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A century of liability for an abandoned well

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Cases Considered:

Dalhousie Oil Company Limited, Section 40 Review of Abandonment Cost Order No. ACO 2008-1, Turner Valley Field, [ERCB Decision 2010-19]

In this decision the Energy Resources Conservation Board (ERCB, the Board) confirms that the current owner of an abandoned well has a continuing responsibility to pay for the re-abandonment costs associated with that well even though the well in question had not produced since the 1920s. The decision is particularly interesting in the context of the current discussion surrounding who should assume responsibility for the long term liabilities associated with carbon capture and storage projects.

The facts

Southern Alberta Oil Company (SAOC) obtained a licence to drill a well in the Turner Valley in 1911. The 1,100 metre well was drilled and produced oil between 1919 and 1921 when it was suspended. The well was zonal abandoned (i.e. the particular interval) in 1926. That same year Dalhousie assumed most of SAOC's assets including the well and the well was surface abandoned in 1958 (casing strings cut off and well capped).

The ERCB received a complaint about the well in 2005 and the ERCB asked Dalhousie to ensure safe and proper abandonment. Dalhousie wrote to the landowner enclosing a cheque to cover fencing costs around the well but took no further steps to deal with the situation. Further follow-up from the Board resulted in the Board issuing an abandonment order and subsequently carrying out a re-abandonment operation and sending the bill to Dalhousie. When Dalhousie failed to pay within the prescribed time the Board added the statutorily mandated 25% penalty for a total liability of nearly $0.5 million. Dalhousie then asked the Board to review the Abandonment Cost Order under s.40 of the *Energy Resources Conservation Act,* R.S.A. 2000, c. E – 10.

Dalhousie's argument on review was that it no longer had an interest in the well because: (1) the well was included in the Rundle Pool which was subject to compulsory unitization by Order (TVU No. 7) under the *Turner Valley Unit Operations Act*, R.S.A. 2000, c. T-9, and, (2) Dalhousie had sold its interest in TVU No. 7 to Signalta.

The decision

The Board held that the responsibility for the costs of abandonment was governed by ss.29 and 30 of the *Oil and Gas Conservation Act*, R.S.A. 2000, c.O-6 (*OGCA*). Section 29 of the *OGCA* makes it clear that a well licensee and working interest participant (WIP) remain responsible for re-abandonment operations notwithstanding prior abandonment efforts. Section 30 deals with who is liable and establishes that each WIP is responsible for its proportionate share of costs based upon its ownership interest. In this case the available evidence suggested that Dalhousie had a 100% WIP in the well and was unable to rebut this by leading evidence showing that it had sold its interest in TVU No. 7 Signalta. The Board reached this conclusion for two main reasons. First, while the well was within the geographical boundaries of TVU No. 7 it was not included in the terms of the Order because TVU No. 7 applied to the Rundle Group and this well had produced from a pool some 650 metres above the Rundle. There was no evidence of communication and thus the well fell outside the terms of the unitization language of the Order:

> All interests in the tracts within that part of the Turner Valley Pool … delineated by the wells drilled into the Rundle group… and including any part of the Rundle group that is, or may be found to be in reservoir communication with the part of the Pool so described are consolidated, merged and otherwise combined in a unit operation accordance with *The Turner Valley Unit Operations Act*, and subject to the terms and conditions herein contained.

Second, while Signalta admitted that it had purchased Dalhousie's interest in TVU No. 7, the well was not in the unit and therefore was not included in the purchase: "Nothing in the agreement identifies the well as being specifically included in the purchase by Signalta" (ERCB Decision at 6).

The Board rejected Dalhousie's arguments to the effect that it had been denied procedural fairness at the time when the abandonment order had been made. In doing so the Board ruled that the time for considering such an argument had long since passed. This is consistent with earlier decisions such as Prince Resource Corporation, Review of Abandonment Costs Order No. ACO 2001-06, AUEB Decision 2003-029 in which the Board characterized such a submission at the Costs Order juncture as a 'collateral attack' on the earlier decision.

Commentary

This is a significant Board decision for a number of reasons. First, it confirms the broad scope of s.29 of the *OGCA*. The Board's specific comments on the section (at 4) were as follows:

> Section 29 prevents a licensee, approval holder or WIP, as the case may be, from avoiding liability for control or further abandonment work of a well or from liability for the costs of such work. The Board interprets Section 29 as prohibiting such parties from using previous abandonment of a well as a shield to protect them from liability for future abandonment work or abandonment costs. The Board finds that Section 29 prevents the WIP in this well from avoiding liability for payment of costs merely because the well had previously been abandoned to a satisfactory condition. Section 29 ensures that Section 30 [the provision that establishes that each WIP bears several responsibility for its share of the costs] applies to further abandonment work, in addition to the initial abandonment.

The result of this is to ensure that a licensee or a WIP that still has assets (i.e. the well is not an orphan) will have to cover these abandonment costs and that they cannot be passed on to the industry as a whole under the terms of the orphan fund provisions of the *OGCA*.

Second, the decision emphasizes that, at least in some cases, liability for a well may be different from the rights and responsibilities associated with a working interest position in a set of leases or other title documents. In this case Signalta seems to have purchased a tract participation interest or working interest in the unit, but it had not purchased an interest in a well that was on those lands but not "attached" to or connected with the unit. This confirms that a vendor seeking to dispose of its entire interest in an area should be careful to ensure that all wells within the area are carefully identified and listed in a schedule of assets and liabilities to be transferred (assuming that that is the shared intention of the parties) to the purchaser.

Third, as I read this decision I cannot help but think of the current debate as to how to allocate the long term liability for failure in the context of the storage part of carbon capture and storage operations. The industry argues that the storage entity cannot accept long term liability for such possible storage failures because it is an unknown and unquantifiable risk, and because after a period of time there is the further risk that the storage entity will be defunct. This decision demonstrates that in the conventional oil and gas business (and not just the conventional business because the ss. 28 – 30 *OGCA* obligations apply, for example to acid gas disposal wells), the industry in practice operates within a rule system that leaves liability on a long-term and on-going basis firmly with owners and operators, and only secondarily with the industry fund; and only if that were to turn out to be under-capitalized would there then be recourse to general revenues (and then only as a mater of policy and discretion and not as a matter of law).

And finally, I wonder whether it was as easy as the Board suggests to conclude that Dalhousie was a WIP or a successor licensee (and does the Board have to make a choice between the two when issuing the abandonment order?) and that it could rely on s.29 even though s.29 is not introduced in to the *OGCA* until 2000 (See *Energy Statutes Amendment Act*, S.A. 2000, c. 12, s.15 which amended the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5 by repealing ss. 20.2 and 20.4 (which were added in 1994 by the *Oil and Gas Conservation Amendment Act*, S.A. 1994, c. 26) and substituting: "20.4: Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.") On reflection, I think that neither is problematic. The balance of the evidence did suggest that Dalhousie was the successor in interest to SAOC and that is all that the Board needs under either s. 27 (duty to abandon – although note that the Board must give special direction to a WIP), or s.30 (duty of a WIP to pay its several share); the Board does not need to show the transfer of the licence to Dalhousie. As for s.29, this section is not retroactive (it would be if it tried to make Dalhousie pay for an abandonment that had been carried out before the section came into force); rather it is simply legislation of immediate effect that applies to "on-going facts", "facts in progress" and there is, as Sullivan\ Driedger note, "no presumption against the immediate and general application of legislation" (*Driedger on the Construction of Statutes*, 1994, 3rd edition at 517). The fact that the legislation creates a continuing and future responsibility for an old (existing) abandonment does not make the legislation retroactive.

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