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The MGA Special Lien

What it is and how to use it

RMA
RURAL MUNICIPALITIES of ALBERTA

BROWNLEE LLP
Barristers & Solicitors

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Contents

“In this world nothing can be said to be certain, except death and taxes.”

- Benjamin Franklin

Introduction

The payment of taxes is commonly seen as inevitable or unavoidable as one of those “facts of life” that simply happens, like the onset of winter in Canada each year. Yet, Alberta’s rural municipalities know that the reality is not so simple.

A recent RMA survey showed that, as of December 31, 2022, there were approximately $268 million in unpaid property taxes owing from the oil and gas industry alone.[1] Missing tax revenues have significant consequences for municipalities and their citizens. They mean fewer civic and social services, less infrastructure, and a greater tax burden placed on those who do pay. They also mean reputational damage for Alberta’s oil and gas industry. Even as the vast majority of oil and gas companies pay their property taxes reliably, those that do not undermine the Government of Alberta’s pursuit to position the Province as global leader for clean, secure and ethically-sourced energy.

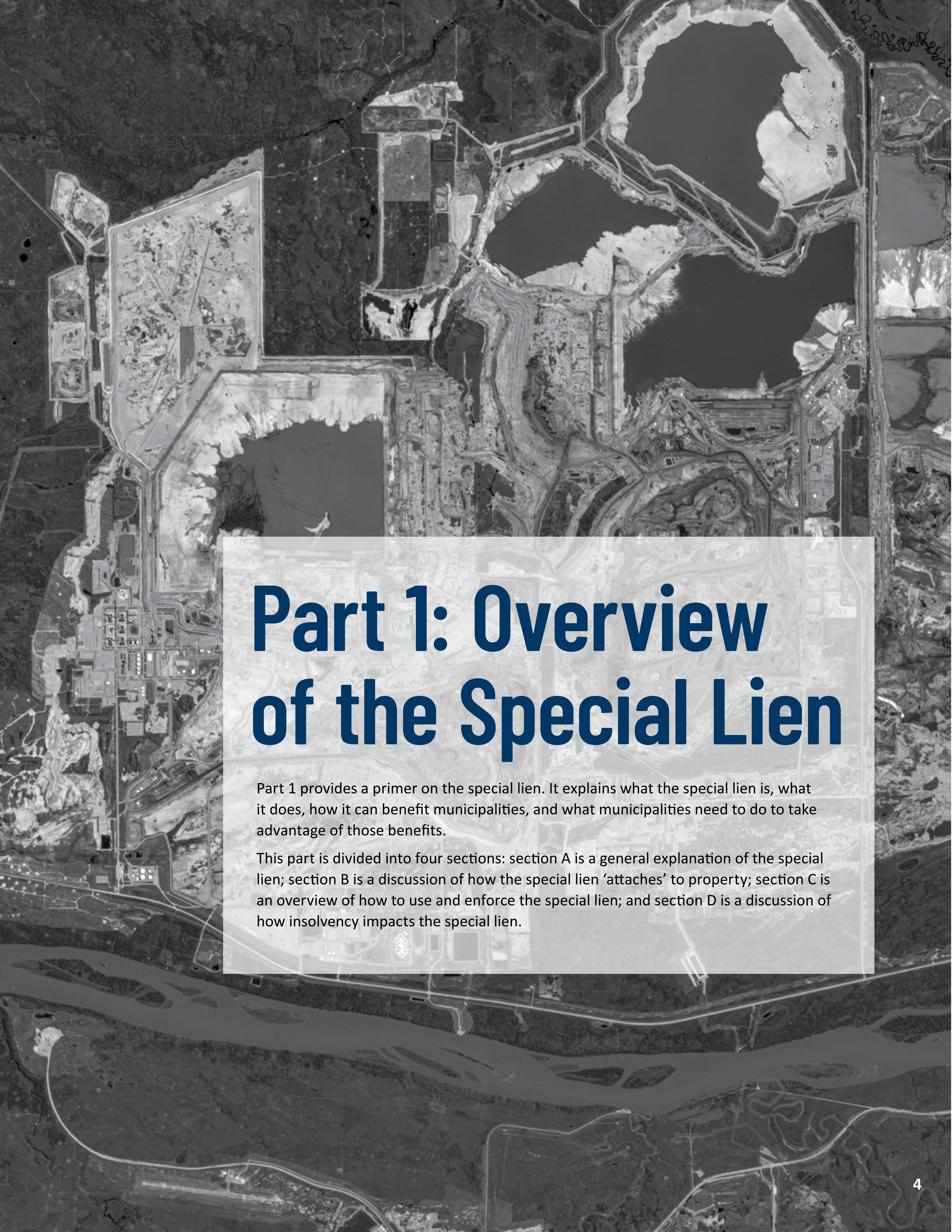
At times like these, it is ever more important for rural municipalities to educate themselves on, and to utilize, the tools available under the *Municipal Government Act* (“MGA”) — especially the special lien — to recover unpaid taxes, not only from oil and gas companies, but from all kinds of taxpayers. It is for this reason that the RMA and Brownlee LLP, through funding support from the Government of Alberta, have collaborated to provide member municipalities with this resource.

Legal disclaimer

This resource is intended as educational material for RMA member municipalities. It is not legal advice, and cannot be used in place of consulting with a lawyer. While it aims to educate municipalities on the options that are generally available to facilitate the recovery of unpaid taxes, this resource cannot, and does not purport to, anticipate every aspect, circumstance, or situation that municipalities may encounter when dealing with a particular delinquent taxpayer.

This resource is current to February 2023. Future amendments to the MGA and other legislation, and other developments to the applicable law, may significantly alter the accuracy of this material.

1 See the following resource: https://rmalberta.com/news/another-year-another-mountain-of-unpaid-property-taxes-as-oil-and-gas-industry-booms-municipalities-seek-accountability/



Part 1: Overview of the Special Lien

Part 1 provides a primer on the special lien. It explains what the special lien is, what it does, how it can benefit municipalities, and what municipalities need to do to take advantage of those benefits.

This part is divided into four sections: section A is a general explanation of the special lien; section B is a discussion of how the special lien ‘attaches’ to property; section C is an overview of how to use and enforce the special lien; and section D is a discussion of how insolvency impacts the special lien.

A. The Special Lien, Generally

What is the special lien?

As the name suggests, it is a special kind of lien. But this begs the question: what is a lien?

A lien is a type of security interest that attaches to particular property in order to secure the payment of a debt, or the performance of some other obligation, that is owed to a creditor.

There are many examples of a lien, and many situations where a lien can arise. If a mechanic installs parts and performs repairs on a vehicle, but is not paid for his services, he can register a garagekeeper's lien on the vehicle in the Personal Property Registry — this is set out in the *Garage Keepers' Lien Act*.[2] Or, if a builder performs construction work and is not paid by the owner, it can register a builder's lien on the title to the property — this is set out in the *Prompt Payment and Construction Lien Act*.[3] In either of these cases, when the lien is registered, it will impair the ability to sell or otherwise dispose of property that is subject to the lien, and will assist in ensuring payment of the underlying debt.

The special lien, granted under sections 348 and 348.1 of the MGA, works in a similar way. It attaches to a taxpayer's property when taxes go unpaid, thereby "tying up" the property and increasing the likelihood that the taxes owed will be paid. The property the special lien attaches to is not necessarily the same property that is taxed; in fact, the special lien applies not only for property taxes, but for other types of taxes, such as business taxes, community aggregate payment levies, etc., where there is no real property being taxed.

What benefits does the special lien provide?

The "special lien" is special because it is not like other liens. It not only secures payment of taxes by "tying up" the taxpayer's property, but also gives those taxes a special priority status in comparison to the claims of other creditors. Both sections 348 and 348.1 of the MGA state that a municipality's taxes "take priority over the claims of every person except the Crown".

This means that if there are multiple creditors with claims secured against the taxpayer's property, all trying to enforce against the taxpayer, the municipality generally receives payment ahead of the other creditors, aside from the Crown (which in this context, is defined as the Government of Alberta and any associated arms-length agencies such as the Alberta Energy Regulator). This priority puts municipalities in a strong position, but not an unassailable one, as will be discussed later in this part.

How far do the benefits of the special Lien extend?

The special lien incorporates not only the initial tax levy, but also other amounts that are lawfully added to the tax roll — most importantly, penalties.

When a bylaw imposes a penalty on taxes, the penalty will be considered to be part of that tax.[4] Therefore, the special lien applies to penalties in the same way that it applies to a tax levy itself. [5]

The situation is similar for costs that are allowed to be added to the tax roll for a parcel of land, pursuant to sections 553 or 553.1 of the MGA, such as enforcement costs for unsightly property,[6] or costs associated with tax recovery proceedings.[7] The MGA specifies that an amount added to the tax roll in this way "is deemed for all purposes to be a" property tax, and "forms a special lien … in favour of the municipality from the date it was added to the tax roll."[8]

2 RSA 2000, c G-2.

3 RSA 2000, c P-26.4.

4 MGA, s. 346.

5 See also *Royal Bank of Canada v. Lawton Development Inc.*, 19 MPLR (2d) 170, 1994 CarswellOnt 599.

6 See e.g. MGA, s. 553(1)(c).

7 See MGA, s. 553(1)(f).

8 MGA, ss. 553(2), 553.1(2).

B. Attachment to the Tax Debtor's Property

What property does the special lien attach to?

The answer to this depends on the type of tax that gives rise to the special lien. The special lien will attach to goods, land and improvements or to all of the debtor's assessable property within the municipality, depending on the type of tax giving rise to the special lien.

A quick reference guide is set out below:

Type of Tax	Property the Special Lien Attaches To
Property tax (unless otherwise listed below)	"Land and any improvements to the land" – s. 348(d)(i), MGA
Special tax	"Land and any improvements to the land" – s. 348(d)(i)
Clean energy improvement tax	"Land and any improvements to the land" – s. 348(d)(i)
Local improvement tax	"Land and any improvements to the land" – s. 348(d)(i)
Business tax	"goods" – s. 348(d)(ii)
Well drilling equipment tax	"goods" – s. 348(d)(ii)
Property tax imposed on a designated manufactured home in a manufactured home community	"goods" – s. 348(d)(ii)
Community aggregate payment levy	"Land and any improvements to the land" – s. 348(d)(i) and "goods" – s. 348(d)(ii)
Community revitalization levy	"Land and any improvements to the land" – s. 348(d)(i)
Property tax imposed on linear property (e.g. oil and gas wells, pipelines)	"all the debtor's assessable property located within the municipality, including any assessable improvements to that property" – s. 348.1(2)(b)
Property tax imposed on machinery and equipment	"all the debtor's assessable property located within the municipality, including any assessable improvements to that property" – s. 348.1(2)(b)

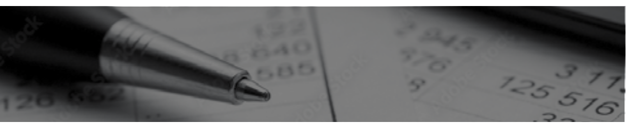
In the table, there are two MGA sections referenced — section 348.1, which governs linear property and machinery and equipment taxes, and section 348, which governs all other taxes (including property taxes on a parcel of land). Originally there was only section 348; that section has been in force for several years. Section 348.1 was passed much more recently to deal specifically with linear property and M&E taxes, for reasons that will be discussed below.

Scope of the special lien under section 348 (for all taxes besides linear and M&E)

You may notice that the phrases "land and any improvements to the land" and "goods", found in section 348 of the MGA, are somewhat ambiguous. We know that the special lien for a tax on a parcel of land attaches to "land and any improvements to the land", and we know that the special lien for a business tax attaches to "goods". But this leads to the question: *which* land, and *which* goods?

To illustrate why this is an issue, consider the following example. Suppose a landowner owns multiple parcels within a municipality, as well as several other parcels outside of the municipality elsewhere within Alberta. Suppose also that the landowner fails to pay the property taxes for just one of the parcels within the municipality. In this case, does the special lien attach to:

"A lien is a type of security interest that attaches to particular property in order to secure the payment of a debt, or the performance of some other obligation, that is owed to a creditor."



a. Just the parcel on which taxes are owing?

b. All parcels the landowner owns within the municipality?

c. Or, all parcels the landowner owns within Alberta?

The language "land and any improvements to the land" alone provides only limited clarity as there is no explanation given as to which land and improvements the special lien attaches to.

The courts have given a partial answer to this issue, but not a complete one. In the cases of *Regent Resources Ltd. (Re)*[9] and *Alberta Treasury Branches v. COGI Limited Partnership*,[10] there were a number of municipalities that were owed property taxes. They argued that the special lien applies to all of a tax debtor's land in Alberta. The Court of King's Bench disagreed, determining that the special lien cannot extend to land located outside the municipality.

The Court did not decide whether the special lien is limited to the land on which the tax is levied, or can extend to other land within the municipality. Instead, it left this an open question.

The result is that it is not clear whether the special lien under section 348 of the MGA where it attaches to "land and any improvements to land", applies just to the land that is taxed, or to any land of the tax debtor within the municipality. Until the Court gives us further guidance on this point, this will continue to be an unresolved question. At a minimum though, the special lien will attach to the parcel of land that is taxed.

The courts have also not confirmed the scope of "goods" pursuant to section 348(d)(ii) of the MGA. Thus, for business taxes, well drilling equipment taxes, and other taxes where the special lien attaches to "goods", it is an open question which "goods" the special lien applies to.

Scope of the special lien under section 348.1 (for taxes on linear property and M&E)

You may also notice that the description of property that taxes on linear property and machinery and equipment attach to "all the debtor's assessable property located within the municipality" is much more detailed, and broadly worded than the descriptions for other types of taxes. That is because, as mentioned earlier, the special lien for linear property and machinery and equipment taxes is set out in a separate, and newer, section of the MGA (348.1 versus 348).

Section 348.1 is a relatively new section of the MGA. It was created by the Government of Alberta in response to a 2019 decision by the Court of Appeal: *Northern Sunrise County v. Virginia Hills Oil Corp.*[11]

Virginia Hills involved a dispute between three municipalities and two lenders (Scotiabank and ATB), in relation to the insolvency of two oil and gas companies. The lenders, seeking to have their claims against the companies paid out ahead of the municipalities, and the court-appointed receiver, argued that taxes on linear property — of which significant amounts were outstanding — do not qualify as "property tax" to which the original special lien under section 348 applies.

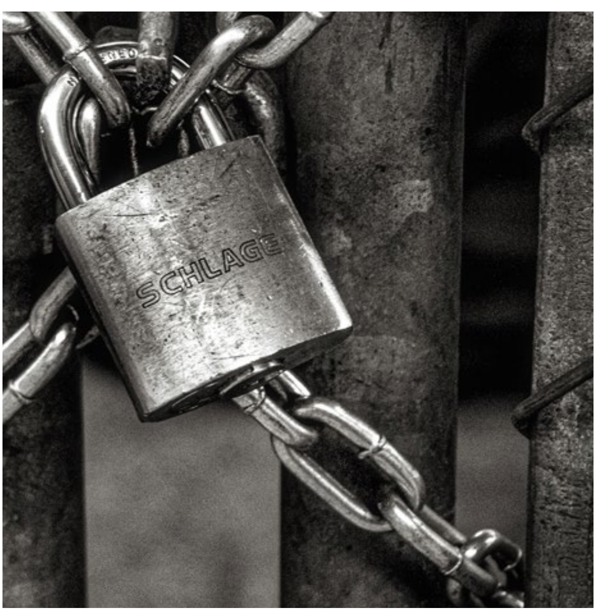
The Court of Appeal accepted the position of the lenders and the receiver. The Court held that taxes on oil and gas wells and pipelines did not benefit from the special lien at all. These linear property taxes were considered unsecured, and would be paid only after all other secured creditors, including the lenders in this case, were first paid in full.

9 2018 ABQB 669.

10 2019 ABQB 94.

11 *Northern Sunrise County v. Virginia Hills Oil Corp.*

Today, linear property taxes have a secured status just like other taxes, *and* their special lien attaches to a wider scope of property than other taxes.



Considering how damaging that outcome was to municipalities' efforts to recover unpaid taxes from oil and gas companies, the Government of Alberta added section 348.1 to the MGA to, among other things, establish a special lien for linear property taxes.

Section 348.1 clarified that a special lien does apply to linear property taxes and machinery and equipment taxes. It also went further than section 348, by specifying not only that a special lien for linear property and machinery and equipment taxes attaches to land and improvements, but also to <u>all the debtor's assessable property located within the municipality.</u>

While, like the section 348 special lien, the scope of the section 348.1 special lien stops at the municipality's borders, this is still a very broad scope of assets covered by the lien. It means that if, for example, an oil and gas company fails to pay taxes on a particular well in the municipality, the special lien attaches to <u>all</u> of the company's wells within the municipality, and any other assessable property it may own or be the assessed person for. This would even include new wells that are not taxable due to the Government of Alberta's temporary tax holiday for new wells and pipelines.[12] As long as the asset is "assessable property" and within the municipality, it will be subject to the special lien.

The shift here is significant. Just two years ago, municipal property taxes on linear property were in an extremely weak position, to be paid only if all secured creditors are paid first. The situation is now very different. Today, linear property taxes have a secured status just like other taxes, *and* their special lien attaches to a wider scope of property than other taxes. In that sense, linear property taxes are now in a stronger position than any other kind of municipal tax.

Notably, this strong position applies even to taxes that came due before section 348.1 came into effect. Section 348.1(4) provides that the special lien on linear property and machinery and equipment applies "regardless of whether the debt became due before or after the coming into force of this section." As a result, there is largely no issue as to *which* outstanding linear property taxes receive the protection of the special lien — all of them do. This does not mean that recovering taxes that are years old will necessarily be easy — there may limitations and challenges to doing this, as will be discussed later in this resource — but it does mean that *Virginia Hills* is no longer an obstacle for any linear property tax, regardless of when it was levied.

12 In October 2020, the Government of Alberta announced that all new wells and pipelines would not be taxed for the 2022, 2023, and 2024 tax years. See the following Government of Alberta resource: https://www.alberta.ca/release.cfm?xID=7450191EACDD1-D715-3078-59DF6480E106FC9E.
See also the following RMA resource: https://rmalberta.com/news/government-of-alberta-announces-assessment-and-tax-initiatives-for-oil-and-gas-properties/.

C. Using the Special Lien

Does a municipality need to register the special lien to benefit from it?

No. This is something else that makes the lien "special".

While commonly, liens must be registered in the Personal Property Registry or at the Alberta Land Titles Registry in order to take effect, to acquire priority over other interests, or to remain in existence, the special lien does not require those steps.

Sections 348 and 348.1 simply declare that the special lien exists for taxes owing to a municipality, and places no obligation on municipalities to register the special lien anywhere.

There is nothing in the *Land Titles Act*[13] (or in other sections of the *Municipal Government Act*) requiring that the special lien be registered with the Land Titles Registry in order for it to attach to land or improvements to land. As part of the tax recovery process for parcels of land, tax recovery notifications are registered with the assistance of the Registrar (see Part 10, Division 8 of the MGA). However, these are simply notices designed to warn of an impending sale and do not affect the existence, or non-existence, of the special lien. If a tax recovery notification has not yet been registered for a parcel, it <u>does not</u> mean that there is no special lien on the outstanding taxes in respect of that parcel.

As well, the *Personal Property Security Act*[14], which governs the Personal Property Registry and requires certain interests to be registered, does not apply to liens granted by statute (see s. 4(a)). There is, accordingly, no requirement to register the special lien at the Personal Property Registry. As part of the tax recovery process for designated manufactured homes (see Part 10, Division 8.1 of the MGA), municipalities are required to register tax recovery liens at the Personal Property Registry. But again, these registrations are distinct from the special lien. They are simply about notifying the owner of the Designated Manufactured Home, and other interested creditors, that the Designated Manufactured Home will be sold in the foreseeable future.

While registering the special lien in the Personal Property Registry is not required, it is also not prohibited either and doing so may provide certain advantages for municipalities, depending on the type of tax. This is discussed in more detail later in this resource, in Part 2.

"While the special lien is largely a passive tool, this does not, however, mean that there are no mechanisms for the *active* enforcement of tax debts."

13 RSA 2000, c L-4

14 RSA 2000, c P-7

How can a municipality enforce the special lien?

There is no specific mechanism in the MGA to enforce the special lien. Instead, the lien works passively by placing the municipality's taxes into a strong priority position, which the tax debtor or other creditors are then incentivized to deal with to avoid having their property "tied up" by the municipality's tax claims.

Consider, for instance, the position of a property owner that wants to sell an asset that is subject to outstanding taxes. The existence of the outstanding taxes does not legally prevent them from selling the asset; however, if they do, the special lien still attaches to the asset, even once it is in the hands of the new owner. The municipality will still be able to enforce its taxes against the asset, and the new owner will be liable for those taxes.

This disincentivizes potential purchasers from acquiring the asset, at least not without a reduction in the purchase price to reflect the amount of the taxes owing on it or without addressing the outstanding taxes as part of the sale (for example, by requiring that a portion of the purchase price be paid directly to the municipality to resolve the outstanding taxes). So, the property owner may be practically, even though not legally, forced to address the outstanding taxes in order to deal with the asset as the tax debtor sees fit.

Another example that illustrates this "tying up" of property is where a tax debtor is seeking financing from a mortgage lender in relation to a parcel of land upon which taxes are owed. Because of the strong priority of the special lien, the mortgage lender will likely refuse to advance funds to the tax debtor, given that the property that will be relied on to secure the mortgage is already encumbered by a higher-ranking charge (the municipality's special lien for outstanding taxes). Accordingly, a sophisticated lender will pressure the tax debtor to address the outstanding taxes as a pre-condition to providing financing.

There are even situations where a lender may, depending on the terms of any existing financing agreement between the lender and the tax debtor, choose to simply pay out the municipality's taxes itself and charge those expenses to the tax debtor in order to stop an upcoming tax sale, or just to stop penalties from accruing over time. Most mortgages, for example, enable the lender to do just this, and then add the amount paid to the lender to the balance owed by the debtor.

While the special lien is largely a passive tool, this does not, however, mean that there are no mechanisms for the *active* enforcement of tax debts. In fact, there are several such tools available pursuant to the MGA. They work in tandem with the special lien — separately, but working toward the same goal. The existence of the special lien enhances the effectiveness of these tools, and in some cases, is what makes the use of them possible.

These tools are:

A. Commencing a legal claim against the tax debtor (with the goal of eventually obtaining a judgment that can be enforced through remedies like garnishment);[15]

B. Sale of lands, or designated manufactured homes, by public auction through the process prescribed in the MGA (to recover property taxes on those assets);[16]

C. Issuing a distress warrant and seizing goods (available for certain kinds of taxes not related to land);[17]

D. Negotiating a tax repayment agreement with the tax debtor, to provide for the payment of outstanding taxes over time;[18]

15 See sections 411 and 438 of the MGA.

16 See MGA, Part 10, Divisions 8 and 8.1 (ss. 410-436.25).

17 See MGA, Part 10, Division 9 (ss. 437-452).

18 See MGA, ss. 347, 418(4).

“Where the insolvent tax debtor is not an oil and gas company, the municipality will generally be in a strong position to recover its taxes.“

E. Registering the special lien at the Personal Property Registry to provide additional notice of the existence of the special lien;[19]

F. Participating in regulatory processes or proceedings involving the taxpayer, where the presence of unpaid taxes is relevant to the issues considered by the regulator; and

G. In very rare cases, appointing a receiver to take control of the tax debtor’s assets, sell them, and distribute the proceeds to creditors.[20]

These tools will be discussed in more detail in Part 2 of this resource.

19 See Personal Property Security Regulation, Alta Reg 95/2001, s 2(d).

20 See *Judicature Act*, RSA 2000, c J-2, s 13(2).

D. The Special Lien and Insolvency

What happens to a municipality's outstanding taxes if a tax debtor is declared insolvent?

Sometimes, tax debtors not only fail to meet their obligations to pay taxes — they fail to meet their financial obligations generally, with numerous other creditors besides municipalities affected. When that happens, a few different things can occur:

- They can try to make a proposal to creditors, including the municipality, encouraging them to accept amounts lower than what is owing through a court-supervised process that will, if successful, see creditors voluntarily compromise their respective claims;
- They can voluntarily declare themselves insolvent by filing for bankruptcy, which will typically lead to the company's assets being liquidated and the process used to pay or partially pay creditors; or
- They can be declared insolvent at the initiation of a third party, and subjected to a receivership or bankruptcy proceeding before the courts where their assets will be sold off, and the proceeds used to pay creditors.

Municipalities may wonder: if this happens to a prominent tax debtor company operating in my municipality cannot successfully reach a proposal with its creditors, and is declared insolvent, how will my outstanding taxes be affected? Will they be paid, or not?

The answer, as is the case for many questions with a legal component to them, is "it depends".

To explain the factors that will determine the answer to this question in a given fact scenario, it is helpful to break the issue down, as follows.

Does the insolvency of a tax debtor mean that the special lien is removed, or no longer effective?

The answer depends on the type of tax involved but, for the most part, the answer to this question is "no".

Insolvencies in Canada are governed by the *Bankruptcy and Insolvency Act* (the "BIA").[21] The BIA generally aims to preserve priorities between creditors as they existed before the debtor became insolvent, without providing significant advantages or disadvantages to any party as a result of the insolvency proceeding having started.

However, the BIA does have an impact on the priority status of some interests. This is commonly due to situations where there is a conflict between the BIA and a provincial statute which establishes a secured claim, and gives that claim a certain priority. If the priority given by the provincial statute conflicts with the priority given to the claim by the BIA in an insolvency context, the BIA generally wins (this is due to federal paramountcy — where a federal statute and a provincial statute conflict, the federal act governs). This means that some interests are better off outside than inside an insolvency proceeding.

Section 136 of the BIA contemplates municipal taxes as being merely an unsecured claim, ranking behind all secured creditors with other unsecured claims. At first blush, this could indicate a conflict between the BIA and sections 348 and 348.1 of the MGA, with the special lien granted by those provisions not being effective in an insolvency. However, section 136 of the MGA specifically acknowledges that municipal taxes may "constitute a secured claim against the real property or immovables of the bankrupt". If this applies, the secured status of the municipal tax will be preserved, even in the insolvency context.

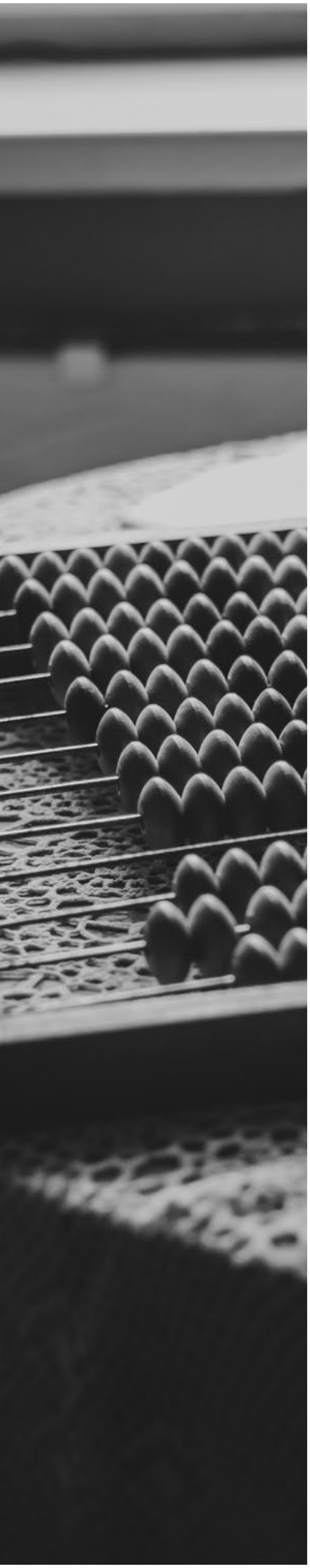
The bottom line here is:

- If the special lien attaches to real property, its status is protected in an insolvency context, and the taxes will keep their secured status and their priority.
- If the special lien does not attach to real property, its status is likely not protected and the taxes can be made to rank only as an ordinary unsecured claim.

Fortunately, most of a municipality's taxes will be of a kind that attaches to real property. As set out in the chart at 6, this includes most property taxes (including linear property and machinery and equipment taxes), special taxes, clean energy improvement taxes, and local improvement taxes.

This will not, however, include property tax on designated manufactured homes, business taxes, or well drilling equipment taxes — for these, the special lien only attaches to "goods" which is a type of personal property, not real property. Therefore, for these taxes, the special lien will generally not be effective in an insolvency context, and the municipality will only be paid these taxes if all secured creditors (and certain unsecured creditors) are paid in full first.

21 RSC 1985, c B-3.



Will unpaid property taxes, where the special lien attaches to real property, be paid out through the insolvency proceeding?

The secured status and priority of property taxes on land, linear property, or machinery and equipment is not disturbed when the company becomes insolvent. However, that does not necessarily mean that the municipality will be able to recover these taxes during an insolvency proceeding. A major determining factor will be whether the insolvent tax debtor is an oil and gas company.

Where the insolvent tax debtor is not an oil and gas company, the municipality will generally be in a strong position to recover its taxes. Sections 348 and 348.1 provide that the special lien will take priority over the claims of every person except the Crown. Therefore, unless there are competing claims by the Government of Alberta or by provincial entities, the municipality will generally rank ahead of every other creditor, and will be entitled to have its taxes paid out first from the proceeds of sale of the assets to which the special lien attaches. This may not result in full recovery — it would depend on how valuable the assets to which the special lien attaches are, and whether the value exceeds the taxes owing — but will in many (but not all) cases result in significant recovery.

Where the insolvent tax debtor is an oil and gas company, however, the situation is quite different and the municipality and the outcome from the perspective of a municipality is much less certain. Importantly, the bulk of the company's assets will typically be licensed oil and gas assets (e.g. wells, pipelines, and facilities) that are regulated by the Alberta Energy Regulator ("AER").

AER-regulated assets generally have significant environmental obligations associated with them. Under Alberta's oil and gas legislation, a company that receives a licence from the AER to use oil and gas assets also assumes end-of-life obligations for these assets. These involve such steps as plugging and capping oil wells to prevent leaks, dismantling surface structures, and restoring the surface to its previous condition. These obligations, which are very expensive to complete, are generally known as abandonment and reclamation obligations (or "ARO").

In cases where an oil and gas company cannot satisfy the ARO for its assets as required — such as when the company becomes insolvent — the AER relies on an organization called the Orphan Well Association ("OWA") to carry out the required cleanup activities. The OWA is an industry-funded agency that is separate from the AER, but works under the direction of the AER as its delegate. The OWA's mandate is to manage and remediate oil and gas properties that do not have a legally or financially responsible party that can be held to account.

Early in the life of an oil or gas well, ARO is generally not much an issue for the licensee, as the well will likely be productive and lucrative for many years to come, and ARO will not need to be addressed until far in the future. But once the well ages and becomes less productive, and the need to abandon and reclaim the well becomes more imminent, it becomes much more of a problem for the licensee — the well is essentially just a liability at that point. When an oil and gas company becomes insolvent, it will typically be in a situation where it has a high number of old and unproductive wells like this, and very few younger, more lucrative wells, leading to very high liabilities relating to ARO. In an oil and gas receivership, it is not uncommon for the total outstanding ARO associated with the company's licensed assets to cost hundreds of millions of dollars to address. This high level of total outstanding ARO, and the comparatively low value of the insolvent company's remaining assets, will be a significant impediment to the recovery of unpaid property taxes.

Why is outstanding ARO an obstacle to municipal taxes being paid in an oil and gas insolvency?

The answer, in short, is the Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*,[22] more commonly known as the *Redwater* decision.

In *Redwater*, the Supreme Court essentially decided that the AER has a super-priority for outstanding ARO. That is, when an insolvent oil and gas company has ARO outstanding, the proceeds of sale of the company's assets must be used to address ARO first, ahead of all secured creditors, including municipalities with a special lien.

Practically, this means that, while the AER is not considered a creditor — as it is technically only a regulator enforcing environmental legislation — it, together with the OWA as its delegate, effectively holds the status of a first-ranking creditor in any insolvency of an oil and gas company. If there is any significant outstanding ARO, the municipality is highly unlikely to see any of its unpaid taxes addressed through the insolvency proceeding.

Redwater was decided in early 2019, and since then there have been questions raised about how far the AER's super-priority extends. For example, *Redwater* did not address the status of municipal property taxes at all — *Redwater* did not state whether post-insolvency taxes (taxes levied on oil and gas assets during the insolvency proceeding, after it has already started) would also need to be paid only after all ARO is addressed. *Redwater* also did not definitively state whether proceeds from all of the company's assets, or only regulated oil and gas assets, would need to be used to satisfy ARO costs.

Unfortunately, courts that have considered these issues since *Redwater* have consistently ruled in ways that broaden the scope of the AER's super-priority (and consequently, narrow the ability of municipalities to recover anything from an oil and gas receivership on the basis of their special lien). For example:

- In *Manitok Energy Inc. (Re),*[23] the Alberta Court of Appeal determined that the AER's super-priority is not limited to licensed oil and gas assets, and that Redwater permits the AER to use the proceeds of "unrelated" non-oil and gas assets to address outstanding ARO.
- In *Orphan Well Association v. Trident Exploration Corp.*,[24] the Alberta Court of King's Bench agreed with the Court of Appeal in *Manitok*, and took the principle even further by stating that the AER can use the proceeds of all of the insolvent oil and gas company's assets, including a parcel of land like an office building. The Court also decided that that the AER's super-priority takes priority over even post-insolvency taxes accruing during the course of the receivership.

The end result is, for the insolvency of an oil and gas company, the municipality's special lien for unpaid taxes will be subordinate to outstanding ARO. Therefore, if all of an insolvent oil and gas company's outstanding ARO obligations are not resolved through sales of all of the assets to other, operational companies (which then adopt the corresponding ARO obligations) it is very unlikely that any taxes will be paid at all. Instead, any available funds would be diverted toward supporting the OWA's efforts in abandoning and reclaiming the company's licensed oil and gas assets.

22 2019 SCC 5.

23 2022 ABCA 117.

24 2022 ABKB 839.

Part 2: Tools to Enforce the Payment of Taxes Secured by the Special Lien

In the last part, we discussed how the special lien is a security interest granted by the MGA which encumbers certain property of the tax debtor, gives municipal taxes priority over every other creditor except the Government of Alberta in respect of that property, and has effect even without being registered. We also discussed some of the strengths and weaknesses of the special lien, and how insolvency may affect it, or the municipality's ability to recover taxes.

In this part, we now discuss the enforcement tools that may be used to recover unpaid taxes, and which leverage the special lien to pressure taxpayers into payment. As discussed on 10 in Part 1, these tools are:

A. Commencing a legal claim against the taxpayer (suing them);

B. For taxes on land or on designated manufactured homes, following the MGA's process to sell the land or designated manufactured homes by public auction;

C. Issuing a distress warrant and seizing goods;

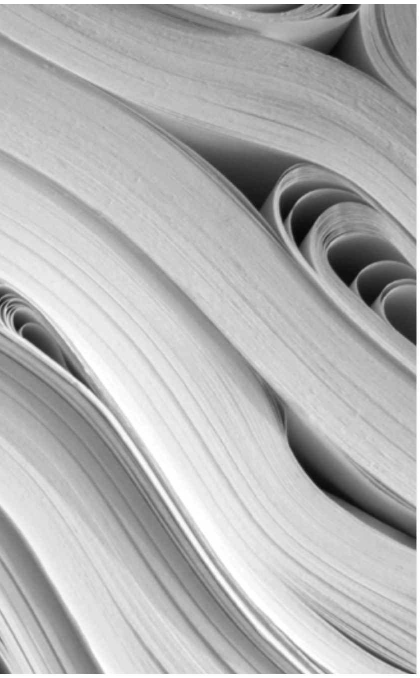
D. Negotiating a tax repayment agreement;

E. Registering the special lien at the Personal Property Registry; and

F. Participation in regulatory processes involving the taxpayer; and

G. In rare cases, applying to have a receiver appointed, with a view to liquidating the taxpayer's assets and distributing the proceeds to creditors.

Each of these options has different pros and cons, and may be more or less feasible depending on the type of taxpayer (and the type of tax that is outstanding). It is therefore beneficial for municipalities to become familiar with all these tools so the most appropriate one, or ones, can be used for the job in each case. The tax enforcement options discussed in this resource should be understood as a toolkit rather than as a checklist.



A. The Legal Claim

Sections 348 and 348.1 of the MGA not only provide that municipal taxes are a special lien — they also specify that taxes are a debt. This is important because, as a debt, taxes are enforceable in the same way as other debts. This means that municipalities can sue for payment of this debt.

Sections 411 and 438 of the MGA confirm this, as they provide that municipalities can attempt to recover tax arrears in accordance with any common law right (which includes the right to sue on a debt). These sections also specifically contemplate that a municipality "may start an action" — meaning a court action, a lawsuit.

The MGA does not, however, provide a process for suing tax debtors. Instead, municipalities must follow the *Alberta Rules of Court*, and other common law rules (that is, judge-made rules set out in case law) relating to litigation.

Starting the legal claim

"The Provincial Court generally does not have jurisdiction to hear a claim by a municipality for the recovery of taxes."

In Alberta, a legal claim in respect of unpaid municipal taxes can only be commenced in the Court of King's Bench, not the Provincial Court. The Provincial Court generally does not have jurisdiction to hear a claim by a municipality for the recovery of taxes.[25]

The claim is started when the municipality files a Statement of Claim in the Court of King's Bench. The Statement of Claim sets out the factual background for the legal claim, details the total taxes owed by the tax debtor, and explains to the Court what the municipality wants (i.e. judgment for the outstanding taxes).

It should be noted that a municipality <u>cannot</u> file a Statement of Claim if the municipality has progressed past a certain point with other enforcement methods (e.g. when the taxes are in respect of a parcel of land, and the parcel has already been sold at public auction;[26] or where the taxes are in respect of linear property, and the municipality has already seized the goods, thereby becoming the owner, and attempted to sell them at a public auction, thereby becoming the owner).[27]

In general, these prohibitions are about stopping "double-dipping" — if the municipality has already taken ownership of, or received proceeds from the sale of, property that was formerly held by the tax debtor, it should not be able to recover the taxes again through a separate legal claim. However, they also prevent a municipality from recovering a shortfall where the proceeds generated are not, or will not be, sufficient to fully address the taxes — in such a case, the municipality will not be able to commence a legal claim for the remaining outstanding taxes, as its authority to start an action will be extinguished at that point. This means that whenever a municipality is taking public auction steps against a parcel of land, or seizure steps against the goods of a tax debtor (more on those tools below), and is nearing the end of that process — it should recognize that the completion of that process may impact valuable rights to commence a legal claim.

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25 Provincial Court Act, RSA 2000, c P-31, s. 9.6(2)(e).

26 MGA, s. 411(2).

27 MGA, ss. 438.438, 448.

Reaching the conclusion of the legal claim

While litigation is often seen as a lengthy and complicated process, this is generally not the case for legal claims for the recovery of unpaid taxes. The facts will typically be very straightforward and leave very little room for the taxpayer defendant to argue that it should not have to pay. Arguments like:

- The municipality's taxes are unreasonably high;
- My properties should have been assessed at a lower value (when the taxpayer did not duly appeal the assessment as it had the right to do); or
- I am, or my company is, dealing with financial hardship;

are not legitimate legal reasons to neglect to pay municipal taxes, and are highly unlikely to succeed in Court.

Because of this, and because taxpayers are often aware of this, the commencement of a legal claim may prompt the taxpayer to offer to enter into a tax repayment agreement with the municipality (more on those later in this resource), to prevent the municipality from proceeding and obtaining judgment against it. Given the costs associated with litigation, the taxpayer may also simply choose not to participate, allowing the municipality to obtain a judgment without resistance from the taxpayer.

Once a judgment is obtained, the municipality can file a writ of enforcement with the court and subsequently in the Personal Property Registry. A "writ" is an essentially a form of court order which sets out a particular remedy; in the case of a writ of enforcement, the remedy is to authorize the municipality to use the typical civil enforcement mechanisms provided for in the *Civil Enforcement Act*.[28] The most relevant of these available mechanisms for our purposes, is garnishment.

A brief primer on garnishment

Garnishment is one of the two main remedies that the municipality gains access to after it achieves a successful judgment against a tax debtor and files a writ of enforcement. The other remedy is seizure; however, the MGA already gives municipalities certain seizure powers as a response to unpaid taxes (more on those below). So, the main benefit of obtaining the judgment and filing the writ of enforcement is access to garnishment.

Garnishment is the process whereby money that would otherwise be paid to a debtor is diverted to creditors instead. Most commonly, a municipality seeking garnishment would serve a document called a Garnishee Summons on a bank where the tax debtor has an account. The bank would then be required to pay money from the account into the Court. The Court distributes these funds among all creditors with writs, subject to any claims by secured creditors.

"Garnishment is the process whereby money that would otherwise be paid to a debtor is diverted to creditors instead. Most commonly, a municipality seeking garnishment would serve a document called a Garnishee Summons on a bank where the tax debtor has an account."

28 RSA 2000, c C-15.

"Pros" of the legal claim

A legal claim is a useful tool for municipalities seeking to enforce taxes because it:

a. Provides a concise statement of the municipality's grievance against the taxpayer and works as a natural "next step" after a municipality's informal demand for payment is ignored;
b. Is likely to get a taxpayer's attention in a way that a simple warning letter will not;
c. Can enable access to civil enforcement remedies, particularly garnishment;
d. Can be an effective way of pressuring a tax debtor into entering a tax repayment agreement; and
e. In respect of taxes on linear and machinery and equipment property, it can be used against both the owner of the property and the assessed person in respect of the property, where those are different persons[29] (commonly, oil wells are operated by one entity (the assessed person) but owned by another entity).

"Cons" of the legal claim

On the other hand, some weaknesses associated with commencing a legal claim are as follows:

a. Litigation is often expensive, and potentially prohibitively so when the outstanding taxes only amount to a few thousand dollars;
b. The process can conflict with other enforcement mechanisms available in the MGA, and may not be warranted when dealing with taxes on a parcel of land or on a designated manufactured home, given the less expensive, expeditious, and simpler public auction procedure that can be used to recover taxes in those instances;
c. Cost recovery is at the discretion of the Court, so some tax enforcement costs that may be recoverable when using another method may be denied by the Court;
d. It can be vulnerable to delay; there are notable risks to the validity of the legal claim in cases where the municipality moves slowly in bringing the claim or in carrying on the litigation;
e. When using garnishment, this is done on behalf of all creditors, so the municipality will likely have to share any proceeds with other writ creditors. Importantly, the special lien under section 348 and 348.1, regardless of the type of tax it arises from, does not apply to bank accounts or cash (as these assets are not land, improvements to land, goods, or assessable property). This means that the municipality will not be a secured creditor in respect of garnishment proceeds, and cannot use this as a basis to be paid ahead of other writ creditors; and
f. If the tax debtor is struggling financially and is on the brink of insolvency, the commencement of a significant legal claim may lead them to respond by ceasing operations and resigning themselves to insolvency. This may be disadvantageous with respect to an oil and gas tax debtor because, as discussed in Part 1, the abandonment and reclamation obligations of the company must be satisfied first, before taxes, and the municipality may not be able to recover any taxes in the event the company becomes insolvent.

29 See section 331(3) of the MGA.

B. Sale by Public Auction

For taxes on a parcel of land, or on a designated manufactured home, the MGA prescribes a process whereby, after the taxes have been outstanding for a sufficient period of time, the municipality is allowed to sell the parcel, or the designated manufactured home, at a public auction and put the proceeds of sale toward the outstanding taxes.

Because this enforcement method is only applicable for parcels of land (and designated manufactured homes), it is less relevant for recovery of oil and gas taxes. While a municipality may be able to sell a parcel of land upon which oil and gas assets are located (with notice given to the AER), oil and gas companies operating in Alberta typically do not own the land on which their assessed oil and gas assets are located, and so cannot be held liable for the taxes on such a parcel. Moreover, even where an oil and gas company does own a parcel of land, the public auction process can only be used to recover outstanding taxes on that parcel — the municipality cannot sell the parcel and immediately put the proceeds of sale toward all outstanding taxes the company owes, the proceeds can only be put toward the outstanding taxes on the parcel itself. A municipality may, pursuant to s. 428 of the MGA seek to retain proceeds from a sale of land to pay for other taxes owing to the municipality that give rise to a special lien pursuant to s. 348.1 of the MGA; however, that will require a court order.

It is rare that the public auction process will represent a viable way of enforcing outstanding taxes against an oil and gas producer.

Nevertheless, knowledge of the public auction process is important, as it represents the default approach to enforcing against outstanding taxes on parcels of land and designated manufactured homes. The remedies available to the municipality through this process are very powerful. If the municipality follows the prescribed process, it can sell the property unilaterally, without the consent of the property owner, and put the proceeds toward the outstanding taxes.

The process for the public auction is slightly different when dealing with a parcel versus a designated manufactured home, but both processes generally have the following broad steps:

a. A tax arrears list is prepared, with notice given to the taxpayer;
b. Notice of the outstanding taxes is registered, either through a tax notification registered at Land Titles (when dealing with taxes on a parcel), or through a tax recovery lien registered at the Personal Property Registry (when dealing with taxes on a designated manufactured home);
c. Notices and warnings are sent to the taxpayer, and anyone else with registered interests in the parcel or home;
d. The public auction is advertised; and
e. The parcel or home is then usually sold (either at the public auction itself, or later if the public auction was unsuccessful) and the proceeds may then be put toward the outstanding taxes.

"If the land is assessed separately, the public auction process would be available, but the problem is one of ownership — oil and gas companies operating in Alberta typically do not own the land on which their assessed oil and gas assets are located, and so cannot be held liable for the taxes on such a parcel."

"Pros" of the public auction process

The public auction process has a number of benefits when a municipality is seeking to recover taxes on a parcel of land or designated manufactured home:

a. The process is relatively straightforward and is less complex and costly than the typical litigation process;
b. The process and specific dates of the auction are controlled by the municipality, making things easier than, for example, trying to enforce a judgment alongside other creditors;
c. The final remedy that results from the process — a sale of the property being taxed, and putting the proceeds toward the outstanding taxes — is very powerful (other creditors' interests are generally subordinate to the municipality's claim for unpaid taxes); and
d. The proceeds of sale can also be used to cover, in addition to the outstanding taxes, reasonable expenses of the municipality in dealing with the property.

"Cons" of the public auction process

Some disadvantages associated with the public auction process under the MGA are:

a. It can only be used for taxes on parcels of land and on designated manufactured homes, through the prescribed process set out in Part 10, Divisions 8 and 8.1 of the MGA;
b. It moves slowly. Taxes on a parcel of land will generally need to have been outstanding for at least three years before the public auction can be held. For example, if the 2023 tax levy goes unpaid, and the owner makes no further payments, the parcel could only be added to the tax arrears list in early 2025, which would put the public auction date between April 2026 and March 2027 (see sections 412, 417, and 418 of the MGA).
c. There are a number of detailed steps that need to be completed along certain timelines, thereby creating some administrative burdens upon the municipality; and
d. Its success depends on the value of the property being sold. If the taxes outweigh the value of the parcel, then there will not be sufficient proceeds to cover the municipality's taxes, and the municipality will suffer a shortfall.

C. The Distress Warrant

Part 10, Division 9 of the MGA allows a municipality to issue a “distress warrant” against a tax debtor to recover certain taxes that are not related to land. This includes business taxes, well drilling equipment taxes, community aggregate payment levies, linear property taxes, and machinery and equipment property taxes.

A “distress warrant” is a written instruction to seize goods of a tax debtor, which will set out the debtor’s name, details as to the amount of the tax debt, and the location where the seizure will be carried out. “Goods” is a generic term that covers most personal property — from company vehicles, to office equipment, to small machinery, etc.

Following a certain period of time after the tax notice is sent, a municipality may issue a distress warrant and engage a licensed civil enforcement agency to seize goods. This can involve either removing the seized goods from the tax debtor’s premises, or leaving them on the premises subject to a bailee’s undertaking (pursuant to which, the seized goods are left on-site, subject to a commitment from the tax debtor not to remove them).

The seizure action would ultimately result in a notice of seizure being issued by the civil enforcement agency, giving details as to the goods that have been seized. The notice of seizure would then be registered in the Personal Property Registry, giving notice to other parties of the municipality’s seizure of the tax debtor’s goods.

The municipality would then be in a position to sell the goods via public auction (most likely, but not necessarily, with the assistance of a professional auctioneer to run the auction), and put any proceeds of sale toward the outstanding taxes.

“Pros” of the distress warrant:

A distress warrant has advantages in that:

a. It is a relatively simple and inexpensive response to outstanding taxes, and will generally be less expensive to carry out than a Statement of Claim process in the Court of King’s Bench;
b. It can be carried out relatively quickly, although there is a waiting period from the date the tax notice is issued;
c. If one seizure is carried out, and it appears that insufficient assets were seized to address the outstanding taxes, nothing in the *Municipal Government Act* prevents the municipality from carrying out a second seizure to seize more assets (though there will be increased costs associated with that of course); and
d. Once the goods are sold, the proceeds of sale can also be used to cover, in addition to the outstanding taxes, reasonable expenses of the municipality in dealing with the goods.

A distress warrant, though, has some disadvantages as well:

a. It is limited in terms of the types of taxes it can be used to enforce;
b. Because it relies on finding and then seizing goods with sufficient value to pay for the outstanding taxes, it is best suited for relatively small tax debts and would not be effective in dealing with a taxpayer owing larger amounts;
c. The success of the seizure may depend on how well the civil enforcement agency is instructed by the municipality (the agency will send a bailiff to carry out the seizures, but that bailiff will likely have only limited understanding of what valuable goods they may be likely to find unless the municipality gives them such background);
d. Some kinds of assets are impractical to seize (for example, the Alberta Energy Regulator will typically oppose attempts by municipalities to seize licensed oil and gas assets and prevent these assets from being sold to a new oil and gas producer);
e. If not done carefully and judiciously, seizure could (unintentionally) disrupt a tax debtor's operations and thereby inhibit their ability to pay other or future taxes (e.g. if all the office computers at the tax debtor's headquarters are seized and removed from the premises);
f. For unpaid taxes on linear property, machinery and equipment, and certain non-residential properties related to oil and gas activities, there is a longer waiting period before a municipality can enforce (120 days after the tax notice is sent); and
g. Unless the special lien is of a type that attaches to "goods" (e.g. business taxes, community aggregate payment levies) pursuant to section 348 of the MGA, the municipality will not have secured creditor status in respect of goods seized.

For example, if a municipality seizes an oil company's truck in response to outstanding linear property taxes, the special lien only attaches to "assessable property", and a truck is not "assessable property". This means that the municipality will rank behind other secured creditors in respect of the truck (like a financing company), and will likely only benefit from a sale of the truck will be sufficient to first pay out the entirety of the higher-ranking claim.

D. The Tax Repayment Agreement

In applicable circumstances, all of the previously discussed enforcement tools can be used, or threatened, against a taxpayer, with the goal of incentivizing them toward entering into a tax repayment agreement (i.e. as an alternative to having their property seized or sold, or having to defend against a legal claim).

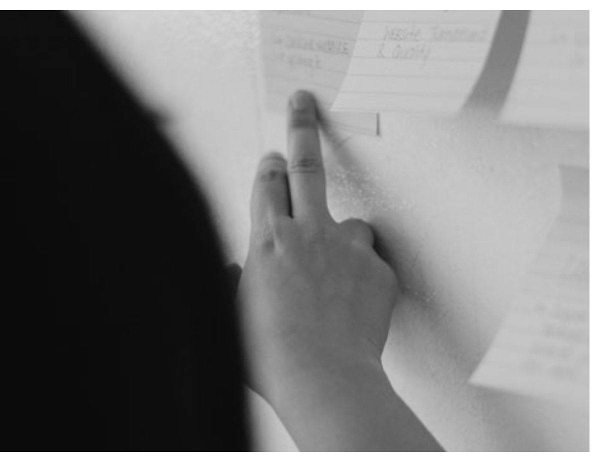
The authority to enter into a formal tax repayment agreement comes from a variety of sources in the MGA. First and foremost, section 6 of the MGA provides that a municipality has "natural person powers", meaning it can enter into contracts just like any individual can. Section 347 of the MGA adds another piece — it provides that Council may cancel, reduce, or defer taxes if it "considers it equitable to do so." The combined effect of these means that a municipality, with the approval of its Council, can enter into a contract with a taxpayer to allow for the repayment of taxes over time. As well, in respect of taxes on a parcel of land, section 418(4) also provides explicit authority to enter into a tax repayment agreement with a delinquent taxpayer (subject to a maximum repayment period of three years).

The result is that municipalities in Alberta are not required to demand that all outstanding taxes be repaid immediately, but have considerable discretion in how they address outstanding taxes. They can negotiate with delinquent taxpayers to allow them additional time to pay, they can cancel or defer some portion of the taxes, they can waive penalties that have already accrued, and they may attach conditions to any of these types of tax relief.

Such arrangements work particularly well in the case of an operating company that, because of temporary cash flow difficulties, has previously been unable to stay current with its debt obligations but can, with some latitude and time, become current again. The taxpayer is generally permitted to pay in instalments over time, making the required payment gradually.

Municipalities have broad discretion to set the terms of a tax repayment agreement, and can be creative in setting the terms of repayment in a manner that will achieve repayment in a manner that is workable for the taxpayer and acceptable to the municipality. For example, a tax repayment agreement may vary payment amounts over the term of repayment, or may vary repayment amounts to coincide with increases or decreases in commodity prices. While these types of repayment arrangements provide flexibility and are responsive to cash flow concerns of a debtor, they are also more difficult to administer. Municipalities should be conscious of these advantages and limitations of these approaches in considering how to structure a tax repayment arrangement with a taxpayer.

The terms of a particular tax repayment agreement are always highly fact-specific and it is advisable to seek legal advice before entering into one, or before using one that the municipality has drafted on its own.



Preparing the tax repayment agreement

The terms of a particular tax repayment agreement are always highly fact-specific and it is advisable to seek legal advice before entering into one, or before using one that the municipality has drafted on its own. That said, a tax repayment agreement will typically address such topics as:

a. Acknowledgment of the debt, and confirmation of the amount of outstanding taxes owing;
b. The required payment schedule and timelines;
c. The consequences if the taxpayer stops making payments over time; and
d. How penalties that accrue during the term of the agreement are dealt with.

Some of the contents of a tax repayment agreement will depend on the type of tax it addresses. For example, as mentioned above, section 418(4) of the MGA provides that a tax repayment agreement in respect of property taxes on a parcel of land cannot be paid over a period that exceeds three years in length. Tax repayment agreements for other types of taxes do not have this restriction, and so this allows for greater flexibility in setting repayment terms (provided always that such terms are considered to be equitable by Council). For example, a tax repayment agreement in respect of linear property taxes, levied on oil and gas wells, could in theory be structured so that the payment instalment amounts vary with commodity prices, or with the production from the oil and gas wells that are taxed (the agreement could require the taxpayer to disclose this information on a structured basis).

In any case, care should be taken to ensure that any tax repayment agreement entered into:

- Complies with the MGA, including the requirement for equity in section 347; and
- Provides a reasonable and realistic means for the taxpayer to repay the tax debt over time.

"Pros" of the tax repayment agreement

A tax repayment agreement:

a. Offers an effective solution where the taxpayer's problem is ability to pay (i.e. cash flow concerns), rather than willingness to pay;
b. Is likely the least time and effort-intensive option available, given that it involves reaching agreement with the taxpayer rather than taking steps against them;
c. Can be useful even if it is breached, as the fact that they signed the agreement and acknowledged the taxes owing can expedite the legal process of establishing their liability in a legal claim; and
d. Can include incentives for timely payment, such as by offering a reduction in penalties on the condition that all payments are made on time (this would require Council approval).

"Cons" of the tax repayment agreement

On the other hand, some drawbacks of resolving taxes through a tax repayment agreement are that:

a. Council must consider whether the agreement would be equitable with respect to other taxpayers (see s. 347 of the MGA);
b. Other taxpayers who become aware of the tax relief granted by the municipality to another party may attempt the municipality to provide them with similar tax relief;
c. Taxpayers may see willingness by a municipality to enter into a tax repayment agreement as a reason to become lax with their payment of taxes, thinking they can avoid paying by the annual deadline and simply enter into an agreement later; and
d. Taxes are recovered incrementally over a period of time rather than all at once.

"The Personal Property Registry functions as a kind of public bulletin board where a creditor can let other parties know that they have an interest in a particular debtor's assets."

E. Registration of the Special Lien at the Personal Property Registry

The next tool to discuss is a single step, one that does not replace any of the other enforcement options discussed above, but may be very useful with respect to certain types of taxes. That step is the registration of the special lien in the Personal Property Registry.

Earlier in this resource, we discussed how registration of the special lien is not required for it to be effective. While that is true, registration of the special lien can still be useful in cases where the special lien does, or might, attach to personal property.

This step should not be confused with registration of a writ of enforcement in the Personal Property Registry, once the municipality obtains a legal judgment against the tax debtor (see the discussion on page 18). Here, we are not registering a writ of enforcement that we have obtained through successful litigation; we are registering the special lien itself, as a "statutory charge". This step can likely be done as soon as taxes are past due.

Authority to register the special lien

The authority to register the special lien in the Personal Property Registry arise from section 2 of the Personal *Property Security Regulation*, which provides that a "statutory charge" may be registered in the Personal Property Registry. "Statutory charge" is defined to include a "lien" that affects property and is created under an enactment in force in Alberta. This definition includes the MGA special lien, which is a lien in favour of unpaid property taxes established by the MGA.

To register the special lien in the Personal Property Registry, the municipality must file a document called a financing statement. That document should include the tax debtor's name and contact information, the total amount of outstanding taxes owing, the municipality's name and contact information, and a description of what the special lien attaches to (including a reference to section 348 or 348.1 of the *Municipal Government Act*, as applicable).

Because registration of the special lien has not been done historically by municipalities, there may be some difficulty in dealing with registry agents, who will not be used to seeing this type of registration. However, registration of the special lien is authorized by statute. Legal assistance may be useful to assist with the registration process.

Importantly, because this involves registering only a statutory charge, taking this step does not open up access to additional enforcement mechanisms (e.g. garnishment) in the same way that registration of a writ of enforcement does. Registering a statutory charge only allows for new enforcement mechanisms to be used if the governing statute says it does. The MGA does not provide for this, nor does it even contemplate that the special lien might be registered in the Personal Property Registry.

Why register the special lien?

One may reasonably ask, if registering the special lien in the Personal Property Registry is not a requirement, and does not enable access to further enforcement mechanisms — then why bother?

The main reason is notification of other parties, especially creditors. The Personal Property Registry functions as a kind of public bulletin board where a creditor can let other parties know that they have an interest in a particular debtor's assets. Parties can search and determine whether a particular individual or company has other creditors' interests registered against them, and assess the risk of entering into a transaction, or extending credit, based on their findings.

Therefore, when a municipality registers its special lien in the Registry for unpaid taxes, it has the potential to get the attention of creditors, lenders, and other parties that are dealing with the taxpayer.

Because the special lien is so powerful in terms of the priority it gives taxes, the appearance of the special lien in the registry may incentivize creditors and lenders to either put pressure on the taxpayer to pay the taxes, or potentially address the taxes themselves. Because the taxes will likely come ahead of the particular creditor or lender in priority, existing or prospective lenders to the tax debtor will be more likely to raise the unpaid taxes as a concern with the tax debtor and required the tax debtor to address the outstanding taxes if the existing loan agreement or as a precondition to extending further financing.

Registration also helps notify third parties who may be interested in purchasing assets upon which taxes are owing. If a prospective purchaser sees a special lien registration in relation to assets they are looking to purchase, they may seek to put pressure on the vendor to address the taxes prior to the sale — or they may ask for a reduction in the purchase price, with a view to paying the taxes after the purchase is complete. Either situation is beneficial to the municipality.

To clarify, none of this should be taken as a suggestion that third parties cannot be expected to be aware of outstanding taxes if a municipality does not register the special lien. A third party who is looking into purchasing an oil and gas asset, for example, should know that it can always request a tax certificate from the municipality where the asset is located to see what tax is owing on the asset (and the municipality should be more than willing to provide this information — it can even provide a breakdown of all the taxes owing on all the assets of the vendor). It is up to the third party to perform reasonable due diligence and make itself aware of relevant interests in the oil and gas property. Still, registration provides an additional, useful means to increase the likelihood of repayment.

When to register the special lien?

It is important to note that the Personal Property Registry covers only personal property, not land. So while technically, the special lien could be registered in the Personal Property Registry regardless of what type of taxes it pertains to, registration makes the most sense for taxes where the special lien attaches to “goods” (business taxes, community revitalization levies, etc.), or where it attaches to “all the debtor’s assessable property located within the municipality” (linear property and machinery and equipment).

For these types of taxes, the special lien either clearly applies to, or could apply to, personal property (in the case of linear property and machinery and equipment, “assessable property” may in some instances include personal property). If a creditor has an interest in the taxpayer’s personal property, that creditor’s priority may be undermined by the existence of outstanding taxes.

This risk is not present for taxes on a parcel of land, for example. In that case, the special lien would only apply to “land and improvements to land” which excludes personal property. So the special lien, and the associated priority, would not attach to whatever personal property the creditor has taken security in, meaning there is much less of a concern of the creditor losing a priority contest with the municipality. Registration may still be used to give creditors notice of the tax debtor’s delinquency, and could prompt them to ask questions of the debtor. However, the same incentive for a creditor to pressure the tax debtor to satisfy the municipality’s taxes is not present.

F. Participation in Regulatory Matters Concerning the Taxpayer

Municipalities commonly wonder whether they can use their regulatory authority with respect to matters like land use planning to enforce the payment of taxes — for example, it is often asked whether a municipality can refuse to process or grant a development permit application unless the applicant's outstanding taxes are paid first.

Typically, this is not permissible and would be considered an improper use of the municipality's regulatory powers. There no express or implied authority under the *Municipal Government Act* to use the municipality's regulatory authority in this manner, meaning that such action would be unlawful. Regulatory powers must be used for the purposes for which they were intended, rather than for unrelated purposes like tax recovery. Planning decisions, for example, must be made based on valid planning reasons — not to punish parties for non-payment of taxes.

However, there are regulatory entities in Alberta who do have the authority to consider unpaid taxes in exercising their regulatory authority. Some important examples are:

- The Alberta Utilities Commission ("AUC"), in considering applications for a hydro development, power plant, transmission line, or gas utility pipeline, must consider whether such developments are "in the public interest". Unpaid taxes may be relevant consideration in this respect.[30]
- The Alberta Energy Regulator, in considering applications for new oil and gas licences, or applications for transfers of existing oil and gas licences (e.g. through sales), has a new and "holistic" approach which looks toward whether the applicant "poses an unreasonable risk" — and one factor that the AER may consider in assessing this is "outstanding debts owed for municipal taxes".[31]

There are times when a delinquent taxpayer may seek these types of regulatory approvals in the course of this business, such as when an oil and gas company seeks to build a small power plant to address its energy needs for a particular site, or seeks to acquire certain well licences from another company. In such cases, the municipality can seek to become involved in the approval process and make the unpaid taxes, and the municipality's concerns respecting them, known to the regulator. This may result in the taxpayer feeling pressure to address the taxes so as to avoid an unfavourable decision from the regulator, or may result in the regulator directly applying pressure on the taxpayer to address the taxpayer.

Involvement in AER approval matters

When an oil and gas company applies for a new licence or for the transfer of an existing licence, a municipality is able to participate in that application process by filing a document called a Statement of Concern. A Statement of Concern is a mechanism, set out in the *Responsible Energy Development Act*,[32] whereby a party who considers itself to be directly and adversely affected by an application to the AER can make its concerns known to the AER.

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30 See section 17 of the Alberta Utilities Commission Act, SA 2007, c A-37.2.

31 See AER Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals, section 4.5; AER Directive 088: Licensee Life-Cycle Management, section 2.

32 SA 2012, c R-17.3.

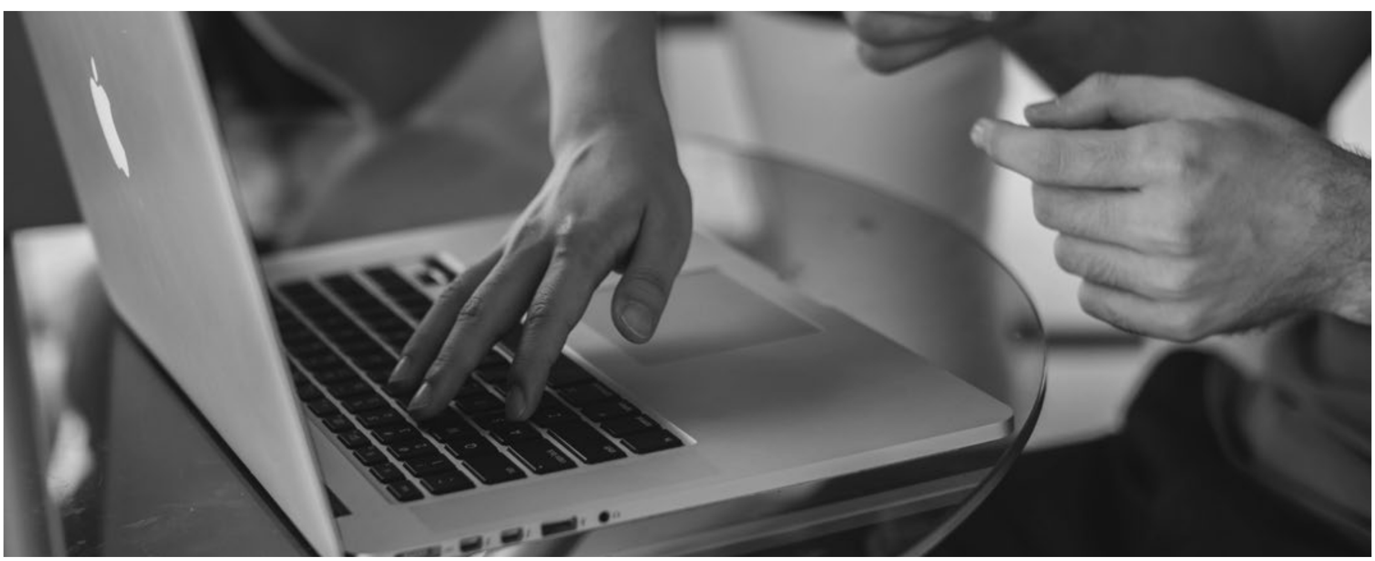
Using the Statement of Concern, the municipality can describe its concerns with the company's application in relation to the outstanding taxes. For example, in an application by an oil and gas tax debtor to acquire an existing licence from another company operating in the municipality, the municipality can point out that the tax debtor has failed to meet its tax obligations with respect to its existing portfolio of assets — and so it is concerned that the same thing will happen in respect of any new assets it acquires within the municipality.

There may be deadlines, both legal and practical, for filing a Statement of Concern in respect of a particular AER application, so it may be prudent for municipalities to regularly search the AER's website for any new applications involving a particular oil and gas tax debtor. If the municipality finds one, it can then consider submitting a Statement of Concern.

It should be noted that participation in this manner does not guarantee that the AER will refuse to grant the company's application. Under its governing legislation, the AER has a wide discretion in deciding whether to allow new licences or licence transfers, and unpaid taxes are just one of many factors it may consider. There are signs, however, that unpaid taxes will be an increasingly important consideration for the AER in the future. Most significantly, on March 16, 2023, the Minister of Energy signed Ministerial Order 043/2023, which essentially directs the AER to require, as a condition of approving a new well licence or transfer of an existing well licence, confirmation that the transferor or transferee either has no outstanding municipal tax arrears exceeding $2,000 provincewide, or has entered into a payment plan for such taxes.[33]

At the time of writing (spring 2023), the full impact of the Ministerial Order is unknown. In conjunction with Municipal Affairs, the AER has developed a system for gathering unpaid tax information directly from municipalities on a quarterly basis, with initial municipal data requested by April 30, 2023. At this point, the initial data has presumably been collected, but has not yet been used to inform a license approval or transfer request. Even when the new data is used by the AER, the full legal impact of this change is something that may not be immediately clear, and may need to be explored through AER regulatory decisions or even court decisions.

Accordingly, municipalities should follow this issue closely to see what new processes and requirements ultimately result from the Ministerial Order, and consider how they can best become involved in them to inform the AER about outstanding taxes owed by oil and gas licencees.



33 See the following link to the Ministerial Order: https://open.alberta.ca/publications/energy-043-2023.
See also the news release that accompanied this Order: https://www.alberta.ca/release.cfm?xID=86773FBAC4491-C8E6-9165-B46EC9F21FDD894D

Involvement in AUC approval matters

Where a taxpayer applies for regulatory approval from the AUC, this may require notice to be given to various potentially affected parties, including municipalities. If the municipality receives that notice, or learns of the application through other means, the municipality may file a Statement of Intent to Participate in the proceeding. This document allows the municipality to declare its intention to become involved in the regulatory proceeding, and to set out its interests and concerns with what the taxpayer is applying for — which can include considerations as to unpaid taxes.

The municipality may then, subject to the AUC's discretion, be allowed to participate in the proceeding and make submissions. The extent of the municipality's involvement may depend on whether the AUC considers that the municipality is "directly and adversely affected" by the application, as this is the standard test for whether a third party can participate fully in the proceeding.[34] However, even where the AUC decides that a municipality is not "directly and adversely affected" by an application, it still has the discretion to allow a municipality to participate in a more limited capacity.

For example, in AUC Proceeding 27527, relating to an energy company's application for a power plant to run a bitcoin mine, the AUC determined that the municipality did not successfully demonstrate that it was directly and adversely affected by the application, but it still allowed the municipality to make a written submission outlining its concerns. Those concerns were then considered and referenced in the AUC's ultimate decision refusing to approve the power plant. In Decision 27527-D01-2023, the AUC noted, in finding that the power plant was not in the public interest, that "the Commission would have benefitted from evidence from [the taxpayer] establishing a stronger track record of proactively addressing both its tax liability with the Municipality and its non-compliance history with the AER."[35]

While this decision is encouraging, it should be kept firmly in mind that unpaid municipal taxes was just one of many problems facing the taxpayer in seeking approval for the power plant. There is no suggestion that the AUC now plans to use its regulatory authority to force applicants to address unpaid taxes, or that keeping current with taxes is now a requirement for receiving regulatory approval from the AUC. Still, this decision shows that the AUC may choose to consider an applicant's unpaid tax status as part of its overall consideration of the public interest, meaning that participation in AUC proceedings involving the taxpayer may be of some benefitting in incentivizing payment of taxes.

34 See Alberta Utilities Commission Act, section 9(2).

35 Decision 27527-D01-2023, page 36.

G. Appointing a Receiver

The seventh and final enforcement tool we will discuss in this resource is also the most drastic and the most seldom-used by municipalities (and not without good reason). In exceptional circumstances, it may be necessary for a municipality to seek to have a receiver appointed in respect of a company by bringing a court application to 1) declare the tax debtor insolvent, and 2) appoint a receiver to take control of the tax debtor, sell its assets, and use the proceeds of sale to address outstanding taxes.

What is a receiver?

A receiver is, in general terms, a court-appointed entity tasked with managing the assets of a company that has become insolvent. Receivers must be licensed insolvency trustees, and most major receiverships are run by accounting firms.

Once the receiver is appointed and the company declared insolvent, the company placed into receivership loses the right to manage its assets normally. The receiver is empowered to take possession and control over the entirety of the company's assets. There is also generally a stay of proceedings granted by the court, preventing creditors from independently exercising any enforcement remedies against the company's property. Instead, creditors are required to pursue their claims through a process overseen by the receiver.

The receiver's task will typically be to sell all of the company's assets and put the proceeds toward the outstanding debts of the company's creditors (with deductions for the receiver's fees and expenses). However, the receiver may also choose to keep the company operating for a time, with the goal of generating revenue from the company's activities that can be used to address outstanding debts or as a means of potentially selling the entire company and all of its assets as a going concern.

In many cases, and in most cases involving oil and gas debtors, the debtor company does not survive the receivership process, but is simply dissolved once its valuable assets are sold and the proceeds distributed to creditors. This makes a receivership a very significant step to take that should not be done lightly. However, in ideal circumstances, the debtor company remains sufficiently viable such that the entire company can be successfully marketed as a going concern. Whether that is possible will depend entirely on the financial status of the debtor company, and the quality of the assets that it owns.

Starting the receivership

The MGA does not provide any express authority to municipalities to commence a receivership in order to pursue the recovery of outstanding taxes. However, in Alberta, the *Judicature Act* provides the Court a broad authority to appoint a Receiver.[36] The Court of King's Bench is empowered to appoint a receiver wherever the Court considers it just to do so. This includes situations where the debtor company has defaulted on its obligations to multiple creditors, where its liabilities exceed its assets, or where the company has simply ceased operations and is no longer making any efforts to meet its financial obligations as they become due.

In order for the Court to appoint a receiver, someone must ask the Court to do so. Commonly, the senior secured creditor (the secured creditor whose claim is first in

36 RSA 2000, c J-2, s 13(2).

priority) will make a formal court application, requesting the Court to make an order placing the debtor company into receivership and setting out the receiver's powers and rights in detail.

A receiver appointed by the Court is an officer of the Court and acts on behalf of all creditors with claims against the debtor company. A receiver is required to consider and respect the interests of all parties, though the order of priorities will necessarily mean that the receiver will be required to subordinate the interests of unsecured creditors behind the interests of higher priority creditors.

Cautions when considering a receivership

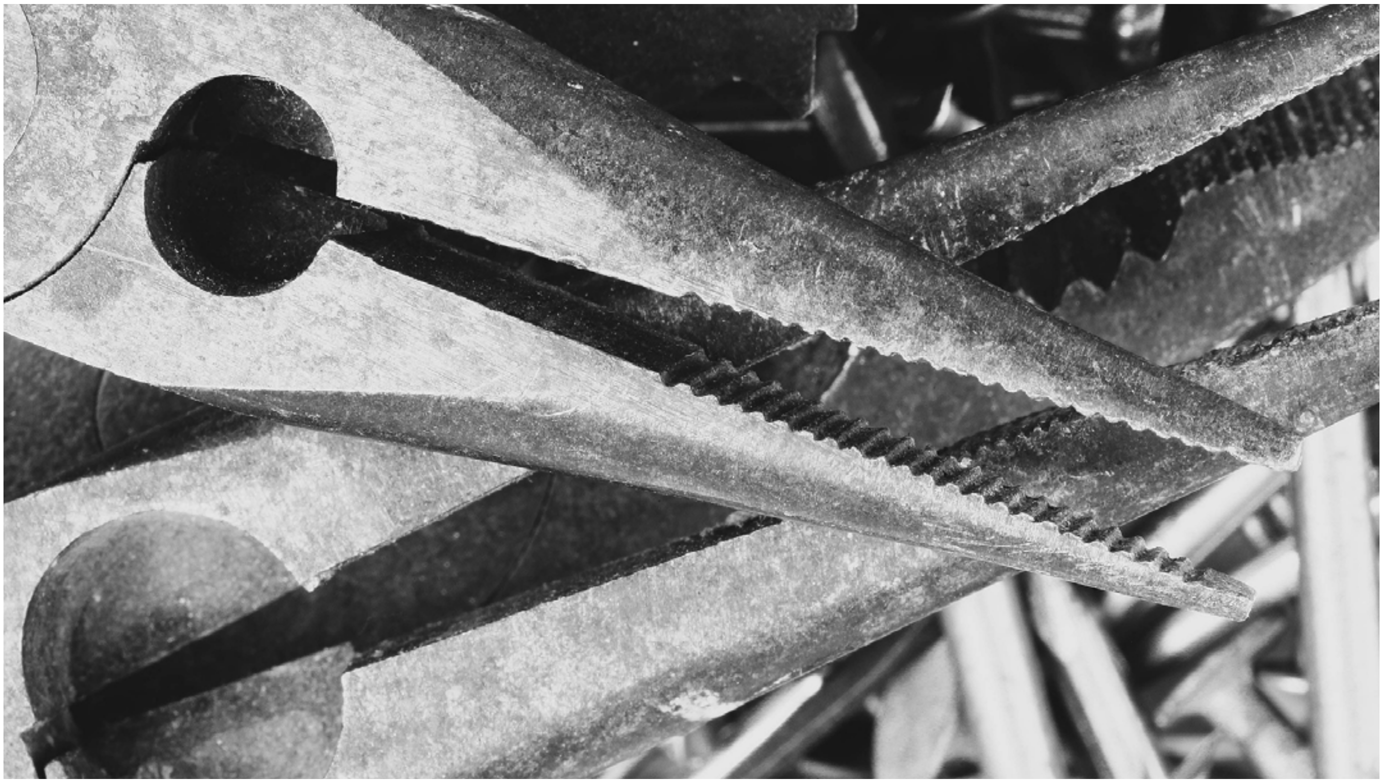
Seeking the appointment of a receiver is the "nuclear option" of the tax enforcement world. The remedies involved with it — hiring insolvency professionals to take control of the tax debtor and sell off its assets to pay creditors — are obviously extremely powerful. No other enforcement tool provides such draconian powers to be wielded in respect of the tax debtor. However, there are significant disadvantages that must be considered whenever a receivership is being contemplated.

First, starting a receivership is often an expensive (and therefore risky) undertaking. Aside from the legal costs to bring the Court application to request that the receiver be appointed, receivers will generally require a significant influx of funding in order to begin their work. It may be possible to secure private financing for the conduct of the receivership (that party would then be granted a first-ranking priority against any proceed realized in the receivership). However, if financing cannot be arranged, the party seeking to have the receiver appointed may need to provide the necessary funds — potentially amounting to several hundreds of thousands of dollars. Even if a first-ranking priority is obtained in respect to that funding, it is not guaranteed that the funds will ultimately be repaid through the receivership. If insufficient proceeds are realized through a liquidation of the company, even a first-ranking debt may go unpaid.

Second, attempting to appoint a receiver is likely only prudent where the municipality stands a reasonable prospect of recovery through the receivership — and that is not always the case. As discussed in Part 1, it is very possible in many instances, a municipality will stand to recover at least some of the outstanding taxes through a receivership given the strong priority that municipal taxes have, and the fact that if the debtor company is insolvent, it will not alter this priority in most cases (see Section D, pages 14 – 15). Unfortunately, as also discussed in Part 1, the municipality's priority will be weakened where the tax debtor is an oil and gas company. For an insolvent oil and gas company, the AER will generally have the greatest priority, since the company's outstanding ARO must be satisfied in its entirety before any outstanding taxes can be paid out by the receiver.

Practically, this means that it will only be viable for a municipality to take the lead in bringing a receivership proceeding in respect to an oil and gas company where all, or the substantial majority, of the company's regulated assets are likely to be successfully sold through a liquidation. If all of a company's regulated oil and gas assets are sold, then all of the associated ARO will be transferred to the new owners, and the overriding priority of the AER and the OWA will no longer have any practical impact. This, however, would likely only happen in rare cases — typically, the struggling oil and gas company will not have a portfolio consisting primarily of younger, more productive assets that can easily be sold, but will have a portfolio consisting of older, less productive, less marketable assets (which is why they are struggling in the first place).

Still, an oil and gas company may be struggling to meet its obligations, in spite of having excellent assets, simply because it has over-leveraged itself and is overwhelmed by its massive debt to lenders. In such a case, there is a much better prospect for a municipality to bring a receivership proceeding, as it is likely that the impact of the AER / OWA claim would be addressed by sales to new owners who, given the quality of the assets, would be more than willing to take on these profitable assets and their outstanding ARO.



H. Using the Tools in Practice

To this point, we have discussed several different tax enforcement tools. It may now be helpful to consider how they can be applied in practice.

The following scenarios represent common tax recovery situations that many municipalities in Alberta have faced in recent years. Given that unpaid taxes from the oil and gas industry continue to be a serious issue for the RMA's member municipalities, these scenarios focus on oil and gas tax debtors.

In exploring these scenarios, we hope to show the type of reasoning that municipalities can employ in considering which enforcement tools to use (or threaten to use). We also hope to show that there is no single "correct answer" as to what tools can be used in a particular scenario — frequently there will be multiple options available, or ways to use multiple tools in combination with each other in response to unique circumstances.

Lastly, before exploring these scenarios, we also want to caution that these are somewhat simplified examples that do not incorporate a municipality's particular needs or priorities, which may vary significantly. Tax recovery issues are complex, and municipalities may frequently face issues or circumstances which are not explored in these scenarios. Accordingly, these scenarios should in no way be understood as a substitute for consultation with legal counsel, which is always advisable when tax recovery challenges arise.

Scenario 1: Small Fry Oil & Gas Ltd.

Small Fry Oil & Gas Ltd. is a relatively obscure oil and gas producer operating in the Municipal District of Wherever. It is the assessed person for just a single linear tax roll for the M.D., covering a modest collection of gas wells and pipelines. However, for the last year and a half, taxes on that linear roll have been outstanding, and the current balance is $7,500, including penalties.

When Small Fry first failed to pay its taxes by the deadline, a year and a half ago, the M.D. sent a letter notifying the company of the outstanding taxes, explaining that penalties will accrue over time, and warning of enforcement action if the taxes were not paid. However, the M.D. did not receive a response to that letter, and other follow-up letters sent later were also ignored.

The M.D. wondered whether Small Fry simply may no longer be operating, so it looked up the company online. It saw the company has a website, which seemed to be regularly updated. The M.D. also sent out a representative to one of Small Fry's sites; it appeared to be in operation. However, the company is not answering its phones.

What can be done in scenario 1?

In a situation like this, where there is a fairly small balance owing, commencing a legal claim is possible, but the cost for doing so would likely be prohibitively expensive.

Small Fry's property is not land, so enforcing by selling the property via public auction is not an option.

Entering into a simple tax repayment agreement would normally be an ideal way to deal with an outstanding balance of this size. However, the company has not been responsive, and so currently seems unwilling to consider an arrangement like this.

A good option to consider in these circumstances would be to issue a distress warrant and hire a civil enforcement agency to seize some of Small Fry's goods. Ideally, the M.D. and the civil enforcement agency will be able to find, perhaps on one of Small Fry's well sites or at its office, a vehicle or easily sold electronic, such as a computer, worth around $7,500 to seize. Once goods are seized, the municipality can then proceed to sell the goods in accordance with the requirements of Part 10, Division 9 of the MGA. In the alternative, since a seizure of goods usually gets the tax debtor's attention in the way that a letter does not, the seizure, and the threat of proceeding with a sale, could be used as leverage to prompt Small Fry to either pay the outstanding taxes or enter into a tax repayment agreement.

If there are no such easily sold goods available, the M.D. could also consider seizing goods that are used in oil and gas activities — such as, for example, a compressor found at one of Small Fry's well sites. However, the M.D. and its civil enforcement agency would not be able to disconnect a compressor and remove it from the site so it can be sold — apart from the obvious safety and environmental concerns, the removal could not proceed without first obtaining the consent of the AER, and the AER may not approve such a request. Still, the compressor could still be seized and left on-site subject to a bailee's undertaking. If the notice of seizure is then registered in the Personal Property Registry, the M.D. will have obtained a security interest in that asset, which is separate from, and in addition to, the special lien on the company's taxed linear property. This puts the M.D.'s taxes in a better position and will give it some additional leverage, as the compressor cannot be sold or removed by the company while it is subject to the seizure.

Scenario 2: Hard Luck Energy Inc.

Hard Luck Energy Inc. is a somewhat larger oil and gas producer with significant operations in the county of Anywhere. It is the assessed person for several linear and non-linear Designated Industrial Property rolls, and also owns a parcel of land in the county where its office is located. Unfortunately, Hard Luck did not pay any of the taxes for any of its tax rolls last year, including for its office building. Because of this, they now owe a total of $150,000 in outstanding taxes to the county, including penalties, just for that one year of non-payment.

When the county reached out to Hard Luck after the tax deadline, providing notice of the non-payment and warning of enforcement action, Hard Luck responded immediately, apologizing and promising to pay the taxes soon. However, months have gone by and Hard Luck has still not paid despite repeated follow-ups. Each time the county has reached out, Hard Luck has promised to pay and asked for more time, but has never actually paid.

The county looked up the company online and found out that there are two outstanding AER compliance orders against Hard Luck, as shown on the AER's website. However, the company otherwise appears to be operating normally.

What to do in scenario 2?

The fact that the company owns a parcel of land adds an interesting wrinkle to this scenario. This means the county can eventually use the public auction process to recover taxes in respect of that parcel. However, as the taxes on the parcel have only been outstanding since last year, it will be quite some time before the county can actually put the property up for auction. Moreover, the public auction process under the MGA will not help the county recover the taxes owing on Hard Luck's oil and gas assets.

The county would want to consider using an enforcement tool that can get results a bit more quickly. A legal claim could be very useful in this case. Given the significant financial amount outstanding, this is likely worth the legal costs of filing the Statement of Claim and obtaining a judgment.

A distress warrant is also an option. However, it is not an ideal option. $150,000 outstanding means that the county needs to seize, and eventually sell, $150,000 worth of goods in order to fully address the taxes, which may not be an easy undertaking. Importantly, the County cannot attempt to recover some taxes through the seizure and sale of goods, and then commence a legal claim for the remaining amount owing — section 438(2) of the MGA specifically prohibits this. So, there is risk in seizing and selling assets in a case like this, where the County cannot be confident that doing so will address all of its taxes.

Instead of starting a legal claim right away, another good option would be to negotiate a tax repayment agreement with Hard Luck. Given that Hard Luck has been responsive and has been willing to acknowledge its tax delinquency, it may be willing to enter into a tax repayment agreement, perhaps on terms that are favourable to the county. If it is hesitant to do so, the county can consider threatening to proceed with a legal claim, or a distress warrant, with the aim of pressuring the company into a tax repayment agreement. Even if the county does commence either of these enforcement proceedings, it may later resume discussions regarding a tax repayment agreement, as voluntary payment of taxes is almost always the preferred resolution.

As well, given the significant quantum of taxes outstanding, and the length of time it may take Hard Luck to pay these taxes, it may be prudent for the county to register its special lien in the Personal Property Registry, in addition to commencing a legal claim or negotiating a tax repayment agreement. The county may be able to use this step, or the threat of this step, to put further pressure on Hard Luck to either pay the taxes outright or enter into a tax repayment agreement. The threat of registration would be particularly effective if Hard Luck was in the process of seeking financing from a third-party lender, as the appearance of the special lien in the Personal Property Registry may impact the lender's willingness to provide them with funding.

Scenario 3: Blood From A Stone Oil Corp.

Blood From A Stone Oil Corp. is a sizable oil and gas producer, operating not only in the Rural Municipality of Somewhere, but all throughout Alberta. For the last several years however, it has paid only minimal taxes to the municipality on its numerous Designated Industrial Property tax rolls. The outstanding balance owing to the municipality is now at approximately $2 million.

The municipality has checked with neighbouring municipalities where it knows Blood From A Stone operates and they also report having significant taxes outstanding from the company. The municipality last heard from Blood From A Stone six months ago, when a representative of the company explained that it was facing significant financial pressure from various lenders. No correspondence has been received from the company since then, and the company is not responding to emails or answering phone calls.

The municipality looked online and found that there are several outstanding compliance orders issued to Blood From A Stone shown on the AER's website. As well, the municipality recently sent a representative to check on some of the company's assets and there appears to be little to no activity taking place on any of them. The Municipality has also heard from an AER representative that the company's portfolio consists almost entirely of very old and unproductive wells, which will likely need to be abandoned and reclaimed within the next few years at most.

Responding to scenario 3

In a difficult situation like this, where the tax debtor is clearly in dire financial straits, and the municipality is far from the only party with significant claims against them, and there is a threat of significant outstanding ARO that will overwhelm the value of the assets. The situation is comparable to a disease that is not treated until its late stages; it is too late for the usual remedies to be effective.

While a claim can be commenced against the company, this is not likely to be successful in recovering taxes. Obtaining a judgment takes some time, and it is likely that by the time the municipality obtains a judgment against Blood From A Stone and files a writ of enforcement in the Personal Property Registry, there will not be any funds of the company to garnish — or the company may have already been placed into receivership at that point, in which case remedies under the *Civil Enforcement Act* can no longer be used.

While the municipality can issue a distress warrant, it is unlikely to find goods to seize that would come anywhere close to satisfying the large amount of taxes owing. Moreover, as discussed earlier in this resource, any attempt to seize and sell regulated oil and gas assets will generally be met with resistance from the AER (who, because it has the authority to regulate the transfer of licensed assets from one company to another, can block sales of seized assets). This would leave the municipality with the recourse of seizing unlicensed, unregulated goods (assuming the company still has any of value), and even this step may be opposed by the AER if a receivership is imminent.

It is unlikely that these steps, or the registration of the special lien in the Personal Property Registry, are likely to be useful in pressuring the company into entering a tax repayment agreement. The company is already facing pressure from all sides and appears to be unable to meet its financial obligations to an extent that more time to pay will not solve the issue.

In a situation like this, it may be best for the municipality to simply "ride the AER and OWA's coattails" — to stand bakc and let the AER and OWA take steps to get a receiver appointed to take control of the business and liquidate any of the company's remaining assets. As referenced previously when discussing the appointment of a receiver, the AER and OWA will typically be in the proverbial “driver's seat” for the receivership of an oil and gas company. Municipalities will generally not be able to recover anything from the receivership, as any funds recovered will be used to address the company's abandonment and reclamation obligations. However, the silver lining is that the receivership may succeed in selling off Blood From A Stone's oil and gas assets and placing them into the hands of healthier oil and gas companies who are able to pay taxes. A purchasing company would not be obligated to pay any of the $2 million outstanding to the municipality, but it would be obligated to pay future taxes levied on the assets it purchased.

Scenario 4: Ambition Oil & Gas Ltd.

Ambition Oil & Gas is a plucky new oil and gas producer on the scene with big dreams. Over the past three years, it has been aggressive in buying up as many young, productive wells in Alberta as it can, including many within Drillworthy County. The company now boasts an impressive portfolio of oil and gas assets. The company is also well aware of the AER's requirements for abandonment and reclamation of wells, so it has been diligent in addressing ARO requirements for its older and less productive wells.

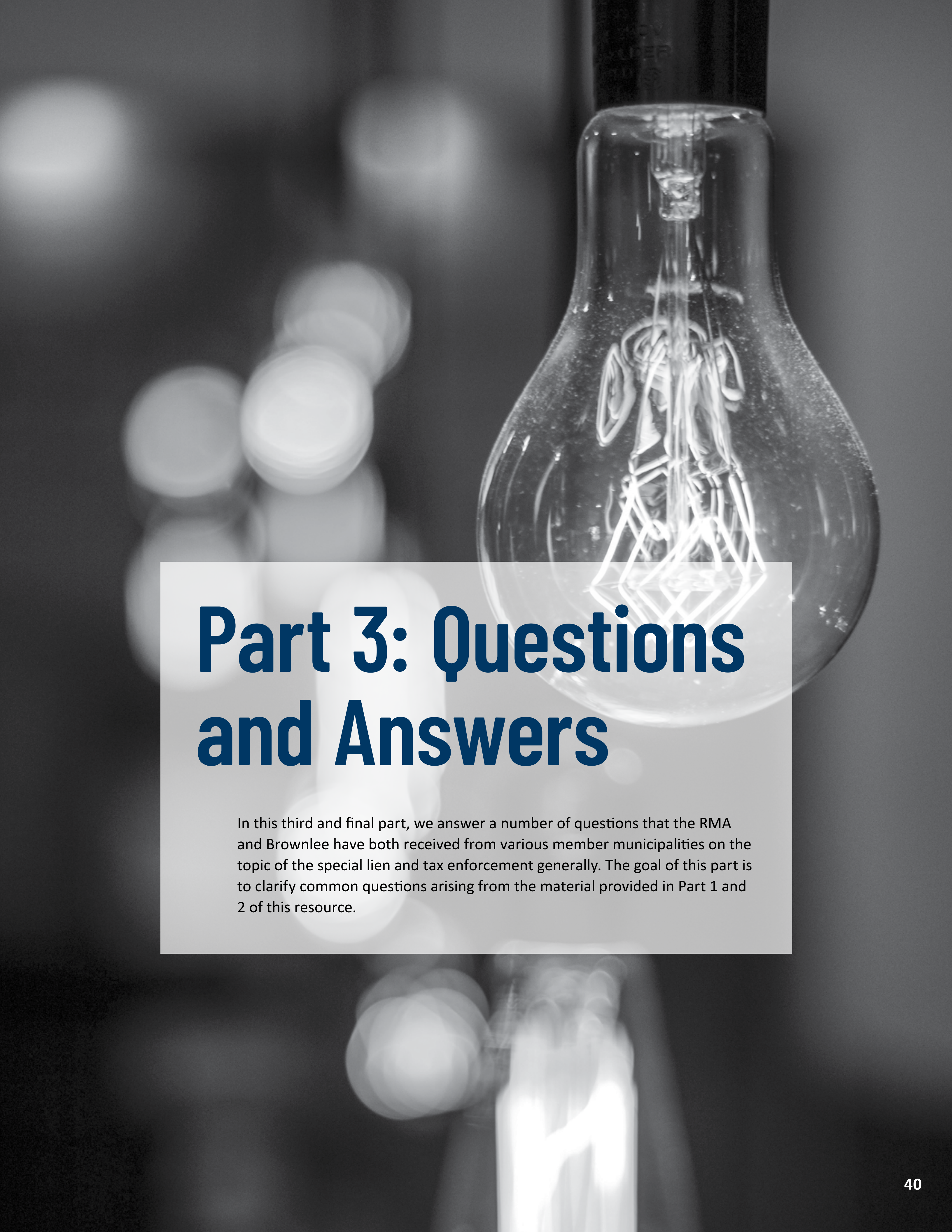
To accomplish all this, however, Ambition needed to take out substantial loans from its private lender, a major Canadian bank, and the company now finds itself over-leveraged. While Ambition generates significant gross revenues every month, higher interest rates have left it beset the costs of servicing its debts, which now exceed its monthly revenues.

When interest rates began rising last year, Drillworthy County noticed that Ambition began to fall behind on its taxes, and heard similar stories from other municipalities. Ambition's lender later reached out to the County, and other municipalities, letting them know that Ambition had been failing to keep up with the interest payments on its loans. Drillworthy County learned that Ambition now owed over $3.5 million to a lender, in addition to $800,000 in outstanding taxes to the County and smaller amounts to other neighbouring municipalities.

Options for scenario 4

Drillworthy County can certainly consider bringing a legal claim, as the magnitude of taxes owing to the County will justify the costs of the legal proceeding. That said, it will take time for the County to obtain a judgment through the litigation — by the time that happens, Ambition may have already been placed into bankruptcy or into a receivership by its lender. This would make the County's judgment largely irrelevant — the County may see its taxes paid through the insolvency proceeding, but it would most likely be by virtue of the fact that the taxes are a secured claim — not by virtue of the outstanding judgment.

In terms of other options, this is actually the rare case where it may be worthwhile to consider placing Ambition into receivership. The County would likely be in a position to benefit from a receivership proceeding since, given the company's impressive asset portfolio and responsible practices in addressing ARO, it is likely that there would be few, if any, assets licensed to Ambition that could not be successfully sold to a willing buyer. This would mean that there would be very little, if any, leftover ARO that would need to be addressed from the proceeds in priority to the County's taxes, and so the County would likely see all of its taxes paid through the sale of the company's assets (the lender would have a lower priority status than the County by virtue of sections 348 and 348.1 of the MGA). Care would need to be taken in commencing the receivership, given the significant financial commitment needed to engage a licenced insolvency trustee, but in theory, this may be a good option to see the taxes paid in a relatively short timeframe.



Part 3: Questions and Answers

In this third and final part, we answer a number of questions that the RMA and Brownlee have both received from various member municipalities on the topic of the special lien and tax enforcement generally. The goal of this part is to clarify common questions arising from the material provided in Part 1 and 2 of this resource.

1. If we seize assets regulated by the AER, are we potentially taking on significant environmental liabilities or other risks?

Generally, the answer to this is going to be "no". Seizing an oil and gas company's assets will not make the municipality liable for outstanding ARO on those assets, and seizure, in and of itself, will not necessarily create a risk of liability. If the municipality was to try to physically remove oilfield assets or equipment from the site, this may represent a liability risk if there are safety / pollution concerns associated with doing so (i.e. the municipality should certainly not be instructing its civil enforcement agency to rip equipment out of the ground). However, that issue can be sidestepped by having the civil enforcement agency issue a bailee's undertaking, pursuant to which the assets are left on site, and are still operated, but are nevertheless considered seized.

It should also be noted, however, that seizure of regulated oil and gas assets will be of only limited benefit, due to the regulatory powers of the AER. The AER has regulatory authority over oil and gas assets, including over sales. Based on this authority, the AER frequently takes the position that a municipality cannot sell, or even remove, oilfield assets without its approval (which it is highly unlikely to grant if the municipality's intention is to sell, and direct the proceeds toward taxes, rather than outstanding ARO).

This means that if the municipality seizes oilfield assets and attempts to sell them in accordance with the distress warrant provisions of the MGA, the AER will likely intervene to prevent the sale. So, the main benefit of seizing AER-regulated assets would not be an eventual sale; it would be the creation of a separate security interest in the seized assets, separate from the special lien, which further impedes the oil and gas company's ability to deal with those assets.

2. When property with outstanding taxes on it is sold to a new owner, does the special lien still apply to it? Can the new owner be held liable for the outstanding taxes?

Except in cases where the property is sold during an insolvency proceeding (where there will typically be an order 'vesting off' the taxes, making them ineffective against the assets or the new owner), the answer is yes, and yes.

The mere fact that property changes hands does not remove the special lien from it. Moreover, section 331 of the MGA indicates that both previous and subsequent owners can be held liable to pay a property tax.

That said, there may be issues of fairness that come up when the municipality seeks to hold a new owner liable for the previous owner's outstanding taxes. A purchaser who is not informed of the outstanding taxes by the vendor may be displeased to discover an outstanding tax balance. Although the purchaser should, as part of its own due diligence steps, request a tax certificate prior to the sale — and the municipality should provide that, along with information on the assessed assets and outstanding balance owing from the seller —

they may not always remember to obtain this. A purchaser surprised by outstanding taxes owing on its new property may explore ways to challenge the taxes if the sum is significant enough (although they would also likely have a claim against the previous owner for failure to disclose the outstanding taxes).

This can be another good reason to consider registering the special lien in the Personal Property Registry, under the name of the tax debtor. If the special lien is visible to the public in the Personal Property Registry, this gives an obvious means, in addition to a request for a tax certificate, by which the purchaser would have been able to determine that there were taxes owing (thus, blunting their ability to complain). Therefore, registration of the special lien in the Personal Property Registry can practically enhance a municipality's ability to hold a new owner liable for previously levied taxes.

3. Can the special lien, or registration of the special lien in the PPR, stop an owner of a taxed asset from selling the asset?

No, neither the special lien itself, nor registration of the special lien, legally prevents a transfer of an asset upon which taxes are outstanding.

Registration of the special lien in the PPR gives notice to the public that the municipality has a tax claim against the tax debtor's assets, which may deter the purchaser from completing the purchase. However, this is only a practical, not a legal, barrier to a sale taking place.

The only way that a municipality can try to use the outstanding taxes to halt a proposed sale is indirectly, through the AER's process for licence transfer approvals. Under the AER's governing legislation, oil and gas producers need AER approval in order to transfer an asset from one licencee to another — one factor that the AER may consider in approving a transfer is whether there are outstanding taxes owing.[37] Municipalities can submit a statement of concern on the licence transfer application relating to a sale, and let the AER know about the outstanding tax balance that way. This may prompt the AER to reject the transfer and halt the sale, but there is no guarantee, as the AER has a wide degree of discretion in approving or rejecting licence transfers, and as outstanding taxes are just one factor among many that may (not must) be considered.

4. Can the special lien stop an owner of a taxed asset from operating the asset?

Similar to the above question, the answer is no. Neither the special lien itself, nor the registration of the special lien, prevents a taxpayer from operating an asset on which taxes are outstanding.

The only way that a municipality can impact a taxpayer's operations is through the distress warrant and seizure process — for example, in response to outstanding taxes owed by an oil and gas company, a municipality could seize equipment at a well-site by taking it away, or by subjecting it to a bailee's undertaking with a condition that it cannot be removed or operated (although this would be difficult to enforce). Practically, however, it would likely be imprudent in most cases to try to disrupt a taxpayer's operations, since it is through those operations that the taxpayer generates revenue needed to pay the taxes in the first place. Interfering with a taxpayer's operations may create an incentive to pay, but it may also disrupt the taxpayer's ability to pay.

As well, there can be significant risks when seizing assets with the intention of preventing the taxpayer from using them — oil and gas equipment may not be disconnected from an oil and gas site without the approval of the AER.

37 See AER Directive 067, section 4.5, and AER Directive 088, section 2.

5. Do you have any tips for taking informal enforcement steps, such as sending demand letters as a first step when taxes go unpaid?

Rather than jumping to the use of a formal enforcement tool as soon as taxes are unpaid, it is nearly always advisable for the municipality to first take less formal steps to encourage voluntary payment. It is often a good idea to take an incremental approach, whereby:

- The municipality's response to the unpaid taxes starts off with informal steps, and escalates to more formal, serious steps over time; and
- The municipality generally threatens taking a step before actually doing so.

For example, when taxes go unpaid, it may be prudent to begin with an initial letter, informing the taxpayer that taxes are unpaid, that penalties will accrue over time if they are not addressed, that the municipality will register the special lien in the personal property registry if the taxes are not addressed within seven days, and that the municipality will take further formal enforcement steps if they are still not addressed. Preparing such a letter is inexpensive and often effective.

These types of letters can be sent more than once. If no response is received, the municipality can then consider retaining outside counsel to send a similar letter (a letter from a lawyer can be better at eliciting a response, as it sends a message that the municipality is willing to incur some legal costs to recover taxes, and is generally taking the matter seriously).

Following this, the municipality could move on to taking one or more a formal enforcement steps, like the commencement of a legal claim or issuance of a distress warrant.

The advantages of taking this kind of incremental approach, where warnings are given before actually taking a particular enforcement step, are generally that:

a. This gives the tax debtor a chance to comply before the municipality incurs greater enforcement costs;

b. This helps the municipality avoid causing unintended harm to the tax debtor that may not be to the municipality's advantage. For example, if the municipality registers the special lien in the PPR immediately, and the tax debtor is in the process of applying to its bank for financing, that may hurt the tax debtor's chances of receiving financing, and thereby harm their ability to operate and pay taxes. Whereas, if the municipality first threatens taking this step, the tax debtor may be willing to pay the taxes in order to avoid alerting other creditors.

6. For an oil and gas company, are there any pre-emptive mechanisms we can use to ensure taxes are paid before they are actually overdue?

Aside from perhaps sending reminder letters in advance of the due date for taxes, there is not much that can be done. The enforcement tools that municipalities have are generally reactive in nature, designed for use after the taxes are overdue rather than before. That said, there are still some pre-emptive strategies a municipality can consider:

- A municipality can keep itself informed of how its significant taxpayers are doing, by reviewing publicly available information pertaining to them. This can be as simple as checking the AER's website to see if there are any outstanding compliance orders in relation to them, checking the company's website to see if they are updating it, checking the company's sites to see if they are active, etc. If the municipality finds that there are signs of potential distress, it can plan for how it will respond and consider what enforcement steps it will use, even if taxes are not outstanding yet.
- A municipality can encourage its taxpayers to participate in its Tax Instalment Payment Plan ("TIPP") program, if the municipality has one (this needs to be authorized by bylaw — see section 340 of the MGA). This generally involves paying the year's taxes through monthly instalments over the course of the year — some falling before the usual tax deadline, some falling after it. The TIPP program can be an excellent option for a taxpayer that often encounters tax flow issues, since the total tax levy for the year

is paid through increments (rather than all at once before the due date, which can strain the taxpayer's accounts).

- Lastly, and most simply, a municipality can also send frequent reminders for payment prior to the annual deadline.

What a municipality can do, however, is keep itself informed of how its significant taxpayers are doing, by reviewing publicly available information pertaining to them. This can be as simple as checking the AER's website to see if there are any outstanding compliance orders in relation to them, checking the company's website to see if they are updating it, checking the company's sites to see if they are active, etc. If the municipality finds that there are signs of potential distress, it can plan for how it will respond and consider what enforcement steps it will use, even if taxes are not outstanding yet.

7. Is there a way to look into an oil and gas company's financials to get an idea of how much of a risk they are, and whether they are likely to default on their taxes?

For the most part, the municipality would have to rely on publicly available information for this. For example, the AER may have some information available on a company online, and if the company is publicly traded, it will likely have some reporting available for both current and prospective investors.

More protected information (like current bank account balances, recent bank account entries, etc.) would likely only come from negotiations with the taxpayer. For example, if the taxpayer claims to only be able to pay a certain amount per month toward taxes, and seeks a tax repayment agreement on that basis, the municipality might reply by asking for financial data that confirms that they have been experiencing cash flow issues (e.g. what have you paid to shareholders in the last year? What payments are you making to other creditors right now? etc.)

8. What about an oil and gas company's assets? Is there any way to look into those, to determine how productive and lucrative they are, in order to get an idea of how healthy the company is, whether they are likely to default on their taxes, and whether their assets are generally valuable or not? Would it help to look at their property assessments?

Likely, looking at the property assessments for a company would not be particularly helpful in determining the quality of a company's assets. Assessment of wells and pipelines is a regulated process, so their assessed values do not necessarily bear a strong connection to their current market value.

To get a truly accurate idea of the quality of an oil and gas company's asset portfolio, a municipality would likely need assistance from experts. The municipality could consider contacting a private firm specializing in the oil and gas industry, who could perform AER database searches, review detailed production records, etc. to derive estimates of the market value of the company's assets and determine what the company would generally be worth. This could be useful if, for example, a municipality was considering applying to place a company in receivership, and wanted to know if there are sufficient assets of value in the company that would make this worthwhile.

9. What if an oil and gas company changes its name, or becomes amalgamated into a new company? Or, what if the people controlling the company start using a different company they control to operate the assets? Does the special lien lose its effectiveness in such cases?

Generally, no, neither situation hurts the effectiveness of the special lien, or means that the municipality will not be able to recover taxes.

In the case of a name change or an amalgamation, the new company will continue to have all the same liabilities as before. A corporation cannot eliminate its debts by changing its name or by amalgamating into a new entity.

In a case where the operator of the assets changes, it is likely that future assessments would be issued in the name of the new operating company as the assessed person. However, section 331 of the MGA provides that a current or a subsequent assessed person can be held liable to pay a property tax. We would therefore be able to argue that both the previous operator and the current operator are jointly and severally liable for any outstanding taxes on the assets (that is, the municipality would be free to recover taxes from either or both of them). In other words, the fact that there is a new operator does not let the old operator "off the hook". Rather, it simply means there is now an additional entity against which taxes can be recovered.

There can be circumstances where companies attempt to structure their affairs in ways that allow them to avoid their obligations, including tax obligations. For example, currently there is ongoing litigation in relation to a case where a company was able to transfer all of its older, poor-quality oil and gas assets to a related company, which quickly went bankrupt. In such a case, the municipality may be able to claim previously assessed taxes against both entities — but not future taxes on the assets that were sold (those could only be recovered from the insolvent company), thereby impacting the municipality's ability to recover future taxes. The extent to which companies are legally able to perform these kinds of maneuvers is still before the courts; however, municipalities can help to mitigate these issues by participating in AER transfer applications through filing a Statement of Concern. Ideally, if a transfer of licences is done as a means to transfer away liabilities to a company that is designed to fail, the AER, with the benefit of a municipality's submissions, will be able to recognize that and refuse to approve the transfer.

10. If an oil and gas company owes taxes to several different municipalities, does it make sense for them to cooperate to try to recover taxes as a group?

There are advantages and disadvantages to this kind of "united front" approach. The main advantages are that legal and other costs can be shared between the municipalities, and working together allows for a coordinated strategy, which may be more effective (for example, if one municipality registers its special lien in the PPR, that will not get as much attention as if five municipalities do it simultaneously).

The main disadvantage is that the taxpayer will want to treat all the municipalities as a group, and will likely want to settle all the taxes collectively. The terms of a tax repayment agreement reached by one municipality, will likely be very similar to the terms of agreement with another municipality in the group. That may be acceptable in some circumstances, but more of a concern in others (for example, if the taxpayer proposes that 25% of the outstanding penalties be cancelled, that may be acceptable to a municipality with $10,000 in penalties outstanding, but not for a municipality with $100,000 in penalties outstanding).

In many cases, coordination of efforts with other municipalities will be a good idea — but, it is not a requirement.

Regardless of whether a team or individual approach is taken by a municipality when enforcing against a taxpayer, it is often a good idea to keep in touch with neighbouring municipalities dealing with the same taxpayer, and to share information. Oil and gas companies may, at times, seek to play municipalities against each other, using a payment proposal from one municipality to extract a better tax repayment plan from another municipality (e.g. this municipality says they will waive all penalties, why won't you?). Keeping in communication with other municipalities can help to ensure a united front and avoid a "race to the bottom" where municipalities feel forced to try to give the best "deal" to a delinquent taxpayer.