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Well Abandonment and Reclamation in Ontario

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Decisions Commented On: *Bilodeau v Her Majesty The Queen in the Right of Ontario*, 2022 ONSC 1742 (CanLII) and 2022 ONSC 4275 (Costs Endorsement).

Over the years ABlawg has published numerous comments on the law pertaining to reclamation and abandonment obligations and the associated orphan well fund in Alberta. See, for example, Drew Yewchuk's many excellent posts on these issues. This comment deals with a recent decision in Ontario which, while in itself a successful enforcement action, does highlight deficiencies in the law and practice pertaining to the abandonment and reclamation of old oil and gas wells in that province.

Some Background

Oil and gas activities began in Ontario in the late 1850s and continue to the present day. The Ontario Oil, Gas and Salt Resources library has records for just under 30,000 wells but the literature suggests that there may be as many as an additional 30,000 undocumented wells. See Khalil El Hachem and Mary Kang, "Methane and hydrogen sulfide emissions from abandoned, active, and marginally producing oil and gas wells in Ontario, Canada" (2022) 823 Science of the Total Environment 153491.

The same database considers that 56% of the documented wells have been abandoned while 13.5% are active, 3% are suspended, and fully 24% are listed as of unknown status. And that is just for the *documented* wells! (El Hachem and Kang) Furthermore, wells abandoned prior to the imposition of modern standards may still be leaking methane, a potent greenhouse gas, and in some cases deadly hydrogen sulphide. These emissions contribute to global warming and pose threats to human health and safety. An explosion attributed to leaking hydrogen sulphide and methane in Wheatley, Ontario in August 2021 flattened several buildings: see Emma Graney et al, "The time-bomb town Ontario did not defuse", *Globe and Mail*, (August 19, 2022).

At the same time, Ontario's legislation, the *Oil, Gas and Salt Resources Act*, RSO 1990, c P 12 (*OGSRA*) is completely inadequate to address the problem. Bonding requirements are limited to $70,000 for all of an operator's wells on land (*Exploration, Drilling and Production Regulation*, O Reg 245/97 at s 16(3)) and there is no equivalent of an orphan fund to address the liabilities of a defunct operator at an industry level. Instead, the legislation deems that the default responsibility for abandonment and reclamation obligations lies with the owner of the land where the well is located: *OGSRA* at s 1(1), definition of "operator" quoted further below. Finally, unlike Saskatchewan, Alberta, and British Columba, Ontario did not benefit from federal COVID-19 related support directed at funding oil and gas abandonment and reclamation activities.

The *Bilodeau* Case

Section 7.01 of the *OGSRA* allows an inspector to order the operator of a well to plug (abandon) a well if the inspector is of the opinion that the well represents a hazard to the public or the environment or where any activity relating to the well has been suspended. The Act defines "operator" as follows:

> (a) a person who has the right as lessee, sub-lessee, assignee, owner or holder of a licence or permit to operate the work,
>
> (b) a person who is authorized under subsection 10 (1.1) to operate the work without a licence,
>
> (c) a person who has the control or management of the operation of the work, or
>
> (d) if there is no person described in clause (a), (b) or (c), the owner of the land on which the work is situated; … (at s 1(1) "operator")

Section 7.02 allows an aggrieved person to appeal any such order, and in such a case the Minister may appoint a designate to hear the matter and make a decision which may confirm or stand in substitution for that of the inspector.

The *Bilodeau* case concerns 14 wells that were originally licensed to Onco Petroleum (Onco) in 2004. Onco continues to hold the licences for these wells. At that time (2004) Bilodeau was simply an Onco shareholder, but when Onco began to experience financial difficulties in 2008, Bilodeau became the Chair, President, and CEO – until resigning as a director in 2011. As part of an attempt to salvage Onco's business, Bilodeau formed Energex to provide a loan to Onco secured against Onco's assets. These efforts to revive Onco failed and, as Onco's largest creditor, Energex had the court appoint a receiver for Onco (March 2010). Prior to that in 2009 the Ministry had ordered Onco to plug 3 of the 14 wells. Onco did not appeal this order and the Ministry used Onco's $70,000 security to carry out these operations.

Further orders were issued with respect to the remaining 11 wells in April 2010, but the Ministry never enforced compliance with these orders.

Onco's receiver (with the approval of the court) sold Onco's assets to Energex in 2011. The purchase and sale agreement (PSA) (executed by the receiver and Energex with Bilodeau signing on behalf of Energex) provided that the purchaser would be:

> … solely responsible for all of the foregoing environmental liabilities respecting the Lands, the Abandonment and Reclamation of the Wells and the reclamation of the Lands as between the Vendor and the Purchaser, and hereby releases the Vendor from any claims the Purchaser may have against the Vendor with respect to all such liabilities and responsibilities. (at para 13, emphasis in original)

Discussions occurred between the Ministry and Energex (through Bilodeau) over a number of years as to the terms on which Energex might acquire Onco's well licences, but ultimately Energex

was assigned into bankruptcy in 2016. Energex remains an undischarged bankrupt with Bilodeau as the sole director and officer.

In 2019 the Ministry revoked the 2010 plugging order and issued new plugging orders with respect to the remaining wells, naming Onco, Energex, and Bilodeau personally. Bilodeau appealed, Energex and Onco did not. The Minister appointed a designee to consider the appeal. The designee rejected Bilodeau's submission to the effect that Bilodeau should not have been named on the grounds that he was not an operator within the meaning of the definition in the *OGSRA*. Bilodeau pointed out that Onco was still the licensee and that Onco's leases with the landowners had expired. Unfortunately, the designee's decision is not a public document and the court's summary of the designee's decision (at paras 29 – 33) is relatively short.

Bilodeau sought judicial review of the designee's decision and its affirmation of the 2019 plugging orders. The Divisional Court dismissed Bilodeau's application. The court identified a number of issues and found that the standard of review in each case should be that of reasonableness (at paras 35 – 39). The issues addressed by the court were as follows: (1) did the *OGSRA* contemplate multiple operators at the same time? (2) did Bilodeau and Energex have control or management of the wells? (3) some issues related to bankruptcy law, and (4) possible arguments with respect to election and delay.

A Single Operator or Multiple Operators?

The first question was whether the *OGSRA* contemplated that there could be multiple operators at the same time. Since the parties agreed that Onco was clearly an operator as the holder of the well licences, Bilodeau's position was that there could only be one operator at a time and that the designee's conclusion that there could be multiple operators must be unreasonable. The court rejected that argument, relying (at least in part) on the polluter pays principle, even though that principle is not referenced in the *OGSRA*. The court reasoned as follows:

> … the Applicant's argument that significance should be attached to the legislature's use of the singular in reference to the work "operator" is undermined by s. 67 of the *Legislation Act*, which states that "[w]ords in the singular include the plural and words in the plural include the singular." Further, the use of the word "or" does not preclude the possibility of there being more than one operator. Having the ability to choose concurrent operators promotes the "polluter pay principle" that the Designee reasonably found to be an important principle in interpreting the legislation at issue. In *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 at para. 23 the Supreme Court recognized that the polluter pay principle is firmly entrenched in environmental law in Canada. If the legislature had wished to confine the Ministry's choice to one "operator", it could have done so explicitly. (at para 47)

Did Bilodeau and Energex Have Control or Management of the Wells?

The second question was whether the designee could reasonably conclude that Energex and Bilodeau had control and management of the wells so as to qualify as an operator within the *OGSRA* definition. Bilodeau argued that the only person who could do work on the wells was

Onco as the licensee; hence neither Energex or Bilodeau should have been made the subject of the plugging order.

The court seems to have concluded that the designee's decision was reasonable for two different reasons. First, the court fastened on para (a) of the definition of operator to conclude that Energex must be the owner within the meaning of that paragraph by virtue of the terms of the PSA referenced above (at para 55). Second, the court seems to have accepted that it was reasonable for the designee to conclude that Energex could have management and control of the wells despite "evidence from the Ministry's inspector [that] if Energex had tried to operate the wells without a license, it would be charged under the Act" (at paras 49, 58). The Court seems to have reached this conclusion on the basis that paragraphs (a) and (c) offered distinct routes to having a party designated as operator and that the terms of the PSA led directly to the conclusion that Energex was the owner of the wells (at para 55) as required by para (a) of the definition.

The court also concluded that it was reasonable for the designee to have pierced the corporate veil and thus to have included Bilodeau in the plugging orders. Seven of the 11 wells subject to the 2019 plugging orders were listed in response to detected leaks of poisonous and/or explosive gases and thus to protect the public or the environment. In the court's view the corporate veil may be pierced to give effect to effect to legislation and:

> While not explicitly phrased in this way, the Designee implicitly found that the only way to give effect to the plugging order was to impose liability on Energex's directing mind, Mr. Bilodeau. Having made this finding, piercing the corporate veil was justifiable and reasonable. (at para 64)

And as remedial legislation the *OGSRA* "should be construed broadly, if doing so helps accomplish its purpose" (at para 65). I observe that the court may be exceeding its role on judicial review to the extent that it is supplementing the actual reasons offered by the designee: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) at paras 96 - 97.

The Bankruptcy Claims

Bilodeau also raised arguments associated with the receivership or bankruptcies of Onco and Energex. Bilodeau took the position that the 2010 plugging orders and the 2019 orders that replaced them were claims provable in bankruptcy from which Onco must have been released with the discharge of Onco. The designee had decided that the orders were not claims provable in bankruptcy on the basis that they were not a monetary claim, since the Ministry "does not plug wells using public funds or seek reimbursement of the cost of plugging from the operator" (at para 75, and see *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (Can LII). The court held that this was a factual finding and as such there was no basis for the court to interfere (at para 76).

Neither was it material that the wells were not listed by the trustee as assets of Energex during Energex's bankruptcy. According to the court, "[t]he logical inference to be drawn is that the Trustee regarded Energex's interest in those wells as an unrealizable asset. As such, pursuant to s. 40(1), the Trustee returned them to Energex before he was discharged" (at para 83).

Election and Delay

The court found that the doctrine of election was inapplicable to the current case. The Ministry had not made an unequivocal choice not to pursue the 2010 plugging orders thereby precluding it from seeking the same relief under the 2019 orders (at para 85). Similarly, while the delay between 2010 and 2019 "is concerning", the Ministry did not act improperly when it failed to enforce the original orders against Onco and then chose to enforce new orders "against the other current operators of the wells, including Mr. Bilodeau. The fact that they took so long to do this operates to the detriment of the public, but not to the detriment of Mr. Bilodeau" (at para 86).

Costs

Having lost on all issues, Bilodeau came up with a creative costs argument, likening the litigation to public interest litigation because of the novel and important issues of law that it raised. The court would have none of that:

> There are indeed very few court decisions that have considered the provisions of the *Oil, Gas and Salt Resources Act*, R.S.O. 1990, c P.12. In that sense, the application was novel. However, viewed in its proper context as remedial legislation concerned with environmental protection, the issues raised in the application pertaining to the application of the Act, while important, were not novel. Rather, there were decided cases in related branches of the law relating to environmental protection and responsibility which would have provided sufficient guidance for the resolution of the issues raised in the application. (Costs Endorsement at para 5)

Conclusion

The exploitation of non-renewable resources has been, and continues to be, an important part of Canada's economy. But whether it be oil and gas operations, oil sands end use lakes, coal mines or hard rock mines, such activities always come with a reckoning, an obligation to properly abandon the site and reclaim and restore the surface. And too often different federal and provincial jurisdictions have failed to ensure that operators fulfill these basic obligations, with the result that these sites become the responsibility of the public purse.

That didn't happen in this case, but we cannot take much comfort from this specific outcome. Ontario's legislative scheme leaves much to be desired and the near decade of inaction from provincial regulators does not inspire confidence. In a sense the province got lucky. The Ministry found somebody still standing, presumably with deep enough pockets to fulfill the plugging operations, and obtained a designee's favourable decision that was insulated from real scrutiny both by its confidentiality and by a deferential standard of review. But it could all have gone very differently. And it frequently does. Ontario still has large numbers of leaking wells that pose a threat of harm to both the environment and members of the public. (El Hachem and Kang)

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