charge the delegated person any reasonable costs incurred in carrying out an audit under subsection (1) and that charge is

recoverable by the Alberta Energy Regulator as a debt due to the Alberta Energy Regulator.

Given the significant amounts of public funds now flowing to the OWA (see my earlier post on Bill 12) it does seem appropriate to equip the AER with the authority to carry out an audit of the OWA's activities.

Enhancing the Scope of OWA Activities through "Agreements"

The current version of the Delegation Regulation authorizes the OWA to enter into agreements with the AER, Alberta, Canada, "or any other person." The amended regulation continues this provision, but it also contains a number of clarifications which may also serve to expand the authority of the OWA and the activities that it may fund. Thus, the amendment (an entirely new section 4) will add a "for greater certainty" provision, which indicates that agreements with the following purposes will be qualified agreements:

(a) a loan or other borrowing agreement entered into for the purposes of carrying out the Association's delegated powers, duties and functions;
(b) an agreement with working interest participants for the purpose of suspension, abandonment, remediation or reclamation of a well, facility, well site or facility site;
(c) an agreement to pay the costs of a receiver, receiver-manager, trustee or liquidator;
(d) an agreement to purchase, lease or obtain access to lands for the purposes of suspension, abandonment, remediation or reclamation of a well, facility, well site or facility site;
(e) agreement providing a reasonable likelihood of reducing the number of, or preventing the occurrence of, orphan wells, facilities, well sites or facility sites.

New clause (e) is particularly intriguing because it is directed at preventing wells and facilities from becoming orphans rather than dealing with wells and facilities that have already been designated as orphans. The amended section 5 and the new section 5.1 confirm that monies in the orphan fund can, *inter alia*, be used "to pay for obligations of the Association under agreements referred to in section 4." As such, these amendments may significantly expand the scope of the AWA's activities, contingent of course upon the terms of these agreements. Given that, it is imperative that the terms of any such agreements be publicly available, either on the website of the OWA or in some other way.

Conclusions

These amendments to the Delegation Regulation are necessary to give effect to the amendments to the *OGCA* and the *Pipeline Act*, RSA 2000, c P-15 brought about by Bill 12, which will come into force on June 15, 2020. The basic content of these amendments could therefore be anticipated, although it is always good to see the details. I have highlighted four points here. First, I examined the definitional clarification which seems designed to ensure that the consent of the owner of the mineral rights will not be required for the OWA to obtain production from a well or facility for which it has assumed management and control. Second, I provided an assessment of the immunity-from-suit provision in both the original regulation and the regulation as amended. I concluded that most of the elements of both the original provision and the

provision as amended can be supported – not through the regulation-making power in the *OGCA*, but through the rather byzantine referential incorporation of a regulation-making power in Schedule 10 of the *GOA*. However, both the original regulation and the regulation as amended overreach the immunity provided for in the *GOA*, although one element of that overreach has been curbed by the amendment. Third, I noted that the amendments serve to expand the AER's supervisory authority over the OWA by affording it audit and inspection powers – again incorporated by reference from the *GOA*. Fourth, the post draws attention to the enhanced agreement-making powers of the OWA. These agreements may serve to enhance the authority of the OWA insofar as the OWA is entitled to make expenditures from the orphan fund in order to fulfil its obligations under these agreements.

Finally, much as with Bill 12 itself, these amendments do not bring about radical change in Alberta's scheme for handling the massive problem of orphan wells and other facilities that the province faces. We still await a clear policy statement from either the Government, or the AER, or a combination of the two, as to how these issues will be handled going forward.

This post may be cited as: Nigel Bankes, "The Implementing Regulation for Bill 12: The *Liabilities Management Statutes Amendments Act, 2020*" (June 8, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/06/Blog_NB_Bill12_Regulations.pdf