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The Effect of Well Abandonment and Reclamation Obligations for the Valuation of Matrimonial Property

By: Nigel Bankes

Case Commented On: *Walker v Walker,* 2017 SKQB 195 (CanLII)

Judicial decisions on the legal nature of abandonment and reclamation obligations may arise in the strangest of ways. Take this matrimonial property case, for example, in which Mr. Walker (Darcy) was seeking to argue that his assets should be discounted on the basis that a small oil and gas company (Outback) that he controlled had net abandonment and reclamation liabilities. Part of the challenge that he faced in making this argument was of course that the liabilities in question were the liabilities of the corporation. While a director or controlling mind of a corporation might ordinarily take some comfort from this state of affairs, in this case counsel for Darcy tried to suggest that his client would inevitably face personal liability under the terms of Saskatchewan's *The Environmental Management and Protection Act, 2010*, SS 2010, c E-10.22 [*EMPA*] and *The Oil and Gas Conservation Act,* RSS 1978, c O-2 [*OGCA*] and s 59 of *The Oil and Gas Conservation Regulations, 2012,* RRS c O-2 Reg 6 [*OGCR*]. Actually the argument was even stranger insofar as Mrs. Walker (Becky) was also a director of the company (Outback) and thus might face the same liability should Darcy be correct.

In any event Justice Elson tackled the arguments head on. He began by addressing arguments with respect to liability under *EMPA* and in particular the definition of "persons responsible" under s 12(2)(g) of that *Act* which refers to directors. However, Justice Elson soon concluded that *EMPA* was not relevant since the legislation was principally concerned with the discharge or presence of a substance causing an adverse effect and that (at para 93) "[w]hile it is entirely conceivable that an oil producer may become responsible for the discharge or presence of a substance, under the *EMPA*, I am satisfied that any such responsibility or liability is separate and apart from responsibility for the abandonment and reclamation of a well or facility." Furthermore (also at para 93), "it is noteworthy that the ***EMPA*** does not incorporate or reference any of the provisions of the ***OGCA*** and does not describe any liability or responsibility for failure to comply with those provisions, or regulations under the ***OGCA***. In short, there is simply no connection, in law, between the two statutes."

Justice Elson then turned to the arguments with respect to the *OGCA* where he concluded (at para 94) that "there is a means by which personal liability can arise, albeit not automatically." Under the statutory scheme of the *OGCA* it appears that it is the operator and licensee who bear the principal liability for reclamation and abandonment under s 59 of that *Act* (quoted at para 91). However, s 53.6 provides a mechanism whereby the Minister may make a declaration against individuals where a licensee or working interest participant is in breach of its obligations or has an outstanding indebtedness where such individuals "were directly or indirectly in control of the licensee or working interest participant at the time of the failure to comply or failure to

pay." While the principal implication of such a declaration is that the named individual may have its operations suspended and may be unable to transfer or take transfers of licences the Minister may also (s 53.7(7)(e)) "require the submission of abandonment and reclamation deposits in an amount determined by the minister for any wells or facilities of any licensee." Justice Elson concluded as follows (at para 95):

> I have not uncovered any reported jurisprudence with respect to this provision. That said, as I read s. 53.6, directors of an oil producing company will find themselves responsible for such things as abandonment and reclamation costs only if the minister makes the appropriate declaration under s. 53.6(2), and follows the related procedure in making that declaration. The requirement of notice permits the director an opportunity to oppose the making of such a declaration. The important feature of the provision is that, contrary to Darcy's argument, personal liability is not automatically triggered.

In the end however Justice Elson clearly considered all of this "almost meaningless" (at para 105):

> [105] . . . Given their respective positions in the company, Darcy and Becky equally share its negative value. Any impact the negative value has on their respective personal situations depends on the minister making a declaration pursuant to s. 53.6(2) of the *OGCA*, thereby triggering the personal liability of one or both of the parties. As mentioned, this liability does not immediately arise as a matter of law. It is entirely contingent for each party. At present, no one can predict whether the minister would make such a declaration or the specific form any declaration might take.
>
> [106] Under the circumstances, it seems to me that Outback's negative value should simply be viewed as contingent liabilities for each party in equal amounts. As such, each contingent liability cancels out the other with the result that there is no point in including a valuation for Outback, at all.

While this overall conclusion may be a little cavalier since potential liability seems to depend on control and there may well therefore be distinctions to be drawn between Darcy and Becky, there seems little doubt that the liability is indeed contingent.

Finally, while this case arises in Saskatchewan it may also be of some interest to Alberta lawyers insofar as the overall legislative schemes are similar in that some liabilities arise under the *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*] and others may arise under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*]. Furthermore, the procedure for naming and the potential liabilities associated with naming are essentially the same under the provisions of s 53.6 of Saskatchewan's statute and s 106 of Alberta's *OGCA*. And while it is I think true to say that there is no case law on s 106 of the *OGCA* there are a number of decisions by the Alberta Energy Regulator or its predecessor under this section.

For a careful analysis of the liability provisions of the *OGCA* and *EPEA* in Alberta see the recently completed LLM thesis (University of Calgary) by Heather Lilles, "The Statutory Liabilities of Joint Operator and Non-Participating Parties".

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