BILL #2 – Responsible Energy Development Act Submission

Summary

The Alberta government has implemented Bill #2 to streamline the regulatory process governing oil/gas development in the province. As stakeholders in the process, landowners expect the government and the regulator to consider their interests as well. It is well recognized that Alberta currently has one of the strongest regulatory frameworks governing oil/gas development on the North American continent. We hope that those formulating the rules and regulations implementing Bill #2 will maintain the high standards that currently exist in the province and ensure that landowner voices are considered along with the input that government has already received from the oil/gas Industry.

In the past, cross-jurisdictional deficiencies have existed because there are gaps in the enabling legislation governing the ERCB, Alberta Environment and the SRB. The current rule and regulation formation process for *REDA* has given government an opportunity to rectify some of these shortcomings. In this brief, we present some areas of concern.

GUIDELINES

1) **Respect for private property is a principle firmly entrenched in legislation and common law.**

The EUB recently recognized the disproportionate burdens that some landowners are forced to bear in the pursuit of energy development. In a February 2007 EUB Inquiry Report relating to the expansion of the Keephills Power Plant, EUB Board member, W. A. Warren wrote:

> ***"When people have coal-mining and power-generation operations come into their community to serve the needs of all Albertans, these individuals should be treated with respect and, in some circumstances, given special consideration. Failure to do so not only reflects poorly on the specific operating company, but the entire industry, and the regulatory system that allows the development as well."***

2) **Legislation does not mean what the legislator intended it to mean; it means what the bureaucrats and the courts interpret it to mean.**

3) **Rules and Regulations should be constructed to govern the worst Operators, and should not assume that Operators will act in the landowner's best interests.**

4) **Streamlining the regulatory process should not mean offloading liabilities onto landowners.**

5) The landowner is to be made whole and not suffer as a result of Energy development on his/her lands.

<u>Uncertainty regarding how REDA will interact with existing legislation</u>

Bill #2 lists a number of "energy resource enactments" and "specified enactments" that it partners with, or refers to, so that regulators and the courts can understand the history and process that governs energy development in the province. These enactments already exist and have governed energy development in the Province for some time. However, Bill #2 omits a couple of provisions which its predecessor *Act* (the *Energy Resources Conservation Act*) contained, that provided oversight to how these enactments were implemented, and this is of great concern to landowners in the province. These provisions are,

Energy Resource Conservation Act

> ***Consideration of public interest***
> ***3*** *Where by any other enactment the Board is charged with the conduct of a hearing, inquiry or other investigation in respect of a proposed energy resource project or carbon capture and storage project, it shall, in addition to any other matters it may or must consider in conducting the hearing, inquiry or investigation, give consideration to whether the project is in the public interest, having regard to the social and economic effects of the project and the effects of the project on the environment.*
>
> *RSA 2000 cE-10 s3;2010 c14 s1*

> ***Hearings***
> ***26(2)*** *Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person*
>
> *(a) notice of the application,*

(b) a reasonable opportunity of learning the facts bearing on the application and presented to the Board by the applicant and other parties to the application,

(c) a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application,

(d) if the person will not have a fair opportunity to contradict or explain the facts or allegations in the application without cross-examination of the person presenting the application, an opportunity of cross-examination in the presence of the Board or its examiners, and

(e) an adequate opportunity of making representations by way of argument to the Board or its examiners

RSA 1980 cE-11 s29

Landowners question why the government would take these two provisions out of *REDA*. These provisions require the regulator to consider the Public Interest, grant impacted stakeholders a forum to present their objections and fund the reasonable costs of those interveners. These Rights are entrenched in common law and jurisprudence and denying landowners these Rights will neither streamline the regulatory process nor improve relationships between landowners and Industry.

Since the "energy resource enactments" and "specified enactments" referred to in Bill #2 do not refer to the Public Interest or require public, oral hearings, it is critical that *REDA*'s rules and regulations clearly outline how our concerns will be addressed.

This last year, the Alberta Court of Appeal gave direct guidance to the government, and the regulators, by stating when the public interest must be considered and under what circumstances costs are to be awarded to the intervener and why. It appears that the drafters of Bill #2 are intentionally trying to nullify, or take advantage of, the guidance provided by the Court of Appeal.

The Public Interest

The Alberta Court of Appeal clearly indicated that if the legislation lacks a "Public Interest" clause, the regulator is not obligated to consider it.

Shaw v Alberta (Utilities Commission), 2012 ABCA 378

[6] As noted above, we are concerned in this appeal with ***whether and how the amendments to the Commission's governing statutes alter the scope of the public interest inquiry delegated to the Commission in assessing a project designated as critical transmission infrastructure.*** *The issue arises in the context of the first such project considered by the Commission: the Heartland project, …. Following a lengthy hearing in April and May 2011, the Commission approved the application to construct and operate the Heartland project. In doing so* ***the Commission concluded that its consideration of project impacts was significantly constrained for critical infrastructure projects:*** *AUC Decision 2011-436, Heartland Transmission Project.*

[7] The appellants ***submit that the Commission continues to enjoy a broad public interest mandate when considering transmission facility applications generally****, and that mandate has not been circumscribed for critical infrastructure projects by the new legislation. They submit that the new statutory framework requires the Commission to undertake a full and purposive exploration of all the socio-economic impacts of the proposed project before granting approval, regardless of whether or not the project is deemed "critical" by government.*

[8] ***This Court must determine what the legislature intended when it granted to government the ability to designate proposed transmission projects as critical and, flowing from that, the extent of the Commission's role when it is asked to approve the construction and operation of a project that has been so designated.***

> *Alberta Utilities Commission Act*
> ***17(1)*** *Where the Commission conducts a hearing or other proceeding on an application to construct or operate a hydro development, power plant or transmission line under the Hydro and Electric Energy Act or a gas utility pipeline under the Gas Utilities Act, it shall, in addition to any other matters it may or must consider in conducting the hearing or other proceeding, give consideration to whether construction or operation of the proposed hydro development, power plant, transmission line or gas utility pipeline is in the public interest, having regard to the social and economic effects of the development, plant, line or pipeline and the effects of the development, plant, line or pipeline on the environment.*
>
> ***(2) The Commission shall not under subsection (1) give consideration to whether critical transmission infrastructure as defined in the Electric Utilities Act is required to meet the needs of Alberta.***

[36] The appellants argue that the "needs" of Alberta and the "public interest" are separate concepts. ***However, by designating a transmission development as critical, and thereby removing the assessment of the need for that development from the Commission, the government has clearly determined that the project and the technical solution specified in the designation are both needed and in the public interest****. To read*

some portions of the legislative scheme as requiring or entitling the Commission to revisit the question of whether the development of a designated project is in the public interest is inconsistent with that determination.

One must question why the government would remove the requirement to consider the Public Interest. Is Industry so hampered by existing legislation, that we must remove consideration of the public interest in the streamlining process? In all practicality, the Public Interest question never hindered Industry and the Regulator in the first place because the Regulator is deemed an expert tribunal mandated to determine and define what the Public Interest is. A reviewing court would never overturn a regulatory finding of Public Interest as the Regulator is the only body considered legally able to make a Public Interest finding in the first place.

The problem now, is that Bill #2 has been passed and the regulator's rules and regulations cannot rectify an omission in its own enabling legislation. Requiring consideration of the Public Interest will now require an Amendment to Bill #2.

Intervener Costs

The Alberta Court of Appeal examined the cost issue in detail in the following decision.

Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19

[1] **The general issue on this appeal is whether the appellants are entitled to costs for their intervention in a hearing that was held before the Board.**

[2] The appellants are the owners of lands in the vicinity of oil wells being drilled and operated by the respondent Grizzly Resources. When they became aware of the application by Grizzly Resources to drill the wells in question, they applied for intervener status under section 26 of the *Energy Resources Conservation Act*, RSA 2000, c. E-10:

> 26(1) Unless it is otherwise expressly provided by this Act to the contrary, any order or direction that the Board is authorized to make may be made on its own motion or initiative, and without the giving of notice, and without holding a hearing.
>
> (2) Notwithstanding subsection (1), if it appears to the Board that its decision on an application may directly and adversely affect the rights of a person, the Board shall give the person . . . notice of the application, . . . and an adequate opportunity of making representations by way of argument to the Board or its examiners.

The Board denied the appellants standing, holding that they were not "directly and adversely affected". That decision was appealed to this Court, which allowed the appeal and directed that the Board conduct a rehearing of the well licence applications, at which

rehearing the appellants would have standing: ***Kelly v Alberta (Energy Resources Conservation Board)***, 2009 ABCA 349, 464 AR 315, 14 Alta LR (5th) 261.

[3] The rehearing was subsequently held. By this time the wells had been drilled, so the focus of the rehearing was whether, or subject to what conditions, Grizzly Resources should be allowed to operate them. **The Board concluded that the appellants had not demonstrated any risk to themselves from the wells, that the emergency response procedures in place were satisfactory, and that the wells could be operated without any additional conditions**: *Re Grizzly Resources Ltd.*, Decision 2010-028.

[4] The appellants subsequently applied for an award of costs to defray the expenses incurred as a result of their intervention. The *Act* allows the Board to grant costs to "local interveners":

The general power to award costs found in the *Act* is supplemented by Part 5 of the Board's *Rules of Practice,* AR 252/2007, which incorporate by reference the Board's Directive 031: *Guidelines for Energy Proceeding Cost Claims*.

[5] **The majority of the Board concluded that the appellants were not entitled to costs because they did not qualify as "local interveners**": *Re Grizzly Resources Ltd.*, Energy Cost Order 2010-007.

[22] The third issue on which leave to appeal was granted concerns the scope of the provisions that set out the eligibility of local interveners for a costs award: In general terms this question can, again, be answered by saying that **reasonable decisions of the Board on issues respecting costs are not subject to appellate review.**

[29] In this case the majority of the Board emphasized the results of the substantive rehearing. The majority noted that the evidence on the rehearing "provided no indication of possible effect" on any of the interveners. The determination of whether the appellants were adversely affected, and therefore eligible for a costs award, was therefore heavily results-oriented; success at the hearing was a key, and possibly a decisive, issue.

[31] In normal civil litigation costs generally go to the "winner". Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying "winners and losers"; as the Board notes in its factum, its hearings are directed at the **public interest**. In ascertaining and protecting the **public interest**, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived "success" of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are "successful" when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

[32] The wording of ss. 26 and 28 supports the view that "success" of the intervention is not an overriding issue. Both of the sections anticipate development that "may" cause an adverse effect. At the end of the substantive hearing it will be known whether the Board found any adverse effect. If a costs award is to be primarily based on the "success" of the intervention, there would be no need to consider if the hearing "may" disclose such an effect. The use of the word "may" is inconsistent with the idea that hindsight should be a primary factor in awarding costs. Further, an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be. As this hearing demonstrated, all the evidence, and its full impact, are never completely known until the hearing is over. It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence "may" disclose an adverse effect: *Re Glacier Power Ltd.*, Energy Cost Order 2003-09 at p. 3.

[33] The respondent Board argues in its factum that its mandate is to "ensure the orderly and efficient development of the province's resources". It argues that its functions are not "thwarted simply because every party who appears before the Board may not be entitled to reimbursement" of costs of participation. Orderly and efficient resource development is undoubtedly the objective of the *Act* in a global sense, but the purpose of the standing and hearing sections of the *Act* is to allow people to be heard. The development of Alberta's natural resources enriches the province as a whole, and provides significant economic benefits to the companies that develop those resources. Resource development can, however, have a disproportionate negative effect on those in the immediate vicinity of the development. **The requirement for public hearings is to allow those "directly and adversely affected" a forum within which they can put forward their interests, and air their concerns. In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.**

[34] In the process of development, the Board is, in part, involved in balancing the interests of the province as a whole, the resource companies, and the neighbours who are adversely affected: *Re Suncor Energy Inc*., Energy Cost Order 2007-001 at pp. 10-11. **Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself.** Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words**, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively**. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.

[35] The third question can be answered by stating that any reasonable decision of the Board respecting costs is not subject to appellate review. However, it is not reasonable to require physical damage to the lands to establish eligibility for costs, nor is it reasonable to make an award of costs overly dependent on the outcome of the hearing.

[37] In the circumstances, the appropriate remedy is to allow the appeal and remit the application for costs back to the Board for reconsideration, in a manner consistent with these reasons. For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger **entitlement** to costs. Further, while the amount of costs to be awarded lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.

The Court of Appeal made the following quite clear:

1) Reviewing courts do not vary a tribunal's cost awards.
2) Regulators have jurisdiction to formulate their own cost rules.
3) A reviewing court will only review whether a cost award should be awarded, not the quantum of the costs.
4) Landowners are entitled to their costs of participating in hearings.

Our legislators may have intended for the Regulator to continue to award reasonable costs to the intervener, however, the Alberta Utilities Commission (the ERCB's sister organization on the Electric Utilities side) position is the following:

AUC Rule #007

Landowners and residents are entitled to consultation; however, as a practical matter, landowners and residents must make their concerns known to Alta Link so that the concerns may be discussed and potential solutions considered. Some landowners requested compensation for their time. **The Commission notes that AUC Rule 007 does not require compensation for consultation**. In previous decisions [footnote 324], the Commission found that Alta Link acted reasonably in denying payment of fees for consultation.

• Decision 2011-445: Alta Link Management Ltd. New 240/138-kV Nilrem 574S Substation, Double-circuit 240-kV Transmission Lines 953L/1047L and Double-circuit 138-kV Transmission Lines 679L/680L, Application No. 1606753, Proceeding ID No. 938, November 10, 2011

• **Para. 71** – The interveners asserted at the hearing that landowners should be compensated for their time during consultations. This stance exacerbated the difficulty in conducting discussions between the parties because Alta Link refused to compensate these landowners for their time at the early consultation stage. The Commission finds that AUC Rule 007 consultation does not require compensation and it is not reasonable for landowners to expect payment for their time at this juncture in the process. In AUC Rule 007, consultation is intended to gather information from landowners so site-specific and other concerns can be reflected in the application; this stage of consultation does not

address the more specific negotiation for easements or rights-of-way which are essentially commercial arrangements where one party owns land that the other wants to access and use. It is understandable that the demands of specific negotiations for easements or rights-of-way should be accompanied by compensation for the landowner's time required to reach the agreement.

The courts and similar circumstances with the AUC has succinctly indicated that the regulations and rules pertaining to Bill #2 have the potential to deny "directly and adversely affected" stakeholders the ability to appear before the regulator simply because they cannot afford to do so. The Court of Appeal has stated that the regulator is obligated to ensure that intervener costs are awarded so that a level playing field is maintained.

In general, landowners are busy people whose schedules are interrupted when the Energy Industry comes knocking on their doors. The courts, and common sense, indicate that they are entitled to be compensated for their time and inconvenience suffered in dealing with the Energy Industry. They are to be made whole as their interests are being sacrificed for the Public Good of the rest of society.

The Purpose of Hearings

It was rare for the ERCB to have full blown hearings regarding proposed energy-related projects in the Province. The ADR process apparently resolves around 95% of situations that arise. However, the potential for landowners to trigger a hearing has kept Operators "honest" in their dealings as landowners have had the recourse of regulatory review to ensure that Operators follow applicable rules and guidelines. In the past, hearings have provided the following:

a) **Public Interest** = Economic Benefit – Social Cost – Environmental Cost

If this formula results in a positive value, it has been assumed that the project is worth approving. However, the onus of proving a positive value rests on the Operator.

b) **Forum for Objection**

Those stakeholders who are Directly and Adversely affected have the opportunity to voice their concerns and explain how they are impacted. This ensures that consultation has occurred and information, about the proposed project, has been provided to the landowner.

c) **Implementation of Conditions on the License**

The Board/Commission can evaluate stakeholder submissions and apply conditions to the license so stakeholder interests are acknowledged and protected. These conditions may require the washing of equipment to prevent the spread of weeds or crop disease, fixing fences in a timely manner, cleaning up debris, locating setbacks, etc.

The courts recently elaborated on the matter by stating in,

<u>Mueller v. Matl</u>, 2011 ABQB 738

[26] The most important thing to be aware of in surface rights is that notwithstanding that the right of entry orders are obtained from the Surface Rights Board, ***it is the Energy Resources Conservation Board which really grants the right to enter****…*

…In Surface rights, it is the E.R.C.B. which determines whether the entry is fair, sound and reasonably necessary…

In discharging its jurisdiction to grant right of entry orders the Board is essentially a "rubber stamp". That is, once the E.R.C.B. has issued a permit for the particular facility, the Surface Rights Board (assuming the documentation is in order) has no choice but to issue a right of entry order so long as the permit possessed by the company authorizes it to seek right of entry onto the particular lands.

The ERCB and AUC are the regulators responsible for imposing conditions on the license. By the time it gets to the SRB, it is too late for that Board to impose conditions that may restrict the underlying license. If *REDA*'s rules and regulations do not require hearings, landowners will lose their only forum to request conditions to protect their interests.

d) **Change of Use situations**

The SRB determines the compensation payable for the Operator's entrance upon the lands. This compensation is reviewable in five year increments. However, changes in the nature of the use of the lands, and changes to the underlying license, can occur at any time; leaving the landowner undercompensated until another five year review period comes along. An examination of SRB decisions will show that the Board declines jurisdiction to vary compensation levels due to the addition of extra wellheads, compressors, batteries, tanks and other infrastructure until the next five year review period occurs (unless extra land is taken).

The "Pattern of Dealings" regarding compensation levels indicates that extra infrastructure creates an additional burden upon the landowner and should be compensated for. The dilemma facing landowners is that unless the Operator agrees to increase compensation levels when they impose the additional burden, the landowner must wait until the next five year review period occurs. However, Industry and landowners have dealt with the situation by Industry voluntarily granting the additional compensation levels in exchange for the landowner approving the "change of use" license application to the ERCB in a timely manner. Fair compensation levels have been achieved without the SRB's involvement simply because the landowner could withhold approval and force the Operator to participate in a time consuming and costly process before the ERCB. If the requirement for a hearing is removed from *REDA*'s rules and regulations, the landowner's bargaining position will be compromised and fair compensation levels will be more difficult to obtain.

Reclamational Issues

The new Regulatory body will have jurisdiction over licensing oil/gas projects from "Cradle to Grave". This will allow the Board to rectify past jurisdictional deficiencies that have caused problems for landowners and Operators. A number of problems still confront landowners and Industry,

a) Permanent Setbacks

Even after a Reclamation Certificate has issued, wellheads now have a permanent setback which prevents landowners from fully utilizing their lands. This is problematic as there is no annual compensation after a Reclamation Certificate is granted. The reasoning for the permanent setback is that the wellhead can still have problems and leak fluids resulting in environmental contamination. The government wants Industry to be able to come back on the lands to solve the problem.

However, it is questionable whether the SRB can simply grant Rights of Entry to enter the lands to rectify the situation if a Reclamation Certificate is still valid. *REDA*'s rules and regulations should resolve the matter by outlining the procedures involved in cancelling Reclamation Certificates and by explaining when Environmental Protection Orders can be utilized.

The Rules and Regulations should also clarify when a landowner can request that abandoned pipelines be relocated due to changes in the landowner's use of the lands.

b) **Hydro Fracking Considerations and Horizontal Drilling**

Industry is adopting extensive horizontal drilling operations which utilize fracking procedures to recover oil and gas resources. Due to the high pressures and long horizontal bore lengths, a number of "interwellbore communication incidents" have occurred during the last year. These are incidents where neighboring wells (abandoned, suspended or producing) are negatively impacted, and spill incidents can occur.

The Board has requested that Operators cooperate together in formulating developmental plans which share access roads, pipelines and surface leases to reduce the footprint upon the lands. However, the *Surface Rights Act* requires different operators to obtain separate Rights of Entry and REDA's rules and regulations should describe how Operators should coordinate their developmental plans under current *SRA* constraints.

c) **Reclamation Certificate Process**

Landowners are currently disadvantaged by the existing 1995 & 2010 Reclamational Criteria which only require wellsites to be reclaimed to 60-80% of original productivity based on the year the well was constructed. In many cases, this results in landowners never making a profit on surface leases that have been granted Reclamation Certificates but still have substandard productivity. This problem is compounded by the fact that Alberta Environment has moved to a self-monitoring system for auditing reclamation applications and has acknowledged that some Operators, and their reclamational subcontractors, are taking advantage of the situation and falsifying reclamation applications.

Another complicating factor is the October 1, 2003 deadline on Environmental Protection Orders which prevents these Orders from being granted on any sites having Reclamation Certificates pre-dating the 2003 deadline. Similarly to the Permanent Setback and Interwellbore Communication problems outlined above, the current regulations do not explain how Operators, or the government, will gain access to some lands that have reclamational issues that still need to be addressed.

The government has instituted the Orphan Well Association and License Liability Rating system to ensure that it is not left responsible for

reclamational liabilities. In fact the government just announced that it was quintupling the LLR deposits that it was requiring from Industry. Landowners are not so fortunate and it is unacceptable that lands that taken for resource development are returned to landowners in a condition that prevents future profitable use of the lands.

d) **Operator Bankruptcy impact on Landowners**

Section 36 of the *SRA* requires the provincial Minister of Finance to guarantee payment of monies due, to the landowner, from an Operator. If the Operator fails to pay, the SRB directs the Minister of Finance to make the payment out of the provincial coffer.

Recent SRB decisions have identified another dilemma that now faces landowners. The federal *Bankruptcy and Insolvency Act* has paramountcy over the provincial *SRA* and landowners are treated as unsecured creditors in bankruptcy proceedings and the SRB will not hear compensation claims during bankruptcy proceedings nor direct the Minister of Finance to make up any shortfalls existing between the annual rentals due and the court ordered unsecured creditor payment schedule.

In **SRB Decision 2012/0532**, Serfas Farms Ltd. Vs. Magnus One Energy Corp, the Board stated:

2. Does the filing of a Notice of Intention under section 50.4 of the BIA preclude the Board from proceeding with an application under s. 36 of the Act?

Section 36 of the Act provides for an action to recover payments due under a compensation order or surface lease. When an Operator is in bankruptcy proceedings, this section of the Act appears to conflict with s 69(1)(a) of the BIA which provides that:

"(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action ... "

Under the doctrine of federal paramountcy, the Act, as provincial legislation, "is rendered inoperative to the extent of the incompatibility" with federal law - Canadian Western Bank v Alberta, 2007 sec 22, [2007] 2 S.C.R. 3 at para 69. While s. 69.6 of the BIA creates an exception for proceedings before a "regulatory body", and the definition of regulatory body appears to include the "Board", the exception excludes "the enforcement of payment ordered by the regulatory body". Since the object of s. 36 of the Act is to enforce payment from the Operator through suspension and termination of its rights, it falls outside the exception of s.

69.6 of the BfA, and is inoperable with respect to Operators in bankruptcy proceedings.

The Landowner asserts that staying the application, because the Operator is in bankruptcy proceedings, violates the spirit of s. 36. However, the legislative intent, or spirit of a provincial statute cannot alter a federal statute, unless specifically allowed for in the statute. There are a number of cases where courts have dealt with provincial legislation interacting with the BIA. In Husky Oil Operation Ltd v Minister of National Revenue [1995] 3 SCR 453, the Supreme court dealt with a provincial (Saskatchewan) Workers Compensation Act, which allowed the Board to obtain amounts owing its Injury fund from a principal of a defaulting contractor. This was contrary to s. 136 of the precursor of the BIA then the Federal Bankruptcy Act. The court declared that provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy. (at para 32) The landowner also submits that the legislation is intended to create "secured creditor" protection to the Landowner. The court stated in para 32 of Husky Oil, supra, that "the definition of terms such as "secured creditor", if defined under the BIA must be interpreted in bankruptcy as such defined, not via provincial statutes.

SRB Decision 2012/0789, Sahara Energy Ltd. vs. Menzies Farms Ltd, explains that the landowner is barred from seeking recourse under the Surface Rights Act for the balance of annual compensation still owed to him after a court approved negotiation is completed while the Operator is under protection

The Board confirmed, again, that the *BIA* does indeed block the Surface Rights Board from attempting to make an Operator pay arrears compensation which is owed to a landowner (Lessor) and thus frustrates the landowner's application under Section 36 of the *Surface Rights Act* to be paid by the Minister for any arrears compensation owed to him/her by that Operator. In fact in this case, the Board rescinds the decision it had previously made awarding $7200 compensation to the landowner for back payments owed by the Operator, once it was informed that the Operator was under *BIA* protection. The decision goes one step further, however, and claims that if, during the course of negotiations between the Operator and its creditors while it is under *BIA* protection, an agreement is reached (for example payment to the unsecured creditors of 15 cents on the dollar, as happened in the case in question), then a landowner is NOT able to apply to the Surface Rights Board under Section 36 for any balance of payment owed to him/her. The landowner is not protected by the *Surface Rights Act* and, at best, is left to his/her own efforts in the Courts to try to achieve justice.

One of the questions which the Board had to address, as stated in the attached decision, was the following:

"b. Once a proposal has been approved by the court, is the balance of the amount owing "money payable by an operator under…a surface lease" within the meaning of s. 36(3) of the Act?"

The Board decided that it was NOT payable. In its words,

"An alternative ground to reject an application under s. 36 where an operator has entered restructuring proceedings relates to the requirement that "money payable by an operator … has not been paid." The effect of court approval of a proposal under the BIA is to compromise the creditors' claims. In this case, the proposal provides that unsecured creditors, including the Lessor, will receive 15 cents on the dollar. The "money payable" under the lease for the years 2008-2010 is limited to this amount. Based on the evidence of the Certificate of Full Performance of Proposal, the Lessor's entitlement under the proposal has been paid, and there is no money payable under the surface lease. If that amount has not been paid, the appropriate remedy arises under the BIA rather than s. 36.

The fact that the Lessor voted in favour of the proposal is not significant. A proposal that is accepted by the class of creditors according to the voting formula prescribed in the BIA and approved by the court binds all creditors in the class, including those who voted against the proposal. Therefore, there is no money payable by an operator under a surface lease."

Another question the Board had to decide upon was the following:

"c. Can the Lessor recover rentals under s. 36 for the portion of its claim not included in the proposal?"

It decided the following:

"The Lessor's proof of claim states that the Operator was, at the date of the proposal, indebted to the Lessor for the sum of $2,400.00. It appears that the Lessor's payment under the proposal was calculated on this basis. However, the Lessor's application under s. 36 claims arrears for three years, totaling $7,200.00.

The process for proving claims relating to a proposal mirrors the process for proving claims in bankruptcy, under s. 124 to 126 of the BIA in the case of unsecured claims – see s. 50(1.6). Section 124(1) provides that "every creditor shall prove his claim, and a creditor who does not prove

his claim is not entitled to share in any distribution that may be made." This provision, along with the provision in s. 62(2)(a) that court approval of a proposal is binding in respect of "all unsecured claims," supports the conclusion that the Lessor cannot now claim through the Board's rental recovery process for amounts it failed to prove in the restructuring proceedings.

The Lessor's application states that it understood there would be a later opportunity to prove the balance of its claim, and this opportunity was not given. The Board has no jurisdiction to inquire into and address this concern."

Finally, the SRB is left to determine:

"3. Should the Board rescind Decision No. 2011/0222?" *(i.e. the original decision awarding the $7200 in back payments owed to the landowner by the Operator)*

It concludes:

"After reviewing the Decision in light of the bankruptcy of the Operator, the Panel determines that it should be rescinded. The Decision shows an important error of fact that affected the outcome of the Decision. Decision No. 2011/0222 shall be rescinded. The Panel is satisfied that full payment has been made for the claim under file RC2010.0248, and the file shall be closed."

This decision underscores the lack of protection which is provided for by the Act. The *Surface Rights Act* can, essentially, force a landowner to accept oil/gas activity by an Operator on his land. Because it takes from the landowner his inherent property right to refuse access by the Operator, if he so chooses, it must also shield that landowner from the financial loss which the potential insolvency of that Operator can bring upon him.

It is questionable whether the *SRA* can be amended to rectify the situation because it is superseded by the *BIA*. However, we believe that under *REDA*'s rules and regulations, the Operator can be required to identify the landowner are a secured creditor with priority rights over all other claims. It is doubtful that the *Surface Rights Act* can be amended sufficiently to overcome the paramountcy problem that exists with the federal *BIA*, however, secured creditors are protected to a greater degree and the Regulator can simply make it a condition of the license, that the landowner is deemed to be a secured creditor at the highest priority level.

Registry

REDA contains provisions for starting a Registry where the landholder can register a "private surface agreement" with the Regulator, with a private surface agreement defined as,

> *"private surface agreement" means a private surface agreement as defined in the rules;*
>
> ***Rules***
> ***66*** *The Regulator may make rules*
> *(a) defining "private surface agreement";*
> *(b) respecting the registration of private surface agreements with the Regulator;*
> *(c) respecting any other matter or thing that the Regulator considers necessary to carry out the purposes of this Part.*

We **strongly request** the Regulator to define "private surface agreements" as including the following:

a) Surface lease agreements signed between a landowner and Operator.
b) Surface lease Addendums attached to the surface lease agreement.
c) Pipeline Right of Way agreements signed between a landowner and Operator.
d) Addendums attached to pipeline ROW agreements.
e) **"Right of Entry Orders"** granted to the Operator by the Surface Rights Board.
f) Memorandums of Understanding agreed to between the landowner and Operator during the Regulator's ADR process.

Court precedent cited throughout this submission shows that the courts clearly regard the landowner as disadvantaged in negotiating with Operators; that it is not a level playing field; that Operators should therefore bear the costs of expropriation; that landowners with oil/gas development on their lands are forced to sacrifice their interests in the public interest; and, that they are to be made whole.

The current state of affairs in Alberta requires the landholder to take the Operator to court to enforce the terms of surface lease agreements, pipeline Right of Way agreements and the attached Addendums. Landowners are at a severe disadvantage against the "deep pockets" of Industry and often the damage from an infraction is much smaller than the legal costs of obtaining redress.

Similarly, the Surface Rights Board refuses to enforce its own Right of Entry conditions that are commonly attached to Board Orders simply because they (and apparently the courts) view the Regulator's license as sacrosanct and inviolable. Regardless of the fact that Section 29 of the *SRA* clearly gives the Board authority to rescind ROE orders, the Board refuses to do so and the courts have upheld the Board's position.

As mentioned in **Mueller v. MATL**, the courts have clearly ruled that the SRB is ancillary to the license granting process and it is really the Regulator that grants rights to enter the lands. The SRB can only impose conditions governing entrance upon the lands that do not restrict the Operator's rights granted under the Regulator's license. However, once the appeal period for the ROE Order conditions has expired, the conditions imposed by the SRB are regarded as lawfully expressed and the Operator clearly has a legal obligation to abide by them.

A **cross-jurisdictional deficiency** currently exists between the Regulator's license and the SRB Right of Entry Order conditions. The Regulator's license conditions and the SRB's ROE conditions are clearly intended by legislation to govern the Operator's activities upon the lands, yet the SRB lacks jurisdiction to enforce its own conditions. As the only entity holding proper jurisdiction to enforce the terms and conditions on the Operator's license, the Regulator is morally obligated to adopt the ROE conditions imposed by the SRB. The Regulator should therefore allow landholder's the opportunity to register SRB Right of Entry Orders as private surface agreements. The fact that a public entity is imposing the conditions does not negate the fact that the Orders govern the affairs between two private parties and the Regulator clearly has authority (as described above in court citations) to make reasonable determinations concerning its own rules and regulations.

Doing so would help level the playing field between landholders and Operators, remove many minor disagreements between landholders and Operators from the already burdened court system, give meaning to SRB Right of Entry Order conditions, legitimize previously unenforceable portions of the *Surface Rights Act* and lighten the burden that landholders, hosting oil/gas activities on their lands, currently shoulder in this province.

Recommendations

Amend Bill #2 to incorporate Section #3 "The Public Interest" and Section #26 "Entitlement to a Hearing" of the *Energy Resources Conservation Act*.

Write the *REDA* rules and regulations so that a hearing is required if someone Directly and Adversely affected asks for one.

Include Landowner Representation in the Board of Directors and on the Corporate Governance Board overseeing the Regulator's operations.

Write the Cost Rule so that intervener "reasonable costs" of personal time and representation are covered from the start of the project to its end.

Write the rules and regulations so that Operators are required to obtain new Rights of Entry from the SRB, or through private agreement, whenever entrance to the lands is required after a Reclamation Certificate has been granted on the lands.

Write the rules and regulations so that multiple Operator access to the lands requires landowner approval according to the *Surface Rights Act* and encourage Industry to adopt Best Management Practises for coordinating multiple Operators using the same padsites, access roads, pipelines and battery facilities (especially for fraccing and horizontal drilling activities).

The Rules and Regulations should also clarify when a landowner can request that abandoned pipelines be relocated due to changes in the landowner's use of the lands and that the Operator will pay for the relocation or abandonment.

As one of the conditions on the license, require the Operator to list the landowner as a secured creditor with the highest priority level.

Define private surface agreements as including Surface Rights Board Right of Entry Orders so the Regulator can enforce the Right of Entry conditions.

Conclusion

1) Courts don't overrule Regulatory tribunals on the magnitude of their cost orders.
2) Regulatory commissions have wide latitude in implementing their own rules (including cost rules).
3) The Public interest is closely tied to the funding issue and landowner's ability to recover costs.
4) Removing the need for oral hearings and the requirement to consider the Public Interest would significantly and negatively impact landowner rights and remove their access to a level playing field.
5) Landowners should have representation on the Corporate Governance Board.
6) Bill #2's Rules and Regulations will determine how Energy development occurs in this province for the foreseeable future. It is widely recognized that Alberta already has one of the best regulatory structures, for energy development, in Alberta. One reason for that reputation is the opportunity for landowner's voices to be heard. If the requirement to hold oral hearings and to consider the Public Interest is removed, landowner rights will suffer a severe blow.
7) The Registry provisions of *REDA* could benefit landowners if ROE Order Conditions and Addendum provisions are given the force of law with an agency endowed with the jurisdiction to enforce them. If the Regulator is going to take control from "cradle to grave" then they should be able to enforce the License conditions along with the Surface Access Provisions.

There has been a lot of speculation concerning the government's intent regarding the formulation and implementation of the *Responsible Energy Development Act*. As the name of the Bill implies, it is likely that the government has desired to streamline the licensing process without compromising the rights of landowners and nullifying the large body of judicial precedence already existing, and providing guidance, on how the energy resources of this Province are to be developed and exploited. Alberta already has the reputation of having one of the best regulatory regimes on the North American continent and the ERCB was a role model for regulatory bodies around the world.

There is always room for improvement and *REDA* has the potential to improve how the energy Industry is regulated in this province. However, it also has the potential to drastically alter the rights that landowners have enjoyed when it comes to energy development on their lands. We ask that the Regulator continue to acknowledge the uneven playing field that has existed in the past by formulating the rules and regulations to address the concerns that we have expressed in this submission. It is in the interests of all Albertans for energy development to continue, however it reflects badly on the energy Industry and the province as a whole, when landowners are severely disadvantaged and forced to unreasonably sacrifice their property rights for the Public Good.