NEWSLETTER

August 8, 2022

Landowner Rights are under unprecedented attack by the current provincial government and its regulatory bodies as they seek to limit landowner compensation for surface leases in Section 27 compensation reviews and Section 36 "Unpaid compensation applications" at the Land Property Rights Tribunal (SRB) and to restrict the landowner's ability to appeal decisions which increasingly violate longstanding compensation principles outlined by the SRB and the courts.

In this newsletter we'll address ASRA's concerns about the state of the Oil/Gas Industry, current government policies and actions, new legislation promoting repurposing of old wells, rates for Wind and Solar projects, and potential landowner liability for renewable energy projects on their lands including wind, solar and geothermal wells.

ASRA is becoming very concerned about the current government's attack on Property Rights in Alberta. It appears that the government has instructed various Boards/Tribunals to reduce landowner compensation, cost awards and appeal rights in an effort to reduce the costs to Industry and the taxpayer. Taxpayer rights are given higher priority than landowner rights. Furthermore, it appears that the provincial government finally realized that it was liable for Industry's past follies and has therefore determined that going forward, it will dump as much of the potential liability, for new types of energy development, onto landowners as possible.

State of the Oil/Gas Industry

These actions are occurring as the Oil/Gas Industry is enjoying high crude oil and natural gas prices and consumers are suffering record high gasoline and diesel fuel prices. A number of Oil/Gas companies are slashing surface lease compensation rates and forcing landowners to defend current compensation rates before the Land Property Rights Tribunal which is showing itself to be increasingly biased against landowners. It is ridiculous that some Oil/Gas Operators are insisting on lower compensation rates when agricultural commodity prices (and Loss of Use) have been the highest in history and input

costs for fertilizer, fuel, seed, and chemical are going through the roof and increasing the adverse effect of farming around Industry infrastructure. The huge backlog of Section 36 "unpaid surface lease compensation" applications and mistakes and clerical errors at the Tribunal is making it difficult for landowner claims to be addressed in a timely manner. The recent Select Committee on Real Property Rights has encouraged the government to address these problems and to ensure that landowners have their representation costs reimbursed and their applications handled in a timely manner.

Ironically, these landowner concerns are occurring at the same time that Industry has been receiving billions in Taxpayer subsidies, with the Federal and provincial governments providing huge subsidies to Industry and to the Orphan Well Association to fund reclamation that Industry was responsible for.

Landowner Rights under Attack

As explained above, the current Alberta government (and its regulatory bodies) have taken steps to limit landowner surface lease compensation. It appears that the LPRT has been told to get its budget under control. In addition, the government has implemented the following programs.

1) **Cutting Red Tape** – many of the rules and regulations that were cut under **Bill #48-Red Tape Reduction Act**, had been put in place to protect landowners and we're already seeing how Industry is taking advantage of these cuts to place landowners at a disadvantage.

Shortly after the Supreme Court of Canada "*Vavilov*" decision which reduced the deference owed to regulatory body decisions, the Alberta government implemented Bill #48 which specifically reduces the "standard of review" from the standard of "correctness" to the lower standard of "reasonableness" in the *LPRT Act* (section 19) and further reduces the time to file a Judicial Review of a Tribunal decision from 6 months to 60 days (section 17(1)).

Judicial review

17(1) Where a decision of the Tribunal is the subject of an application for judicial review, the application must be filed with the Court and served according to Part 3 of the Alberta Rules of Court ***not more than 60 days*** *after the date of the decision.*

Standard of review

19 On an application for judicial review, leave to appeal, appeal of a Tribunal's decision or order, **the standard of review to be applied is reasonableness**.

This is a great disservice to landowners and inexcusable. Landowners already have a hard time finding legal representation, and it is difficult to file for a Judicial Review within the 60-day window. The lowered standard of review was recently mentioned in the *Sabo v AltaLink* **2022 ABQB0156** decision where the judge stated that if the appeal had been filed a couple of weeks later (after the **Bill #48 – Red Tape Reduction Act**) had passed Sabo would have lost the case because the standard of review would have been reasonableness instead of correctness. This lower standard means that the Tribunal doesn't have to strictly follow the rules and court precedence as long as its decision is "reasonable" which leads to a wide range of possible decisions.

Developments at the LPRT

2) **LAND AND PROPERTY RIGHTS TRIBUNAL** - combining the SRB with three other Boards does not seem to be working well. The time delays, misplaced submissions, poor rulings and the mistakes coming from this Tribunal (acknowledged by Industry as well) are unacceptable especially in light of the increase in funding that was provided. Some applications have sat for 3 or more years and the Tribunal just ignores requests for updates. It certainly speaks poorly of this government's priority of landowner property rights when the procedures put in place to address those concerns are deliberately lengthened and complicated. More full-time Panel members need to be hired and the Tribunal's bias of fast-tracking Industry applications at the expense of landowner applications needs to be addressed. The Special Committee on Real Property Rights have made recommendations regarding this issue and hopefully the government will take action to correct the problems.

The LPRT has improved the application process in some ways but it's getting more complicated for landowners to do themselves. It can be challenging to the computer illiterate as the Tribunal now uses an online portal and requires electronic disclosure. The Tribunal is also refusing to hold in-person hearings and requires participation in "Zoom" hearings online which can be difficult.

The Tribunals cost award practices are also making it more difficult to obtain representation as lawyers are reluctant to swallow the cost haircuts that regularly occur and landowners are left with very large legal bills for attempting to defend their rights. The Tribunal is by far the worst of the government agencies (AUC, AER and LPRT) in awarding fair representation costs.

ASRA Directors have been informed by a government whistleblower that the provincial government told the LPRT to start cutting compensation awards to landowners. Regardless of whether this can be proven, it is obvious that the Tribunal is indeed taking steps to reduce landowner compensation by issuing Decisions which do the following:

a) *Reducing Section 36 compensation for back compensation owing*

The Tribunal is now commonly stating that it has a duty to the taxpayer and is cutting Section 36 payments by 25-75% due to the fact that the landowner is farming part of the surface lease. This is in direct contravention to court precedence but the Tribunal is now stating that the "reasonableness" provision of Bill #48 gives them the discretion to do so. The Tribunal claims that landowners are being "unjustly enriched" because they derive revenue from farming part of the surface lease. ASRA is helping fund the Judicial Review of the *Lexin v Bateman* decision where the Tribunal cut the compensation award by 50%. It is critical that we defeat this ruling which resurrects the "Footprint argument" which has been denied by the courts for decades.

b) Only paying up to 5 years in back compensation in Section 36 claims

The courts have been clear that there is no Statute of Limitation for Section 36 compensation owing claims, yet the Tribunal is now telling landowners to not even bother applying for more than 5 years. The Tribunal is now stating that this policy is "reasonable" even though the landowner did suffer the Loss of Use and Adverse Effects in prior years. In some cases, the Tribunal's own delays in processing claims extended the time period past 5 years and the Tribunal denied the extra years payments even though the landowner applied within the 5-year window. Landowners have sought legal counsel to appeal these decisions but the two-month Judicial Review time limit has made it difficult.

c) *Cutting landowner personal and representation costs*

The Tribunal has been cutting landowner cost awards and reducing payments for representation services. The Tribunal also awards minimal costs for Section 36 applications and no costs for recurring Section 36 applications. This is in direct contravention of Section 39 of the *SRA*.

Bad actors within Industry are now taking advantage of these Tribunal decisions and simply cutting landowner compensation and forcing the landowner to apply to the Tribunal for redress. This is expensive, time consuming and generally takes a couple years for the Tribunal to hold a hearing and issue a decision.

The Tribunal did issue the *Lynx v Fulton* Decision which is favorable to landowners as it states that Operators have a narrow 30-day window to request compensation reductions on the 4th year lease anniversary whereas landowners have up to 5 years to file a request for a compensation increase. Lynx has filed a Judicial Review of the decision and ASRA is helping to fund the legal defense.

However, there is no question that recent rulings from the LPRT and Bill # 48 have eroded landowner property rights and diminished the original protections that the Surface Rights Act contained and that this has occurred under the direction of the current provincial government.

Developments at the AUC

3) **Changes to AUC Rule 007** – The rule was recently changed to reduce the notification distance for affected landowners, regarding proposed wind farm projects, from 2000 meters to 1500 meters. Considering the fact that wind turbines are now 2-3 times taller than older turbines, it is absolutely ridiculous that anyone would think that the notification distance should have been reduced.

Notification distances from Solar projects were also reduced. There has been a Municipal push for renewable development (and associated property tax revenues to replace lost oil/gas taxes) and a global push to transition to electric vehicles. It is likely we'll see many more applications for wind and solar projects within the province and the AUC has a mandate to approve these projects and has taken steps to limit neighbouring landowner's rights to object.

4) The AUC has now approved more than **$6 Billion dollars of new transmission infrastructure** to connect renewable energy projects. The recent CETO AUC decision will burden ratepayers with another $350 million solely to service up to two large wind farms that are not yet built. This cost is borne directly by the rate payers and is a subsidy to the renewable energy Industry. The fact that the TFOs (transmission facility owners) then make a guaranteed 8.5% rate of return on this $6 Billion is offensive. Electrical distribution and transmission charges are going through the roof and making irrigation uneconomical. Many of these renewable energy projects are only financially viable because of the transmission line subsidies and the increasing carbon tax levy that increase prices for ratepayers and consumers.

5) The **Public Interest mandate of the AUC** does not allow compensation for a project's negative impacts, and forces adjacent landowners to subsidize big Industry through loss of aerial spraying opportunities, property devaluation, noise and adverse health impacts. The rural quality of life is compromised by allowing Industry to pollute the rural environment, and lax Canadian standards allow foreign companies to take advantage of rural Alberta and build wind and solar projects that they would not be allowed to build in their home countries.

6) It appears that the AUC **has not denied a wind or solar farm application yet**. They routinely accept Alberta Environment's waiver of **wildlife setbacks** and every new project makes the next application easier because of the number of birds and bats that are being killed. There are less to detect when the next project is applied for. They also only require 3 years of post-construction mortality surveys and do not consider cumulative impacts. These projects also burden surrounding landowners because of the need of a connecting transmission line which goes over their property with little compensation for the negative impacts.

<u>Developments at the AER</u>

7) **Relaxation of Environmental Standards** – The relaxations introduced because of COVID were unjustified and unwarranted. It is unclear whether these have now been revoked. The Fasttrack Reclamation Certificate Process, the high percentage of uninspected sites and the resulting fraudulent certificates that have been issued are also allowing Industry to falsify documentation, usually without consequence. Recent AER audits found 100% failure to restore "reclaimed lands" to full productivity.

Wellsites already have a permanent setback and access requirements and inhibit future development of private property and allowing further permanent agricultural productivity losses is inexcusable.

It appears that this government is relaxing Industry rules and requirements at the expense of landowners. Many of the surface rights associations and commodity groups, including the cattle organizations, are thoroughly disenchanted by the actions that this government has taken to lessen the rural voice and property rights.

8) **Landowners must now watch the AER website** for information on projects on their own lands and file SOCs (statements of concern) if they have concerns. This is a ridiculous process as the vast majority of landowners will not even know of this process and requirement. Industry should be required to notify landowner of changes in ownership of oil/gas infrastructure on their lands, especially if Orphan wells are involved or if new types of development are being proposed.

9) **New "innovative" development** – The Geothermal Bill and the Bill #82 – *Mineral Resources Development Act* promote the use of old wells for new types of Industry development but potentially shift the liability from Industry onto landowners and it is unclear whether these new developments will have the existing protections of 1) an Orphan Well Association, 2) the *MGA* exemption for property taxes and 3) the jurisdiction of the LPRT for damages and unpaid compensation. Making the AER a "super regulator" and granting them "overriding provisions" so that they can void provisions in existing surface leases is foolish and possibly illegal.

MRDA – Bill #82

Overriding provisions

41(1) A provision of

(a) this Act,

(b) the regulations or rules made under this Act, or

(c) a declaration, order or direction of the Regulator made under this Act in respect of any matter over which the Regulator has jurisdiction

overrides any term or condition of any contract or other arrangement that conflicts with the provision of this Act or the regulations, rules, declaration, order or direction.

(2) No term or condition of a contract or other arrangement that conflicts with a provision referred to in subsection (1) **is enforceable** or gives rise to any cause of action by any party against any other party to the contract or arrangement.

10) **Biased Industry legal input**- Government departments are using the same major legal firm, to write oil/gas legislation, that Industry uses to oppose landowners in LPRT, AER and AUC hearings. This is a huge conflict of interest where a legal firm is allowed to create loopholes in the legislation that they will then take advantage of when they face landowners in tribunal hearings and in court. Bill #2 (*REDA*) already took landowner appeal rights away and now hiring this legal firm to write legislation further strips landowners of their property rights.

Conclusion

Property Rights are under an unprecedented attack by the current government. It is promoting new types of Industry development while taking steps to offload the liability onto landowners and at the same time instructing the quasi-judicial tribunals to ignore decades of jurisprudence put in place to protect landowner rights. **Bill #48 is probably the worst piece of legislation attacking landowner rights to be passed in Alberta in the last 30 years**. It allows the LPRT to ignore the court precedent that landowners have won over the past few decades, limits the landowner right to appeal and the LPRT reduces costs awards for legal representation, so it is difficult to find lawyers who are willing to get involved.

The Geothermal Bill and Bill #82-MRDA appear to remove the safeguards of the LPRT/SRB process, the OWA obligation to reclaim orphan wells and the *MGA* exemptions on property taxes; and this will only increase landowner liability, yet it appears that they can't even object because the AER has been given authority to ignore the terms of the existing surface lease agreement when the lease is transferred to a new Operator. It's even worse, since the landowner must constantly monitor the AER website to see if the surface leases have been transferred because legal notification isn't required.

It's obvious that an effective Provincial organization of landowners is needed to combat Industry and government's attack on our property rights. We've asked for government cooperation on this matter but have been strongly rebuffed.

ASRA therefore encourages landowners to **renew their annual memberships** and to **donate to help ASRA** fund landowner participation in legal appeals that are necessary to protect everyone's property rights. In many cases, landowners face costly appeals over small amounts, yet the cases are extremely important to all landowners. It's not fair to expect individual landowners to have to pay all of the court costs for these files. **Please consider donating money to ASRA's legal defense fund as these cases directly affect your property rights.**

Donations and annual membership fees can be sent to:

Action Surface Rights Association
P.O. Box 4593
Taber, Alberta
T1G 2C9

www.actionsurfacerights.ca also has a PayPal link that can be used for memberships or donations.

Wind and Solar Contract concerns

The provincial government has increased regulations regarding Renewable Energy by instituting the *Conservation and Reclamation Directive* which outlines expectations for reclaiming renewable energy sites. Reclamation Certificates are now required and the reclamation criteria is similar to oil/gas criteria. There are also a number of Wetland and Wildlife directives which supposedly restrict renewable energy's negative impact on the environment but Alberta Environment and Parks – Wildlife Division routinely waives those requirements.

It appears that the Alberta Utilities Commission has not refused a wind or solar project yet, as it deems them to be in the Public Interest even though they recognize many of the adverse impacts that result to nearby stakeholders. They weigh the benefits versus the costs and do have a mandate to facilitate energy development in Alberta. They do not have jurisdiction to compensate those who may suffer adverse effects.

The AUC recently changed the Rule 007 notification requirements and the distance at which you are deemed to have Standing to participate in a hearing. For windmills, it used to be 2000 meters, now it is 1500 meters. It is even less for solar projects. Landowners also need to be careful signing wind and solar leases as they don't require a Land Agent to present them to you and there are no standardized contracts. They are written in Industry's favor.

Current rates for solar projects

Solar Operators are commonly paying $600/acre on grassland and between $7001300/acre on cultivated lands. Large projects on cultivated lands have generally been between $700-900/acre and some include royalty sharing. Initial option payments are between $10 - $30/acre per year depending on the desirability of the location and the closeness of transmission lines.

Current rates for wind projects

It appears that some wind Operators are seeking to decrease turbine payments from the $4000-$5000/MW range down to $2500/MW as wind turbines increase in size. They are not willing to share some of the economies of scale with the landowners that host the wind projects. Good land lease rates have been in the $25,000 - $30,000 per turbine/year for the larger turbines and some include royalty sharing. Compensation rates are all over the place with great variation between compensation for Substation sites, power poles, access roads and collector lines. Some contracts also include a 1-2%/year escalation factor but landowners should insist upon a CPI inflation escalator in case higher inflation rates are here to stay.

Critical Issues regarding Renewable Energy projects

Renewable Projects have **3 major liabilities** to hosting landowners.

1) There isn't any **Orphan Well Association** to take care of reclamation and many contracts are worded to allow the company to walk away just like many Oil/Gas companies have done in Alberta. Landowners should request a Reclamation Bond or Letter of Credit to be put in place but it has to be "ring-fenced" so a lender doesn't seize it during bankruptcy. Some wind/solar Operators have agreed to this request. Government staff have indicated that they have concerns that hosting landowners are assuming a huge liability if the wind/solar Operator goes bankrupt.

2) Renewable Energy projects are **not exempt** (like oil/gas wells) in the **Municipal Government Act** and landowners can be held liable for unpaid property taxes if the Renewable Energy Operator doesn't pay the property taxes. These property taxes are generally much higher than the annual compensation paid to landowners and landowners should request that the county waive this right due to the high taxes that will be generated by the projects for the municipality.

3) Renewable Energy projects are **outside the jurisdiction of the Surface Rights Board** (now **LPRT**) and you can't apply to them to recover unpaid annual compensation or recovery of damages. If the Renewable Operator goes bankrupt, you will not be able to apply for unpaid lease compensation or for damages that might occur. Landowner should ensure that the initial lease compensation rates are high enough to compensate for this additional risk.

Renewable Energy leases also don't come under the purview of the **Land Agents Act** and it's the wild west out there when it comes to contracts. Often, the proponent's agents don't even know the regulations and they just want a signature. Even if the proponent uses a land agent, some of these companies' prey on the gullible and just want a signature. If the landowner has questions, they just move onto the next landowner. ASRA has mentioned this to senior levels in the Alberta government but they just state that it's a free market and they're not going to intervene in regulating renewable contracts even though they know landowners are being taken advantage of.

Additional Issues with Wind and Solar leases

1) We've seen some banks refuse to mortgage lands if they have a renewable energy project. Part of this is because the wind/solar lease subordinates the bank to the renewable energy operator and its lender.

2) The Default clause is very poor and often the landowner simply doesn't have the right to enforce an Operator default.

3) Option periods are often long and have low compensation and this ties up the land for a long period of time when another Operator might come along and offer more. Generally, contracts don't allow the landowner to terminate. Some landowners are trapped in contracts that can't get out of because they don't expire. You want at least a $15/acre/year option payment during the option period and even that is quite low.

4) Leases are often very long and some have an "everlasting clause" and never expire unless the Operator cancels the lease.

5) Many contracts only offer a 1-2% inflation clause. Landowners should insist upon a CPI inflator escalator in case we see inflation rates higher than 2%.

6) Many contracts put an onus on the landowner to notify the Operator about changes in County tax assessment rate changes, insurance level changes, intent to sell the land, intent to build on the land, etc. and have significant penalties if the landowner does not comply. It is highly unlikely that most landowners would be familiar enough with their contracts to follow up on commitments and much less likely that heirs would be aware of the issue.

7) Many contracts require Operator consent for you to sell or mortgage your land.

8) Many contracts require the landowner to indemnify the Operator against existing Environmental contamination without measuring what contamination exists. This might allow the Operator to offload future contamination onto the landowner.

9) Some contracts allow the Operator to reduce the acreage in the Extension period if they want to Surrender land and Reduce Payments.

10) Most contracts allow the Operator to exercise the Option on a portion of the land but keep the rest under Option.

11) Most contracts require the landowner to join in proceedings to help the Operator get licenses.

12) Many solar contracts allow the Operator to subdivide the leased area if necessary for their operations.

13) Many renewable energy contracts allow the Operator to access the rest of the lands, possibly without compensation.

14) Many contracts allow the Operator to sublet the lands or grant easements for roads and powerlines (at minimal compensation) to other Operators for other uses.

15) Some contracts allow the Operator to use the aggregates (gravel) found on land without payment to the landowner.

Suggested additions to Renewable Energy Contracts

1) You need to insist that all construction equipment is cleaned so they don't introduce weeds or crop disease into the area.

2) The Operator should pay for baseline soil and weed studies which would be used during Reclamation.

3) For solar projects, you want the Operator to take, and pay, based upon at least 40 acre LSD parcels. The landowner doesn't want to be left with small, oddly shaped, parcels to farm. On the other hand, the landowner needs to make sure that access to water sources and critical infrastructure is not impeded. The Operator should pay based upon the entire 40 acres whether they use it or not.

4) The annual compensation should state payable in advance at the beginning of each year.

5) The Crop Loss provision should have a set amount which escalates at 2% or the CPI rate, you don't want to have to justify the amount every time.

6) Its critical that the lease's **lender clause is not unfavorable** to the landowner and most are extremely unfavorable and need to be changed.

7) You want to make sure that all compensation escalators begin with the effective date and not a later construction or operational date.

8) The **Reclamation Term payment** needs to be sufficient to pay for land still out of production as reclamation may take some time and the Operator won't be generating offsetting revenue. Many contracts state $5/acre which is ridiculous.

9) Many windmill contracts pay a $450/acre rate during reclamation but wind turbine footprints are only about 1/10th of an acre and could be left into eternity for $45/year instead of paying hundreds of thousands of dollars to remove.

10) Stripping of top soils should be restricted and top soil should be stored on the lands and not removed. It needs to be taken care of so it doesn't become a weed problem.

11) The assignment clause has to be restricted so that the Operator cannot offload the project onto a deadbeat company just before reclamation.

12) The contract should require both parties to have Insurance and to list the other party as an additional insured. Landowners should not allow the Operator to self-insure.

Conclusion

Basically, all of the contracts offload liability onto the landowner and are written to protect the Operator. Many put the landowner at risk of losing their land (or control of it) in the future. The government has stated that they are not going to interfere in private business matters and require land agent involvement or standardized surface lease contracts. They have also refused (so far) to implement an Orphan Association to fund reclamation or to include renewable energy projects in the *MGA* exemption so landowners don't end up liable for unpaid property taxes.

As a result, landowner should be very careful about signing wind and solar leases as the proffered contracts are highly prejudiced against landowner interests.