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## **A Legal Regime for the Development of Geothermal Resources in Alberta**

**By:** Nigel Bankes

**Bill Commented On:** [Bill 36, \*Geothermal Resources Development Act\*](#), 2nd Sess, 30th Leg, Alberta, 2020 (first reading 20 October 2020)

The recognition of a “new” resource, whether that be the use of pore space for sequestering carbon dioxide or in this case the exploitation of geothermal energy (for a primer on geothermal energy see David Roberts, “[Geothermal Energy Poised for a Big Breakout](#)” *Vox* (21 October 2020)), often requires the creation of new legal and regulatory instruments (or adaptation of existing ones) to provide legal certainty for investors and to protect the public interest. Although the issues may vary for different “new” resources, such instruments will typically need to address the following types of questions: (1) who owns the resource in question and how may a developer acquire rights to the resource?; (2) what regulatory regime needs to be put in place to protect the public interest, including the environment? and; (3) what liability regime should we put in place to provide compensation in the event that third parties suffer harm and to ensure fulfillment of reclamation and abandonment obligations?

With the introduction of Bill 36, the Government of Alberta proposes to put in place a legal regime that will address these questions. In large part, the Bill addresses the second and third issues by drawing extensively on the *Oil and Gas Conservation Act*, [RSA 2000 c O-6](#) as a model. I will not say much about that model in this post, but one well-known flaw of this model is that it has proven to be far too permissive. What I mean by permissive is that the model gives the Alberta Energy Regulator (AER) the power to make a lot of rules (e.g. rules for suspension and timely abandonment of wells) but it does not actually require that such rules be put in place. As a result, those rules may never be promulgated and the public interest not fully protected. See “[Bill 12: A Small Step Forward in Managing Orphan Liabilities in Alberta](#)”.

My purpose in this post is to examine how the Bill responds to the first question: who owns geothermal resources in Alberta, or, who should be treated as the owner of such resources for the purposes of establishing a stable legal regime that protects the public interest? The first part of this is a doctrinal question: i.e. what is our best assessment of the current state of the law? The second part is a normative question.

Another way to put the doctrinal part of the question is this: what would we expect to be the outcome of a dispute between the owner of the mineral rights and the owner of the surface rights to that same property? Which one of them has the right to lease the geothermal development rights to a developer? If our answer is the mineral owner, we may have to pose an additional question if the mineral estate has been severed (as it frequently has been for privately owned mineral rights in Alberta) into separate estates for petroleum and natural gas, and in some cases a

separate coal estate as well. For a discussion of the history of severed mineral estates (or split titles) in Alberta see *Anderson v Amoco Canada Oil and Gas*, [2004 SCC 49 \(CanLII\)](#), and in the context of coalbed methane see *Encana Corporation v Devon Canada Corporation*, [2012 ABCA 271 \(CanLII\)](#) and my post on that decision [here](#).

My assessment is that there is considerable uncertainty about how that doctrinal question would be answered if it were to come before an Alberta court. The best guidance likely comes from a decision of the UK Supreme Court, *Star Energy Weald Basin Limited v Bocardo SA*, [\[2010\] UKSC 35](#), which stands for the proposition that as between a surface owner and a mineral owner, any residual rights not expressly covered by a conveyance of minerals would accrue to the surface owner rather than the mineral owner. My post on *Star Weald* in the context of carbon capture and storage (CCS) developments is [here](#).

As for the normative rather than doctrinal part of the question, the inquiry differs. The question here is not what is the current best estimation of the outcome of a competition between the surface and mineral owners, but what might be the most optimal rule? The normative approach allows us to think outside the box and contemplate not just the binary options of surface title owner or mineral title owner(s), but also the possibility of public ownership of the geothermal resource. This is the solution that British Columbia adopted many years ago in section 2 of its *Geothermal Resources Act*, [RSBC 1996, c 171](#), which reads as follows:

The right, title and interest in all geothermal resources in British Columbia are vested in and reserved to the government and the government may dispose of them only under this Act.

Nova Scotia gets to the same place through a combination of sections 4 and 8A of the *Mineral Resources Act*, [SNS 1990, c 18](#).

It is also the solution that Alberta adopted in 2010 with respect to geological pore space ownership for CCS purposes. See section 15.1 of the *Mines and Minerals Act*, [RSA 2000, c M-17 \(MMA\)](#), which provides as follows:

**15.1(1)** It is hereby declared that

(a) no grant from the Crown of any land in Alberta, or mines or minerals in any land in Alberta, has operated or will operate as a conveyance of the title to the pore space contained in, occupied by or formerly occupied by minerals or water below the surface of that land,

(b) the pore space below the surface of all land in Alberta is vested in and is the property of the Crown in right of Alberta and remains the property of the Crown in right of Alberta whether or not

(i) this Act, or an agreement issued under this Act, grants rights in respect of the subsurface reservoir or in respect of minerals occupying the subsurface reservoir, or

(ii) minerals or water is produced, recovered or extracted from the subsurface reservoir,

and

(c) the exception of pore space under this section is deemed to be an exception contained in the original grant from the Crown for the purposes of section 61(1) of the *Land Titles Act*.

(2) Subsection (1) does not operate to affect the title to land that, on the date on which this section comes into force, belongs to the Crown in right of Canada.

(3) The Minister may enter into agreements with respect to the use of pore space.

(4) It is deemed for all purposes, including for the purposes of the *Expropriation Act*, that no expropriation occurs as a result of the enactment of this section.

(5) No person has a right of action and no person shall commence or maintain proceedings

(a) to claim damages or compensation of any kind, including, without limitation, damages or compensation for injurious affection, from the Crown, or

(b) to obtain a declaration that the damages or compensation referred to in clause (a) is payable by the Crown,

as a result of the enactment of this section.

For my post on this provision, see [here](#).

The arguments in favour of such a provision are largely based on ideas of efficiency and certainty as to title. Fragmented ownership (which may occur under either of the binary options) may make it difficult to secure the necessary titles for a large-scale project. It is much easier to deal with a single owner. This sort of provision also definitively resolves the ownership issue. We do not need years of litigation to determine who, as between the surface owner and mineral owner (and if a mineral owner, which mineral owner) should prevail.

With this background in mind we can now look at how Bill 36 answers the ownership question with respect to geothermal resources. Bill 36 deals with this question in the consequential amendments provisions. Bill 36 if enacted will add the following new section to the *MMA*:

10.2 The owner of the mineral title in any land in Alberta has the right to explore for, develop, recover and manage the geothermal resources associated with those minerals and with any subsurface reservoirs under the land.

I have four observations on this section.

First, the section purports to answer the binary question as to who owns the geothermal development rights (surface title owner or mineral title owner) in favour of the mineral owner.

Second, the section as drafted is not framed in declaratory terms and neither is it expressed to be retroactive. There may therefore be a question as to whether it will be effective to completely resolve potential disputes between mineral owners and surface owners. Suppose, for example, that the correct legal position before this section is enacted is that the surface owner owns the geothermal resource rights - as suggested by *Star Weald*. If that is the case then I think that the language of section 10.2 is not clear enough to *transfer* title from S the surface owner to M the mineral owner. One wonders why the drafter did not use more explicit declaratory or deeming language to make this clear – as the drafter did in the case of the pore space amendment quoted above (and compare section 10.1 dealing with coalbed methane). Here is a possible alternative drafting (with changes underlined) that might assist a court to find in favour of M:

The owner of the mineral title in any land in Alberta is deemed to have and to always have had ~~has~~ the right to explore for, develop, recover and manage the geothermal resources associated with those minerals and with any subsurface reservoirs under the land.

Third, in most cases in Alberta the mineral owner will be the Crown, as a single owner of the entire mineral estate. As such, if a court were to give full effect to section 10.2 there can be no doubt that the Crown will have the authority to grant licences and leases to those Crown-owned geothermal resource rights; indeed, further consequential amendments to the *MMA* in Bill 36 put such a scheme in place. There may not be the same clarity however, for the 20% of mineral titles that are in private hands. This is because in many cases, as noted above, those titles may have been split into different mineral titles. That is to say, there may be scenarios in which P owns petroleum rights, N owns natural gas rights, and C owns the coal rights. In such a scenario, who is the mineral owner for the purposes of obtaining a grant of geothermal resource rights? I think that the answer must be that they are all mineral title owners - and not as tenants in common. Consequently, a developer will need to obtain a grant of geothermal resource rights from each of P, N and C in order to be able to proceed with a clear title.

Fourth, the government has clearly rejected the public ownership solution to ownership of geothermal resources adopted by British Columbia and Nova Scotia.

My final comment relates to process. While the government had indicated several weeks ago (see the press release, [Setting the stage for clean geothermal development](#) (October 7, 2020)) that it was developing geothermal legislation (“The government is set to have discussions this fall with key groups and introduce legislation to create greater policy and regulatory certainty for investors and Albertans”), there was certainly no broad consultation on the form that such legislation should take, or how we should answer the ownership question. I think that this is unfortunate. While it is certainly in everybody’s interest to put in place a clear legal regime to guide and govern the development of geothermal resources, we have missed an opportunity for a careful consideration of the pros and cons of different options. By failing to engage in such a broader discussion of this issue it may be questioned whether Bill 36 really does provide the policy and regulatory certainty that the government hopes for and that developers and investors need.

This post may be cited as: Nigel Bankes, “A Legal Regime for the Development of Geothermal Resources in Alberta” (October 24, 2020), online: ABlawg, [http://ablawg.ca/wp-content/uploads/2020/10/Blog\\_NB\\_Bill\\_36.pdf](http://ablawg.ca/wp-content/uploads/2020/10/Blog_NB_Bill_36.pdf)

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