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AMENDMENTS TO OIL AND GAS CONSERVATION ACT AND PIPELINE ACT

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The Government of Alberta recently made certain technical amendments to the Oil and Gas Conservation Act[1](the "***OGCA***") and the Pipeline Act[2] which may be of interest to insolvency practitioners and the financial services and oil and gas industries. In an accelerated process, the Liabilities Management Statutes Amendment Act, 2020[3] was introduced in the Alberta Legislative Assembly on March 31, 2020 and received Royal Assent on April 2, 2020. The amendments are directed at sustainable development of Alberta's oil and gas resources[4] and attempt to address the increasing inventory of orphaned wells, pipelines and facilities that remain unabandoned and unreclaimed. As of April 15, 2020, the Orphan Well Association ("**OWA**") had an inventory of 2983 unabandoned wells, 3844 unabandoned pipeline segments, 3284 unreclaimed sites, and 283 facilities requiring decommissioning.[5] The Amendment Act expands obligations for licensees and approval holders (collectively, "***Licensees***") and increases the powers and responsibilities of the OWA and the Alberta Energy Regulator ("**AER**").

In order to provide the Government of Alberta with increased flexibility to adapt the role and powers of the AER and OWA to changing circumstances, the Amendment Act empowered the Lieutenant Governor in Council to enact regulations with respect to the orphan well fund (the "**Fund**")[6] that are "necessary to carry out the provisions [relating to the Orphan Fund] according to their intent or to meet cases that arise and for which no provision is made by this Part".

Expanded Obligations

While the AER already had significant rule making powers including those in respect of the operation, repair and abandonment of wells and facilities, it lacked the authority to proactively address remediation and reclamation issues before they arose. Under the

amended OGCA and Pipeline Act, Licensees will be obligated to provide reasonable care and measures to prevent impairment or damage "that results in or could reasonably be expected to result in harm to the integrity of a [pipeline], well or facility or harm to the environment, human health or safety or property".[7] If the AER, in its sole discretion, is not satisfied with the measures put in place by a Licensee, it may order the Licensee to provide reasonable care and take measures to prevent impairment or damage, on such terms as the AER sees fit.[8] The AER may also order the OWA to provide the required reasonable care and preventative measures.[9] Where the AER issues such an order, working interest participants will be liable for their proportionate share of the associated costs.[10] A Licensee's directors, officers and agents may be named as a "named person" under section 106 of the OGCA, which permits the AER to impose a variety of sanctions including ordering a Licensee to suspend its operations, refusing to consider pending applications for licence transfers, or requiring the Licensee to post deposits or other forms of security for its abandonment, remediation and reclamation obligations.[11]

Changes to Security Deposits

The Amendment Act expands the definition of "debtor" under section 103(1)(a) of the OGCA to include a person who is indebted to the AER for a deposit or other form of security.[12] The obligation to provide security for abandonment and reclamation costs appears to be captured by this change. Hence, if a Licensee that is obliged to provide such security is a "debtor", the obligation would appear to be a "debt". The obligation is secured by a lien in favour of the AER that ranks in priority over all other liens, charges, rights of set.off, mortgages and other security interests.[13]

This change is interesting in light of the Supreme Court of Canada's ("**SCC**") decision in Orphan Well Association v Grant Thornton Ltd.[14] The SCC had concluded that the AER's requirement that the debtor provide security was not a "debt" but rather a bona fide exercise of regulatory power in the public interest.[15] The SCC reasoned that because the obligation arose out of the licensee liability program rather than from debt enforcement provisions in the OGCA, it was not a debt and therefore was not subject to the priority regime[16] set out in the Bankruptcy and Insolvency Act (the "***BIA***").[17]

By characterizing the obligation to post security as a debt, secured by a lien in priority to other security, the Amendment Act may have the effect of converting the obligation into a provable claim under the BIA that is subject to the priority regime in bankruptcy. It remains unclear, however, whether such a characterization would make the AER a "creditor" by enforcing an obligation to post security. This would also not affect the characterization of

an order by the AER requiring that a Licensee or working interest participant abandon and reclaim wells, pipelines and facilities, which order would remain regulatory in nature rather than a provable claim.

Expanded Functions of the OWA

During insolvency proceedings, receivers and other court officers are generally able to find buyers for productive oil and gas assets. The inactive wells and associated pipelines and facilities, however, are often surrendered to the OWA and become orphaned assets. However, in a number of instances even the debtor's productive assets have proven to be unsellable and have ended up with the OWA. The OWA was historically not empowered to operate these assets notwithstanding that revenues from production could mitigate their economic cost to the orphaned asset system. The Amendment Act addresses this gap by permitting the OWA, if ordered by the AER, and if other working interest participants consent, to operate orphaned but potentially productive wells and facilities.[18]

The Amendment Act also expands the permitted uses of the orphan well fund to include costs for providing reasonable care of, and measures to prevent impairment or damage to, wells and facilities, monitoring wells and facilities, hiring and retaining staff, experts and professionals to conduct monitoring and risk management, and funding the costs of receivers, trustees or liquidators appointed by the Court pursuant to an application by the AER.[19]

Conclusion

While the changes implemented by the Amendment Act provide some tools for the AER and OWA to respond to the increasing inventory of orphaned wells, pipelines and facilities that remain unabandoned and unreclaimed in Alberta, some question whether the new tools will be enough. The changes are focused on the management of existing orphans and enhancing the AER's ability to respond to issues before they arise, but do not address the systemic causes of Alberta's orphan liability problem. Suggested solutions to the ongoing and growing orphan liability program include ensuring adequate financial arrangements to secure the cost of abandonment, reclamation and remediation of well sites and facilities, as well as rules setting limits for how long wells can be suspended before they must be abandoned.[20]

During the second reading of the Amendment Act, Energy Minister Sonya Savage noted that expanding the role of the OWA is "one part of a new suite of policies to be announced

in the near future which will touch every stage in the life cycle of a well, from exploration to postclosure, while at the same time ensuring industry is able to meet its obligations in a manageable way".[21] It is possible that these forthcoming policies will include those that the Government of Alberta agreed to implement as a condition of receiving up to $ 1.2 billion from the Federal Government through Canada's COVID-19 Economic Response Plan and will include regulatory solutions aimed significantly reducing the future prospect of new orphan wells.[22]

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[1] Oil and Gas Conservation Act, RSA 2000, c O-6 ("***OGCA***").
[2] Pipeline Act, RSA 2000, c P-15 ("***Pipeline Act***").
[3] Liabilities Management Statutes Amendment Act, 2020, SA 2020, c 4 (the "***Amendment Act***").
[4] Amendment Act, s 1(3).
[5] "Orphan Inventory - Orphan Well Association", (2020), online: Orphan Well Association <http://www.orphanwell.ca/about /orphan-inventory/>.
[6] OGCA s 77(1.1).
[7] OGCA, s 26.2(1) and Pipeline Act, s 22.1(1).
[8] OGCA, s 26.2(2) and Pipeline Act, s 22.1(3).
[9] OGCA, s 26.2(2) and Pipeline Act, s 22.1(3).
[10] OGCA, s 30(1.1).
[11] OGCA, s 106(3).
[12] Amendment Act, s 18.
[13] OGCA, s 103(2).
[14] Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5 ("Redwater").
[15] Redwater, at para 128.
[16] Redwater, at para 159.
[17] Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 136 ("***BIA***"). Redwater, at puras 155 to 158.
[18] OGCA, ss 12(a.1), 12(2.1).
[19] OGCA, s 106.1.
[20] Nigel Bankes, "Bill 12: A Small Step Forward in Managing Orphan Liabilities in Alberta" (April 9, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_NB_Bill12_April2020.pdf/.
[21] Alberta, Legislative Assembly, Hansard, 30th Leg, 2nd Sess (April 1, 2020), at 320 (Sonya Savage).
[22] Department of Finance - Canada, "Canada's COVID-19 Economic Response Plan: New Support to Protect Canadian Jobs", (2020), online: Canadaca <https://www.canada.ca/en/department-finance/news/2020/04/canadas-covid-19-

economic-response-plan-new-support-to-protect-canadian-jobs.html>.

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Authors

Tom Cumming

Associé - Calgary

Email
tom.cumming@gowlingwlg.com

Phone
+1 403-298-1938

vCard
Tom Cumming

Alex Matthews

Associate - Calgary

Email
alex.matthews@gowlingwlg.com

Phone
+1 403-298-1018

vCard
Alex Matthews