ERCB

Sarg Oils Limited

Review of Abandonment Orders AD 2006-17, AD 2006-17A, AD 2006-18, AD 2006-19, and AD 2006-20

November 15, 2011

Energy Resources Conservation Board

ENERGY RESOURCES CONSERVATION BOARD
Decision 2011 ABERCB 032: Sarg Oils Limited, Review of Abandonment Orders AD 2006-17, AD 2006-17A, AD 2006-18, AD 2006-19, and AD 2006-20

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Energy Resources Conservation Board
Suite 1000, 250 – 5 Street SW
Calgary, Alberta
T2P 0R4

Telephone: 403-297-8311
Toll free: 1-855-297-8311
E-mail: Hinfoservices@ercb.caH
Website: Hwww.ercb.caH

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ENERGY RESOURCES CONSERVATION BOARD
Calgary Alberta

SARG OILS LIMITED
REVIEW OF ABANDONMENT ORDERS AD 2006-17,
AD 2006-17A, AD 2006-18, AD 2006-19, AND AD 2006-20 **2011 ABERCB 032**

1 DECISION

[1] Having carefully considered all of the evidence, the Energy Resources Conservation Board (ERCB/Board) hereby upholds and affirms Abandonment Orders AD 2006-17, AD 2006-17A, AD 2006-18, AD 2006-19, and AD 2006-20 (orders) issued to Sarg Oils Ltd. (Sarg) and sets new deadlines for abandonment of the eight wells, four pipelines, and single facility (a battery) specified in the orders.

2 INTRODUCTION

2.1 Application(s)

[2] Sarg refused to deposit security with the Energy and Utilities Board (EUB), now the ERCB (both referred to herein as the ERCB). The ERCB had demanded security under the Licensee Liability Rating program, which is administered by the ERCB, so the ERCB issued the orders.

[3] The ERCB issued the following orders to Sarg:

Abandonment order no.	Subject of abandonment order	Location or unique well identifier	Licence no.
AD 2006-17 and AD 2006-17A	An order respecting the abandonment of wells licensed to Sarg Oils Ltd.	A0/05-05-001-16W4 00/10-09-001-17W4 00/12-09-001-17W4 00/04-16-001-17W4	0029273 0117799 0019730 0032059
AD 2006-18	An order respecting the abandonment of wells licensed to Sarg Oils Ltd.	A3/03-04-001-16W4 C0/03-04-001-16W4 A2/04-04-001-16W4 D0/04-04-001-16W4	0053700 0016974 0053699 0053703
AD 2006-19	An order respecting the abandonment of a facility licensed to Sarg Oils Ltd.	00/03-04-001-16W4	F9
AD 2006-20	An order respecting the closure and abandonment of pipelines licensed to Sarg Oils Ltd.	From 12-09-001-17W4 to 04-16-001-17W4 From 04-04-001-16W4 to 04-04-001-16W4 From 03-04-001-16W4 to 04-04-001-16W4 From 03-04-001-16W4 to 04-04-001-16W4	6607 (line no. 002) 19219 (line no. 001) 19219 (line no. 002) 19219 (line no. 003)

[4] The wells, pipelines, and facility specified in the orders will be referred to as the "Southern Alberta facilities." The ERCB issued the orders on October 12, 2006, with the exception of the

amended order (AD 2006-17A), which it issued on October 19, 2006, to correct a legal description of a well location. The orders are attached as Appendices 2 through 6 to this decision.

[5] The deadline of November 17, 2006, set in the orders for the abandonment work to be completed has long since passed. The Southern Alberta facilities have not been abandoned, and the sites have not been reclaimed.

[6] By letter dated October 31, 2006, from its legal counsel, Sarg sought a review hearing under Section 40 of the *Energy Resources Conservation Act* (*ERCA*) on the basis that it was directly and adversely affected by a decision of the Board made without a hearing. The ERCB granted a review hearing. The Board set the issues as follows:

1. What is the Board's authority to issue the orders?
2. Was Sarg Oils Ltd. properly named in the orders?
3. If Sarg Oils Ltd. was properly named, are there any mitigating circumstances that require the Board to reconsider the issuance of the orders?

[7] The review hearing was delayed for long periods by interim proceedings and by an appeal to the Court of Appeal of Alberta of a January 11, 2008, preliminary ruling on the admissibility of certain evidence.[1] The appeal proceedings led to a long adjournment of the review hearing.

2.2 Background

(a) The Camrose Wells

[8] In 1988, Sarg sold 15 wells in the Camrose area (Camrose wells). The purchaser submitted licence transfers in the summer of 1988. After many months passed, the ERCB decided it would not approve transfers of the well licences into the name of the purchaser of the Camrose wells because the purchaser did not meet certain ERCB licensee requirements that existed at the time. As a result, Sarg remained the licensee despite having sold the wells, and as licensee, Sarg remained responsible for abandonment and reclamation of the wells. Over the course of October and November of 1991, the ERCB ordered Sarg to abandon the Camrose wells, and Alberta Environment ordered Sarg to reclaim the well sites. Sarg did not abandon the wells, so by the end of December 1993 the ERCB paid the cost of abandoning the Camrose wells and sued Sarg for the abandonment expenditures.

[9] In 1998, the trial justice denied judgment to the ERCB after finding that the ERCB's handling of the applications for the transfers of the well licenses was unfair to Sarg.[2] The ERCB appealed the trial decision to the Court of Appeal of Alberta,[3] which granted the ERCB judgment of $226 113.07 for the debt. In 2002, the Court of Appeal of Alberta held that Sarg was liable to the ERCB as the licensee of the Camrose wells.

[10] Sarg tried to appeal the Alberta Court of Appeal decision to the Supreme Court of Canada, but the Supreme Court of Canada denied leave to appeal.[4] The Alberta Court of Appeal's

[1] *Sarg Oils Ltd. v. Alberta (Energy and Utilities Board)*, 2011 ABCA 56.
[2] *Energy Resources Conservation Board v. Sarg Oils Ltd.*, 1998 ABQB 804.
[3] *Energy Resources Conservation Board v. Sarg Oils Ltd.*, 2002 ABCA 174.
[4] *Sarg Oils Ltd. v. The Energy Resources Conservation Board, et al.* S.C.C. (29314), March 21, 2003.

decision on the liabilities became final and meant that Sarg was responsible for abandonment and reclamation liabilities for the Camrose wells.

[11] In the summer of 2002, the Board filed its judgment against Sarg. In the fall of 2002, the ERCB filed a writ of execution for the judgment amount plus interest and costs with the Alberta courts. The total amount of the writ of execution was $310 517.90. The judgment remains unpaid except for amounts recovered by garnishee proceedings, which are described below.

[12] Alberta Environment sought to compel Sarg to reclaim the Camrose well sites. Sarg began litigation against Alberta Environment and the Environmental Appeals Board over the liabilities related to reclamation. Reclamation liabilities remain outstanding against Sarg for the Camrose wells.

[13] In late 2002, the ERCB tried to recover its debt from Sarg and attached, by garnishee summons, the proceeds of production from the Southern Alberta facilities. As discussed below in relation to the evidence of Sarg, Sarg chose to shut in the Southern Alberta wells because if the wells were produced, the proceeds would go to the Board and not Sarg. The evidence shows that because the Southern Alberta wells were no longer producing, Alberta Energy advised the ERCB that certain of the Crown petroleum and natural gas mineral rights had expired under the *Mines and Minerals Act*[5] and the terms of the leases.

(b) The Licensee Liability Rating Program

[14] The ERCB requires that abandonment and reclamation of oil and gas facilities be done by companies that profit from the facilities by exploring for and producing petroleum products. Two programs are in place to ensure that abandonment and reclamation liabilities are not transferred to the public purse: the Licensee Liability Rating (LLR) program administered by the ERCB, and the Orphan Well program, which is administered by the Orphan Well Association (OWA) under terms of the *Oil and Gas Conservation Act* (*OGCA*).[6]

[15] *Interim Directive ID 2001-8 -Revised Licensee Liability Rating (LLR) Program and Energy Development Licence Transfer Requirements* (*ID 2001-8*), issued on December 4, 2001, explained the LLR program. The LLR requirements outlined in *ID 2001-08* had an effective date of May 1, 2002, and replaced the well screening requirements, licence transfer assessment process, and licensee liability requirements previously in effect as outlined in the *Oil and Gas Conservation Regulations* (*OGCR*), *Interim Directive 2000-11*, and *Interim Directive 2000-11 Amendment*. The LLR program is currently described in *ERCB Directive 006 – Licensee Liability Rating (LLR) Program and Licence Transfer Process* (*Directive 006*). The Board does not believe that changes made to the LLR program over the intervening years are relevant to this proceeding.

[16] Under the LLR program, the ERCB regularly calculates a ratio of the licensee's deemed assets (Alberta cash flow) to deemed liabilities (abandonment and reclamation liabilities). If the ratio falls to less than one, a security deposit is required to bring the ratio back up to at least one. If a licensee does not agree with the ERCB's LLR calculations, it has limited rights of appeal to

[5] RSA 2000, Chapter M-17.
[6] RSA 2000, Chapter O-6, Sections 68-77.

the section leader of the Liability Management Group Field Surveillance and Operations Branch at the ERCB.

[17] The LLR program is in place to limit the risk to the Orphan Fund and the public purse posed by unfunded well, facility, and pipeline abandonment and reclamation liabilities. The Orphan Fund was established under Sections 68-77 of the *OGCA*. The ERCB applies levies to licensees to develop a fund to pay for facility abandonment liabilities in the event the ERCB declares the facilities to be orphans under the *OGCA* legislation.

(c) Issuance of the Abandonment Orders

[18] In early 2002, the ERCB's LLR assessment of Sarg identified a deficiency in its LLR ratio, with the value of Sarg's deemed liabilities exceeding the value of its deemed assets by $723 500.90. The liabilities the ERCB used in the LLR calculation did not include the debt owed to the ERCB for its judgment for abandonment costs for the Camrose wells, but they did include the outstanding liabilities for surface reclamation of the Camrose wells and the abandonment and reclamation liabilities for the Southern Alberta facilities.

[19] The ERCB communicated the results of the LLR calculation and the requirement for Sarg to provide a security deposit under the LLR program in a letter to Sarg dated May 6, 2002. The letter also identified options for payment of the security deposit and the potential for enforcement action if Sarg did not satisfy the security deposit requirements of the LLR program.

[20] The ERCB wrote to Sarg between May and July, 2002, about the security deposit sought from Sarg. Sarg did not pay the security deposit sought by the Board, so the Board issued a miscellaneous order (no. MISC 01014) dated October 1, 2002, demanding that the $721 683.57 security deposit be posted. The amount demanded from Sarg differed from time to time because of monthly recalculations. Sarg did not respond to the miscellaneous order.

[21] The ERCB issued a closure order (C989) on February 3, 2003, suspending the licences of Sarg.

[22] By notice dated November 29, 2005, the Board advised Sarg that if it did not address the requirements of the LLR program by posting security, the Board would order the Southern Alberta facilities abandoned.

[23] On July 28, 2006, the ERCB wrote four letters to Sarg relating to the four wells listed in AD 2006-18. The letters said

> The Alberta Energy and Utilities Board (EUB) has been notified by the Department of Energy (DOE) that the petroleum and natural gas mineral rights expired for the following well:
>
> [Here the Letters Listed the Relevant Unique Well Identifiers]
>
> The licensee may have an obligation to abandon the well in accordance with section 3.012(a) of the Oil and Gas Conservation Regulations since it appears it does not have the right to produce oil, gas, or crude bitumen from the drilling spacing unit.

> Thus, the licensee must complete and submit within 30 days of the date of this letter the enclosed Declaration Document to indicate one of the following options:
>
> - the mineral rights have been reacquired, reinstated, or posted
> - the well has been approved by DOE and the EOB for water disposal or injection
> - the well licence is being transferred to a viable licensee, and the wellbore is being linked to an active mineral agreement
>
> If the licensee does not meet any of the above conditions, it must abandon the well within 60 days of the [ERCB] receiving back the completed Declaration Document.

[24] Sarg did not establish that it had met any of the three conditions set out above. Sarg also testified that it lost the petroleum and natural gas rights to two of the wells listed in AD 2006-17 because of non-production. The wells were Legal Subdivision 10, Section 9, Township 1, Range 17, West of the 4th Meridian (10-9-1-17W4M) and 12-9-1-17W4M.

[25] The ERCB issued the abandonment orders in October 2006.

[26] To date, Sarg has refused to accept the liabilities associated with the Camrose wells or to pay the security deposit required under the LLR program. The deficiency has grown to more than $1 000 000.

[27] None of the facilities that are the subjects of the orders have been abandoned.

(d) Notice of Question of Constitutional Law

[28] On May 6, 2011, Sarg filed and served a notice of question of constitutional law (NQCL) under the provisions of the *Administrative Procedures and Jurisdiction Act*.[7] The Attorney General of Alberta (AG) appeared at the hearing, by counsel, and made submissions in argument. The Attorney General of Canada declined to appear.

[29] Sarg's NQCL set out the following issues:

> 1. Provincial LLR regulations conflict with and frustrate the purpose, provisions and core undertakings of the federal *Competition Act*. The LLR has the effect of limiting and reducing competition in the energy resource industry and does not give small and medium size businesses the equitable opportunity to participate in the market. In turn this limits consumer choice and interferes with competitive pricing. The LLR frustrates a core undertaking of the federal government. Therefore it is submitted that the doctrines of paramountcy and/or interjurisdictional immunity dictate that the provincial legislation should be rendered ineffective to the extent of that frustration.
>
> 2. The Applicant has the right under the Charter to be treated equally under the law (s.15) and to not be discriminated against within the same class (ie: licensees) by legislation that has the effect of favouring wealthy, large companies and squeezing smaller companies out of the industry. The Applicant has the right to liberty (s.7) to earn a living and pursue its chosen profession within its industry.

[7] *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, Chapter A-3.

2.3 Intervention(s)

[30] Sarg appeared at the hearing represented by counsel. It called evidence, cross-examined, and made final submissions. Sarg sought to have the orders set aside or vacated.

[31] The Liability Management Group (LMG) of the ERCB sought enforcement of the orders. LMG called evidence, cross-examined, and made final submissions.

[32] The Canadian Association of Petroleum Producers (CAPP), the Small Explorers and Producers Association of Canada (SEPAC), and the OWA (the industry associations) intervened. The industry associations sought standing in the hearing under Section 26(2) of the *ERCA*; however, the Board denied the industry associations standing and the full participatory rights that accompany standing under Section 26(2) of the *ERCA*. The Board decided that the industry associations had not established that they may be directly and adversely affected by a Board decision on the enforceability of the orders. The Board did grant the industry associations status as discretionary participants and allowed them to make a short and unsworn oral statement at the outset of the hearing. The industry associations supported the LLR program and wanted the orders upheld because members of CAPP and SEPAC contribute to the Orphan Well Fund.

2.4 Hearing

[33] The Board held a public hearing in Calgary, Alberta, on August 16 and 17, 2011, before Board Members Mr. J.D. Dilay, P.Eng. (Presiding Member), Mr. Alex Bolton, P.Geol., and Acting Board Member Mr. Tom McGee. Persons appearing at the hearing are listed in Appendix 1. The Board considers that the record of the proceeding closed on August 17, 2011.

3 ISSUES

[34] The notices of hearing specified that the Board consider the issues in the hearing to be

- the Board's authority to issue the orders;
- whether Sarg Oils Ltd. was properly named in the orders; and
- if Sarg Oils Ltd. was properly named, whether there are any mitigating circumstances that require the Board to reconsider the issuance of the orders.

[35] In reaching the determinations contained in this decision, the Board has considered all relevant materials constituting the record of this proceeding, including the evidence and argument provided by each party. Accordingly, references in this decision to specific parts of the record are intended to assist the reader in understanding the Board's reasoning relating to a particular matter and should not be taken as an indication that the Board did not consider all relevant portions of the record with respect to that matter.

4 THE ERCB'S AUTHORITY TO ISSUE THE ORDERS

4.1 Evidence and Submissions of the Parties

[36] LMG relied on a few sections of the *OGCA* and *OGCR* [8] in saying that a licensee's obligation to abandon its wells and facilities, and the ERCB's authority to order them to do so, is established. For the sake of brevity, the sections are not repeated here.

[37] LMG said that in mid-2006, Alberta Energy advised the ERCB that Sarg had lost the mineral rights for four of its licensed wells, namely those listed in AD 2006-18.

[38] Pursuant to Section 16(2) of the *OGCA*, the ERCB notified Sarg on July 28, 2006, of its obligation to prove entitlement to hold the licences. The ERCB also informed Sarg of the consequences of failure to prove entitlement. As Sarg failed to prove entitlement to the mineral rights for these wells, the ERCB suspended these well licences under Section 16(2) of the *OGCA.*

[39] Sarg advised the ERCB on August 25, 2006, that it had appealed Alberta Energy's position on the termination of the petroleum and natural gas leases. Sarg asked that the ERCB grant an extension until the appeal associated with the mineral leases was dealt with by Alberta Energy. The ERCB did not proceed with its enforcement action (i.e., issuing the abandonment orders) until it learned that Sarg's appeal to Alberta Energy to reinstate the mineral leases was denied. Sarg did not reacquire the expired mineral rights for the wells.

[40] LMG argued that as a result, Sarg no longer had the right to produce from the wells. LMG also provided evidence that in 2009 Sarg lost the mineral rights for two additional wells listed in AD 2006-17 and AD 2006-17A.

[41] LMG pointed out that for Sarg to recommence production from those wells, it would have to reacquire the mineral rights for these wells and pay the security deposit, which had grown to $1 080 600.00.

[42] LMG argued that a licensee's obligation to abandon its pipelines and the ERCB's authority to order them to do so is set out in the *Pipeline Act,* RSA 2000 c. P-15 and the *Pipeline Regulations,* AR 91/2005*,* as amended.[9]

[43] LMG submitted that the *Pipeline Act* and the *Pipeline Regulations* authorize the ERCB to order the licensee to abandon a pipeline when directed by the Board or when required by the regulations. Section 82(9)(g) of the *Pipeline Regulations* requires that a licensee abandon a pipeline that is attached to a well or facility that has been ordered abandoned by the ERCB. The pipelines named in AD 2006-20 are pipelines that are licensed to Sarg and that are attached to wells that the ERCB ordered abandoned in AD 2006-17, AD 2006-17A, and AD 2006-18.

[44] LMG stated that the ERCB's authority to collect security deposits from licensees is found in Section 1.100 of the *OGCR*.

[8] Sections 16 and 27 of the *OGCA* and Section 3.012 of the *OGCR*.
[9] Section 23 of the *Pipeline Act,* RSA 2000 c. P-15 (PA), Section 82(9) of the *Pipeline Regulations,* AR *91/2005,* as amended (PR).

4.2 Analysis and Findings of the Board

[45] The Board notes that Sarg did not contest the authority of the ERCB to issue the orders.

[46] The Board is satisfied that the ERCB had authority to issue the orders.

5 WAS SARG PROPERLY NAMED IN THE ORDERS

5.1 Evidence and Submissions of the Parties

[47] LMG submitted evidence that Sarg was the licensee for the following 38 ERCB licences:

- 8 licences for unabandoned wells,
- 17 licences for abandoned wells with unreclaimed sites,
- 1 licence for an abandoned well with a reclaimed site,
- 1 licence for an unabandoned facility,
- 2 licences for unabandoned pipelines, and
- 9 licences for abandoned pipelines.

[48] LMG submitted that the obligation to abandon wells and facilities is imposed by statute and regulation upon the licensee unless otherwise directed by the Board. The obligation to abandon pipelines is also imposed by statute and regulation upon the licensee. As Sarg was the licensee of all of the Southern Alberta facilities, and the Board had not directed that a working interest participant other than the licensee must abandon these wells and facilities (it cannot so direct in the case of pipelines), it follows that Sarg was properly named in the orders as the person responsible for abandonment.

5.2 Analysis and Findings of the Board

[49] The Board notes that Sarg did not dispute LMG's evidence that the company was the licensee of the Southern Alberta facilities.

[50] The Board is satisfied that Sarg is the licensee of the Southern Alberta wells and facilities and was properly named in the orders.

6 MITIGATING CIRCUMSTANCES AND CONSTITUTIONAL ISSUES

6.1 Purpose and Effect of the LLR Program

6.1.1 Evidence and Submissions of the Parties

[51] Sarg argued that the LLR program is discriminatory and unfair because it places disproportionate financial burdens on small companies that are the least able to post large security deposits. Sarg suggested that while larger companies can more easily bear the regulatory burden of having to post security, they often have sufficient assets to avoid the need to post security.

[52] Mr. S. Mankow is the principal of Sarg. Mr. Mankow said he has spent many years in the oil and gas industry. He said that the efforts of CAPP and SEPAC during the consultation associated with development of the LLR program suited only the interests of their members, and in particular, bigger companies.

[53] Mr. T. Gladysz was a witness for Sarg. He indicated that he has had a long career in the oil and gas industry and had been past chairman or president of the Independent Oil and Gas Association (IOGA) for seven years. He had formed IOGA because certain oil and gas operators were not satisfied that CAPP and SEPAC adequately represented their interests. Mr. Gladysz said that he was a critic of the LLR program and that the program has had devastating effects. He said that the LLR program has led to a decline in the number of small companies operating in the sector and that by implementing and enforcing the LLR program, the ERCB was catering to big companies. He said that the requirement to post security with the ERCB under the LLR program impaired competition.

[54] Mr. Gladysz submitted correspondence that small operators had sent to IOGA asking for help in dealing with problems that were allegedly due to the LLR program and the demands by the ERCB that security be posted.

[55] Sarg also argued that the design and implementation of the LLR program was not, as intended, reducing the number of inactive wells in the province. Mr. Gladysz was of the opinion that the LLR program was supposed to stop the growth in the number of inactive or deemed orphan wells and that the program has not done that. Sarg presented evidence that the number of inactive wells had grown significantly since the ERCB implemented the LLR program in 2002. Mr. Gladysz also was of the view that the LLR program had the undesirable effect of allowing large numbers of inactive wells to become concentrated in the hands of a few large companies that have the assets to offset the liabilities.

[56] It was also Sarg's view that the LLR program would not, as intended, prevent an increase in the number of orphan wells and prevent unfunded abandonment liabilities from being transferred to the OWA. Sarg claimed that because the Southern Alberta facilities have been shut in since early 2003 and the wells were the only source of revenue for the company, it did not have the financial resources to abandon the wells. Sarg submitted that if the Board upheld the orders and required Sarg to abandon the wells, the Southern Alberta facilities would likely become orphan facilities and abandonment and reclamation costs would need to be paid by the Orphan Fund.

[57] LMG submitted that complaints about LLR program policy do not constitute a "mitigating factor" for the purpose of relief from the orders. LMG said the LLR program is a validly enacted regulatory program that is enforced fairly and uniformly across industry, and an appeal mechanism is built into the program for licensees that dispute their LLR calculation. LMG stated that Sarg did not avail itself of that process. LMG submitted that the development and implementation of industry-wide requirements is activity of a regulatory nature. LMG also submitted that the Board should not consider a challenge to the policy underlying regulatory requirements to be a valid defense to enforcement action.

[58] LMG evidence contained a letter dated May 31, 2002, from Sarg objecting to the inclusion of reclamation amounts for the Camrose wells in an LLR monthly audit dated May 4, 2002.

[59] LMG disputed Sarg's allegations that the ERCB failed to consider, during development of the LLR program, the circumstances of licensees that are small businesses. Development of the LLR program is described in LMG's March 18, 2011, submission. The LLR program was developed in consultation with stakeholders, including both CAPP and SEPAC. LMG pointed out that the SEPAC website states that "the Association represents a wide spectrum of independent oil and gas companies ranging from startups to junior and mid-sized producers...."

[60] LMG submitted a letter dated August 21, 2002, from CAPP and SEPAC to the Minister of Energy that said

- the associations were aware that a few small companies expressed concern about the impact of the LLR calculation and the program on their businesses;
- in developing the LLR calculation over an 18-month period, industry was consulted in various and multiple ways;
- a great deal of consideration was put into the potential impacts on smaller companies, and steps were included in the program to mitigate the impacts; and
- the success of the LLR calculation was demonstrated by the fact that only 13 of 1400 companies operating in the province (i.e., less than 1 per cent) were facing enforcement action as a result of the implementation of the LLR program.

[61] LMG stated that stakeholder engagement has always been a key component in the development and maintenance of the ERCB's liability management programs, including the LLR program. This has included stakeholder participation in committees and working groups formed to develop and modify the programs, and allowing stakeholders to provide comments once draft requirements are developed. Stakeholders have also contributed to the ongoing maintenance of the programs by participating in the Fund Advisory Committee and subsequently through the Liability Management Advisory Committee. LMG pointed out that industry stakeholder groups that have participated in these committees include CAPP, SEPAC, the Alberta Oilfield Treating and Disposal Association, and the Gas Processing Association of Canada.

[62] LMG rejected the proposition that before the LLR program was implemented, the vast majority of small companies were meeting their responsibilities to produce wells properly and abandon wells properly. LMG said that was not the case. LMG rejected the proposition that the LLR program simply served to place inactive wells in the hands of larger companies because smaller companies were not viable under the LLR program. LMG rejected the notion that the

number of smaller companies was shrinking and suggested that the reverse was happening, based on its experience with the number of business codes issued to new licensees between 2003 and 2010. LMG stated that during that period, the ERCB issued approximately 890 new codes for licensees to hold licences, and that in LMG's view most, if not all, of those were small to medium companies.

[63] LMG said that it has noticed over the years that by the time a file gets to LMG for enforcement, the company may be in financial trouble and may not be paying other liabilities. The company may not be paying its taxes, surface lease payments, or amounts due under its mineral leases. LMG may be the body that steps in and stops the company from operating because other bodies, such as municipalities or the Surface Rights Board, do not have the power to issue abandonment orders. When licensees are, by enforcement of the provisions of the LLR program, stopped from operating, it sometimes appears that the LLR program is causing the shutdown of operations. However, in LMG's experience, by the time abandonment orders are issued, the company is so far in debt that it is near the end of the road, and the ERCB has the legislation to do something about it.

[64] LMG would not agree with Sarg's suggestion that the LLR program was causing a growth in the number of inactive wells in Alberta. LMG acknowledged that it was possible for companies to have large inventories of inactive wells, depending on the assets the companies held. LMG agreed that in principle it was a beneficial use of resources if inactive wells are placed on production, perhaps by a purchaser of the inactive wells. LMG would not accept that the LLR program is a disincentive for companies considering purchasing and producing from inactive wells.

[65] LMG did agree that a program that would cause the number of inactive wells to shrink would be beneficial. LMG also commented that in the past, the Board has had programs in place to address the number of inactive wells in Alberta.

[66] LMG acknowledged that if Sarg cannot pay the abandonment costs of the Southern Alberta wells, the costs are likely to be paid by the Orphan Fund.

6.1.2 Analysis and Findings of the Board

[67] Although Sarg presented evidence from other cases in which small companies objected to or had difficulty meeting the security provisions of the LLR program, the small number of cases presented do not support Sarg's view that the LLR program had a widespread and adverse effect on small companies. It was also not clear whether or not the LLR requirements contributed to the financial difficulties faced by these companies.

[68] The evidence and submissions of LMG indicate that small oil and gas operators continue to enter and compete in the industry while complying with the requirements of the LLR program.

[69] Based on the evidence, the Board finds that the arguments that the LLR program unfairly discriminates against small companies and that it has resulted in a significant reduction in the number of small companies in the oil and gas industry in Alberta are incorrect.

[70] The Board acknowledges that the number of inactive wells in the province has grown since the LLR program was implemented. However, reducing the number of inactive wells is not an

objective of the LLR program. The purpose and intent of the LLR program is stated in the original interim directive (*ID 2001-8*) and in the present version of *Directive 006*.

[71] *ID 2001-8* says

> The purpose of this revised liability management program is to minimize the risk of unfunded abandonment and reclamation liabilities of well and facility licensees and to support the increased scope of the Orphan Fund.

[72] *Directive 006* says

> **1 Purpose of the LLR Program**
>
> The purpose of the Energy Resources Conservation Board (ERCB) LLR Program and licence transfer process as set out in this directive is to
>
> - prevent the costs to suspend, abandon, remediate, and reclaim a well, facility, or pipeline in the LLR Program from being borne by the public of Alberta should a licensee become defunct, and
> - minimize the risk to the Orphan Fund posed by the unfunded liability of licences in the program.

[73] To the Board, it is clear that the purpose of the LLR program is not to reduce the number of inactive wells and facilities but to ensure that when a well or facility needs to be abandoned and reclaimed there is money available to perform the work. The money has to be in the hands of the licensee or on deposit with the ERCB.

[74] Notwithstanding the above, the Board agrees with the LMG that this hearing is not the appropriate forum for determining whether the LLR program is achieving its intended policy outcomes. The Board holds that the LLR program is a validly enacted regulatory requirement that is enforced fairly and uniformly across the upstream oil and gas industry. Disputes about the purpose or effect of the LLR program do not constitute a mitigating circumstance that would cause the Board to cancel or decline to enforce the orders.

6.2 Impact of the Camrose Wells on the LLR Calculation

6.2.1 Evidence and Submissions of the Parties

[75] Mr. Mankow described his practice of buying older wells that could still produce but were wells that larger companies were not interested in continuing to own and produce. He said that that Sarg's overhead was quite low. He described the production from the Southern Alberta facilities and contended that the wells were economic to produce and generated a profit. Mr. Mankow suggested that when considered on their own, the Southern Alberta facilities would have generated sufficient funds to meet abandonment and reclamation liabilities attaching to them.

[76] Mr. Mankow also maintained that before the enforcement actions resulting from implementation of the LLR program in early 2002, no non-compliance issues had resulted from Sarg's operation of the Southern Alberta facilities.

[77] Mr. Mankow said that the closure orders the ERCB issued for the Southern Alberta facilities were largely due to the liabilities associated with the Camrose wells, which he referred to as the "unowned wells". He said he believed that Sarg would have had an LLR ratio of one or

above if the liabilities associated with the Camrose wells had not been included in the LLR calculation. As a result, Mr. Mankow said he believed there was no reason to ask for the security deposit on the Southern Alberta facilities. Mr. Mankow said it was not right for the ERCB to include the Camrose wells in the calculation of Sarg's LLR rating and that he would not accept that Sarg was responsible for another company's liabilities.

[78] Mr. Mankow said that the enforcement actions put Sarg in a very difficult position. Mr. Mankow described the history of the garnishee proceedings that the ERCB took to collect on its judgment related to the Camrose wells and how that garnishment of production revenue led him to shut in the Southern Alberta facilities. Mr. Mankow said that he did not choose to spend money producing the Southern Alberta facilities only to have all of the proceeds of production go to the ERCB. That in turn led to cancellation of the mineral rights by the provincial government. Mr. Mankow said that the wells could have produced for a long time and that but for the effects of the LLR program and the requirement to post security, the wells would not likely have become orphan wells. Sarg has no Alberta oil and gas production at present.

[79] LMG acknowledged that before shutting in the Southern Alberta wells in January, 2003, there had not been any non-compliance issues with those properties.

[80] LMG stated that the LLR program requires a consideration of all of a licensee's assets and liabilities as defined by the requirements of the LLR program. The outstanding reclamation liabilities for the Camrose wells were included in the LLR calculation for Sarg because Sarg was the licensee for those wells. LMG argued that excluding certain non-productive assets from the LLR calculation would defeat the purpose of the LLR program.

[81] LMG noted that most of Sarg's requests for hearings since early 2003 related to requests that the ERCB review the issues surrounding the well licence transfer application of 1988/1989 for the Camrose wells. The ERCB denied all of these review requests. Sarg also requested a hearing before the ERCB for a stay of enforcement of orders pending its application for leave to appeal to the Supreme Court of Canada, which the Board also denied.

6.2.2 Analysis and Findings of the Board

[82] Although Sarg was of the view that it was no longer the licensee of the Camrose wells and should not be responsible for the outstanding liabilities associated with these wells, this issue has been addressed in previous proceedings as discussed in the background above. To summarize, the well licence transfers associated with the sale of the Camrose wells were never approved and registered by the ERCB. This result was upheld by the 2002 decision of the Alberta Court of Appeal, and the Supreme Court of Canada denied leave to appeal the Court of Appeal decision. The Board therefore confirms that Sarg was and is the licensee of the Camrose wells.

[83] Because Sarg was the licensee of the Camrose wells, the Board believes that LMG was correct to include the outstanding reclamation liabilities associated with the Camrose wells in the LLR calculation for Sarg. The Board does not accept that it would be appropriate to exclude the reclamation liabilities for the Camrose wells. To do so would impair the function of the LLR program. The Board accepts that for the LLR program to be effective, the LLR calculation must include all of the relevant assets and liabilities that a licensee has or is responsible for as defined by the LLR program.

[84] The Board finds that inclusion of the liabilities associated with the Camrose wells in the LLR calculation is not a mitigating circumstance that would cause the Board to cancel or decline to enforce the orders.

6.3 Alleged Breach of the Competition Act

6.3.1 Evidence and Submissions of the Parties

[85] Sarg argued that the LLR program and its effect was contrary to the federal *Competition Act*,[10] stating it unfairly stifles competition. Sarg cited the "Purpose" section of the *Competition Act* (Section 1.1) and the definition of "anti-competitive act" in Section 78 of that act.

[86] LMG submitted that the Board is not the correct forum for considering possible breaches of the *Competition Act*. LMG also cited a passage from the decision of the Alberta Court of Queen's Bench in *Edmonton Regional Airports Authority v. North West Geomatics Ltd.*, 2002 ABQB 1041, in Paragraph 27 as follows:

> I do not accept that the *Competition Act* could apply to legal entities incorporated by statute and required by statute to operate in the public interest.

6.3.2 Analysis and Findings of the Board

[87] The Board agrees with LMG that the ERCB is not the proper forum for bringing forward this allegation. Breaches of the *Competition Act* should be taken to the Competition Tribunal established under the *Competition Tribunal Act*.[11] The Competition Tribunal is the specialized expert tribunal with the mandate to enforce the *Competition Act* to maintain competition in accordance with that act.

[88] As will be seen upon reading this decision in its entirety, the Board is of the opinion that the legislation and directives under consideration here are valid provincial regulatory requirements. There are other cases in addition to *Edmonton Regional Airports Authority* that support the argument that the *Competition Act* has no application here. An important one is *Canada (Attorney General) v. Law Society (British Columbia)*[12]—the "*Jabour*" case, decided by the Supreme Court of Canada. In that case, the regulator of the legal profession in British Columbia, the Benchers of the Law Society of British Columbia, held disciplinary proceedings against a lawyer for advertising. The basis of the discipline proceeding was that advertising by a lawyer was considered contrary to the best interests of the profession. The lawyer, Mr. Jabour, made a complaint to the federal government that the actions of the Benchers were contrary to the federal statute that promoted competition in business. The Supreme Court of Canada said that "when a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes."

[89] Another instance of the application of the principle is the decision of the Trial Division of the Federal Court of Canada in *Industrial Milk Producers Assn. v. British Columbia (Milk*

[10] R.S.C., 1985, c. C-34.
[11] R.S.C., 1985, c 19 (2nd Supp.).
[12] 1982 Carswell BC 133, 37 B.C.L.R. 145, [1982] 2 S.C.R. 307, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, J.E. 82-973, 15 A.C.W.S. (2d) 304.

Board).[13] In that case, industrial milk producers wanted to be free to market their milk as they pleased and without the application of a provincial quota system. They argued that provincial agricultural marketing legislation was contrary to federal competition legislation. The Federal Court applied the principle of the *Jabour* case and said the federal competition legislation did not apply to a regulatory scheme established under valid provincial legislation.

[90] The Board is of the view that some activities carried out by persons in a regulated industry are exempt from the *Competition Act* if those activities are required or authorized by valid provincial legislation. Sarg is dissatisfied with regulatory activities of the ERCB rather than with competitive commercial activities. The Board does not accept that it has gone outside its statutory authority in implementing and acting on its LLR program because it is authorized to do so by the legislation and *Directive 006*.

[91] Based on the foregoing, the Board is of the view that the validly passed federal legislation, the *Competition Act*, and the validly enacted provincial legislation under consideration here should be interpreted by the Board such that the *Competition Act* does not apply to the valid provincial regulatory scheme.

6.4 Paramountcy of Federal Legislation over Provincial Legislation

6.4.1 Evidence and Submissions of the Parties

[92] Sarg argued that the LLR program is unconstitutional according to the doctrine of the paramountcy of federal legislation over provincial legislation.

[93] Sarg argued that the doctrine of paramountcy establishes that where there is a conflict between valid provincial and federal laws, the federal law will prevail and the provincial law will be inoperative to the extent that it conflicts with the federal law.

[94] Sarg argued that the Saskatchewan Court of Appeal in *Rothmans, Benson & Hedges v. Saskatchewan*[14] expanded the paramountcy doctrine to state that a "provincial enactment must not frustrate the purpose of a federal enactment, whether by making it impossible to comply with the latter or by some other means."

[95] Sarg also argued that by requiring small oil companies with slimmer margins and fewer resources to make a security deposit, the ERCB's LLR program reduces, and has the potential to further reduce, competition in the market by squeezing out smaller businesses. Sarg said the scheme would seem to be directly frustrating the purpose and provisions of the federal *Competition Act* and hence should be inoperative to the extent of that frustration.

[96] Sarg argued that the LLR program may lead to more exposure to the Orphan Fund and more costs associated with abandonment. It argued that there are other and better ways of achieving the goals without the resulting effects of discouraging competition in the market. Sarg said the LLR program was contrary to several provisions and the very purpose of the *Competition Act*. Sarg contended that the LLR program does not promote efficiency or adaptability in the marketplace. It does not promote equal opportunity for small companies to

[13] 1988 Carswell Nat 148, [1989] 1 F.C. 463, 18 F.T.R. 147, 47 D.L.R. (4th) 710, 21 C.P.R. (3d) 33.
[14] *Rothmans, Benson & Hedges* v. *Saskatchewan 2003 SKCA 104 (CanLII).*

participate in the market. By losing small businesses, the program takes away competitive pricing and choice from the consumer. Sarg concluded by stating that requiring compliance with the provincial LLR scheme frustrates the purpose of and does not comply with the federal *Competition Act.*

[97] The AG pointed out that, when considering a constitutional case, the first step is to decide what the purposes of the two pieces of legislation are. Sarg and the LMG put forward two diverging views of the purpose of the LLR program. Sarg contended that the purpose of the program was to reduce the number of deemed orphan or inactive wells, or wells that haven't been produced in 12 months. Sarg said that the number of deemed orphan wells is increasing, yet enforcement is focused on a small minority of companies, and that did not make sense. LMG put forward a different view of the purpose of the program. Inactivity of a well is not a trigger. Instead, there is a measure of the financial ability of a licensee to meet its foreseen abandonment and reclamation obligations. The AG argued that the fact that a relatively small minority of companies become the focus of enforcement seems neither peculiar nor alarming.

[98] The AG further stated that inactive wells in the hands of wealthier licensees might deserve a regulatory response, but that this issue called for something other than the response of the LLR program. The AG argued that the Board should accept that the purpose of the LLR program was to address concerns about the financial responsibilities of licensees with low-margin wells. The AG also argued that the regulatory burden is imposed on a particular niche in the oil and gas industry, namely companies that buy wells that are becoming less productive and seek to make them profitable through lower overhead. This type of niche is one in which concerns about financial capacity of participants are likely to arise.

[99] Turning to issues related to the *Competition Act*, the AG argued that the LLR program is valid subordinate legislation. The AG said the doctrine would apply if the provincial legislation interfered with the operation of the *Competition Act* and somehow lessened competition.

[100] The AG relied on the Supreme Court of Canada decision in *Canadian Western Bank v. Alberta*.[15] One point that the court emphasizes is that incidental effects of either provincial or federal legislation on matters that are the concern of the other level of government are the ordinary case and are not themselves offensive to the Canadian division of powers.

[101] The AG submitted that the *Competition Act* encourages more competition by small actors in the economy, and that the LLR program places a specific burden on licensees of lower margin wells. The AG argued that the evidence before the Board tended to show that these licensees are typically smaller operators. The AG submitted that the implications of the LLR program on competition among small- and middle-sized enterprises somehow does not interfere with or undermine federal jurisdiction. The AG argued that an incidental effect of a valid provincial law on federal jurisdiction occurs often in a federal system such as Canada's. The AG stated that it is difficult to imagine a law that does not have some kind of effect on matters of concern to another level of government. The doctrines of paramountcy and interjurisdictional immunity deal with the applicability of a law. The AG also said that it is clear that the LLR program is a valid

[15] 2007 Carswell Alta 702, 2007 SCC 22, J.E. 2007-1068, [2007] A.W.L.D. 2141, [2007] A.W.L.D. 2143, [2007] A.W.L.D. 2087, 49 C.C.L.I. (4th) 1, [2007] 8 W.W.R. 1, 362 N.R. 111, 75 Alta. L.R. (4th) 1, 281 D.L.R. (4th) 125, [2007] I.L.R. I-4622, 409 A.R. 207, 402 W.A.C. 207, [2007] 2 S.C.R. 3.

provincial legislation, at least as far as the division of powers is concerned. The AG asked, does it affect some particular thing that is distinctively of federal concern?

[102] The AG argued that with respect to federal paramountcy, the decision maker must ask whether the laws are actually inconsistent and whether a person cannot act in accordance with both of them. In that case, the federal law will govern and provincial law is rendered inoperative to the extent of the inconsistency.

[103] The AG argued that, in this case, the provincial law does not undermine the purpose of the federal law, there is no actual inconsistency, and the *Competition Act* is not undermined by the LLR program. Further, the AG said that when parliamentary intent is considered, the *Competition Act* cannot be read as preventing licensees of oil and gas wells in Alberta that operate specifically marginal wells from being required to post security to ensure that foreseen liabilities will be met.

[104] The AG argued that parliament could not have intended anything like that nor, it can be fairly said, could it have thought anything like that; hence discussions of paramountcy require the Board to be clear about the intentions attributed to parliament in passing the *Competition Act.* The AG concluded on the issue of paramountcy by stating that it was entirely implausible to suggest that this kind of law of general application, which ensures that a particular actor in a particular marketplace is able to bear some of the costs of its operations, is implausible. The AG concluded that the aspect of the paramountcy doctrine that Sarg wants to rely on—namely, an attribution of federal intent that companies like Sarg ought to be free of this burden on competition—doesn't bear examination.

6.4.2 Analysis and Findings of the Board

[105] The Board is satisfied that the LLR program is validly passed and that the legislation under which it is developed is within the jurisdiction of the provincial government. The Board is of the view that the pith and substance of the provincial legislation under consideration here falls squarely within the exclusive jurisdiction of the provinces. Section 92A of the Constitution Act, 1867, states

> 92A. (1) In each province, the legislature may exclusively make laws in relation to
>
> (a) exploration for non-renewable natural resources in the province;
>
> (b) development, conservation and management of non-renewable resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
>
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

[106] Provincial and federal jurisdiction over environmental matters is shared, with each level of government having jurisdiction over matters within their sphere of power.

[107] The Board holds that the provincial law and the federal law are neither in conflict nor inconsistent. The Board does not accept that it was parliament’s intention in enacting the *Competition Act* that participants in a provincially regulated industry be able to escape regulatory requirements by arguing that they would be better able to compete if those requirements were not

placed upon them. It is entirely possible for industry participants to comply with both the LLR program requirements and the *Competition Act*. The oil and gas industry in Alberta includes many small companies that effectively compete in the industry while meeting the requirements of the LLR program.

6.5 Interjurisdictional Immunity Between Federal and Provincial Legislative Spheres

6.5.1 Evidence and Submissions of the Parties

[108] Sarg argued that the LLR program is unconstitutional under the doctrine of interjurisdictional immunity.[16]

[109] Sarg argued that the interjurisdictional immunity doctrine differs from the paramountcy doctrine in that interjurisdictional immunity is activated even where there is no meeting of legislation or contradiction between federal and provincial statutes. Interjurisdictional immunity only requires that the provincial legislation affect federal things, persons, or undertakings significantly. Interjurisdictional immunity renders inapplicable any legislation of general application that affects the rights and obligations, affects the status, or regulates the essential parts of things, persons, or undertakings that are exclusively within the core of the jurisdiction of the other level of government.

[110] Sarg submitted that interjurisdictional immunity renders inapplicable any impugned provincial law that affects a vital aspect of the core of a federal power or undertaking. “Affects” here means that the provincial law intrudes heavily upon core areas of federal jurisdiction.

[111] Sarg also said that if the doctrine of paramountcy does not apply in the present situation, it seems clear that the doctrine of interjurisdictional immunity does. The provincial LLR regulatory scheme enforced by the Board has a significant impact on the federal undertakings sanctioned by the *Competition Act*, and as such, Sarg submitted that the provincial legislation does not apply to the extent that it undermines the core of the federal undertakings of encouraging and protecting competition in the Canadian market.

[112] The AG relied on the Supreme Court of Canada decision in *Canadian Western Bank v. Alberta* and called it a very current restatement from beginning to end of the role of these kinds of doctrines, particularly interjurisdictional immunity, in the law of Canadian federalism. The AG contended that the court emphasized that incidental effects of either provincial or federal legislation on matters that are the concern of the other level of government are the ordinary case and are not themselves offensive to the Canadian federal system with its division of powers.

[113] Again the AG argued that the *Competition Act* foresees more competition by small actors in the economy and that the incidental effect of a clearly valid provincial law that may be present here is common in Canada’s federal system of government. The AG submitted that it is difficult

[16] By way of background to this section, the Board understands that the doctrine of interjurisdictional immunity is based on the principle that there is a basic, minimum, and unassailable content to the heads of powers of the federal and provincial governments that should not be impaired by the other level of government. Where interjurisdictional immunity applies, the legislation passed by one level of government will be considered valid, but it will not apply to the identified core of the other level of government. For interjurisdictional immunity to apply, it is not necessary to show that there is a conflict between the laws adopted by the two levels of government. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

to imagine a law that does not have some kind of effect on matters of concern to another level of government. The AG also said that interjurisdictional immunity deals with the applicability of a law and that it is clear that the LLR program is valid provincial legislation, at least in regard to the division of powers. The question, AG said, is does the LLR program affect some particular thing that is distinctively of federal concern.

[114] The AG pointed out that in the *Canadian Western Bank v. Alberta*[17] case, the Supreme Court of Canada makes it clear that interjurisdictional immunity is not a favoured doctrine in analyzing interaction between federal and provincial jurisdiction. Its primary application is to things, people, and institutions that are specifically federal government concerns. Examples are treaty Indians, banks, and undertakings, such bus lines and railroads, that are interprovincial. The doctrine has a secondary application to other heads of power with respect to federal jurisdiction to regulate trade and commerce and competition.

[115] The AG argued that the court is clear that this doctrine ought to be read restrictively. So in order for it to apply, assuming the discussion is about the immunity of a federal undertaking, a provincial law would have to not merely affect but impair what the court calls the basic minimum and unassailable content of federal jurisdiction. The AG contended that it is clear that the kind of regulatory burden under consideration here is directed at companies that, because of the niche they have chosen in the oil and gas industry, may be at greater risk of not being able to meet their clean-up obligations. It may affect how, or the extent to which, they are able to compete, but it certainly does not impair the basic minimal and unassailable content of federal jurisdiction. This type of burden of provincial law is simply the ordinary case. These companies could also compete more if their taxes were lower. Almost any regulatory burden is going to affect the less wealthy and companies less able to obtain financing differently. In this case, licensees that direct their efforts into a niche where margins are lower will be affected. These kinds of incidental effects on either federal or provincial jurisdiction by legislation made by the other level of government are the ordinary case in Canadian federalism and are not to be vigorously resisted.

6.5.2 Analysis and Findings of the Board

[116] The Board restates its view that it is satisfied that the LLR program is validly passed and that the legislation under which it is developed is within the jurisdiction of the provincial government.

[117] The Board notes that in *Canada (Attorney General) v. PHS Community Services Society,*[18] which was decided after the hearing in this matter, the Supreme Court of Canada affirmed and emphasized what it had decided in the *Canadian Western Bank* decision.

[118] The Board holds that there is no basis for an interjurisdictional immunity argument here. It does not accept the assertion that collection of security—in the oil and gas development context to ensure abandonment and reclamation—intrudes heavily on the trade and commerce jurisdiction of the federal government. Rather, the Board finds that the effect the program may have on the ability of some companies to compete is only an incidental effect that should not involve the doctrine of interjurisdictional immunity.

[17] Ibid.
[18] 2011 SCC 44.

[119] On balance, the Board favours the arguments of the AG over those of Sarg on interjurisdictional immunity. The Board is of the view that incidental effects of the LLR program on trade and commerce are the effects of a valid provincial law, and that the doctrine is not a favoured doctrine in analyzing interaction between federal and provincial jurisdictions. Finally, the Board does not agree that the provincial scheme intrudes heavily on the federal government's jurisdiction over trade and commerce in Canada.

6.6 Section 7 of the Charter of Rights and Freedoms

6.6.1 Evidence and Submissions of the Parties

[120] Sarg argued that the LLR program and its effect constitute breaches of Section 7 of the Charter of Rights and Freedoms[19] (Charter) because it infringes on guaranteed rights to life, liberty, and security of the person.

[121] The Canadian Charter[20] provides in Section 7 as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[122] Sarg sought to establish that the guarantee that everyone has the right to liberty includes the protection of the economic interests of a small corporation engaged in the oil and gas industry. Sarg submitted that its Charter challenge on infringement could succeed under Section 7 of the Charter if it first proved that there has been a deprivation of its right to life, liberty, or security of the person, and if so, it would also need to show that the deprivation is contrary to the principles of fundamental justice.

[123] Sarg relied on the 1988 decision of the British Columbia Court of Appeal (B.C.C.A.) in *Wilson v. British Columbia (Medical Services Commission)*[21] (*Wilson)*. The *Wilson* decision dealt with a provincial scheme governing the right of medical practitioners to bill the medicare plan. This right was conferred when a physician was issued a practitioner number, which was essential to earn a living in private practice as a physician in British Columbia. The province was seeking to have medical practitioners in centres other than the large urban centres in the province, so practitioner numbers were only issued for certain locales. In that decision, the court summarized the meaning of liberty as follows:

> To summarize: 'Liberty' within the meaning of s. 7 is not confined to mere freedom from bodily restraint. It does not, however, extend to protect property or pure economic rights. It may embrace individual freedom of movement, including the right to choose one's occupation and where to pursue it, subject to the right of the state to impose, in accordance with the principles of fundamental justice, legitimate and reasonable restrictions on the activities of individuals.

[19] Enacted as Schedule B to the *Canada Act 1982,* (U.K.) 1982, c. 11, which came into force on April 17, 1982.
[20] Ibid.
[21] (1988), 34 Admin. L.R. 235, 30 B.C.L.R. (2d) 1, [1989] 2 W.W.R. 1, 41 C.R.R. 276, 53 D.L.R. (4th) 171 (C.A.), leave to appeal to S.C.C. refused [1988] 2 S.C.R. viii (note), 36 Admin. L.R. xl (note), 36 B.C.L.R. (2d) xxxvii (note), [1989] 3 W.W.R. lxxi (note), 92 N.R. 400 (note) (S.C.C.).

[124] The Board notes that Sarg took the position that the LLR program impaired individual freedom because it could impair the ability of industry participants to choose an occupation and where to engage in that occupation.

[125] The AG argued that Section 7 of the Charter did not apply to the economic interests of a corporation. AG relied principally on the decision of the Court of Queen's Bench of Alberta and the decision of the Court of Appeal of Alberta in *Lavallee v. Alberta (Securities Commission).* (*Lavallee*)[22].

[126] *Lavallee* dealt with the imposition of sanctions by a securities regulator against securities market participants. The Court of Queen's Bench justice said this at Paragraph 115:

> There is no doubt that an ASC panel has the power to severely impact the Applicants' choices regarding their economic life. Although the Applicants did not put forward such an argument, it is important to emphasize that an ASC panel does not have the power to exclude Lavallee and Morice from obtaining employment. Therefore, even if s. 7 afforded protection to economic rights in such instances, this is not the case before me: see discussion in *Gosselin* c. *Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.) at paras. 75 ff., per McLachlin C.J. The Applicants will not be precluded from meeting their essential needs. It is well established in the case law that s. 7 does not protect purely economic rights: see for example *Yin v. Lewin*, 2006 ABQB 402, 403 A.R. 79 (Alta. Q.B.) at paras. 38 ff., aff'd 2007 ABCA 406, 422 A.R. 263 (Alta. C.A.).

[127] The individuals appealed to the Alberta Court of Appeal. Two of three Justices of the Court of Appeal commented favourably on the thoroughness of the Queen's Bench justice who decided the case initially. The majority (two of three justices) said at Paragraph 19

> My conclusion on the interpretation of ss. 29(e) and (f) is sufficient to dispose of this appeal. Even if I had reached a different conclusion on that point, however, the appeal would fail. I agree with the analysis and the conclusions of the chambers judge with respect to the applicability of ss. 7 and 11 of the Charter to the facts of this case and, like him, I conclude that those Charter rights are not engaged here.

[128] The third justice found it unnecessary to comment on the Charter issue.

[129] The Supreme Court of Canada denied leave to appeal in *Lavallee*.[23]

[130] Sarg argued that *Lavallee*, as a result, is *obiter dicta* on the application of Section 7 of the Charter, or in other words, it is a mere passing remark and not declaratory of the law.

[131] To counter Sarg's argument that *Lavallee* did not wipe out the effect of *Wilson*, the AG argued that *Wilson* was decided when the Charter was fresh and that the jurisprudence has moved away from *Wilson* as it has matured.

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[22] 2009 Carswell Alta 27, 2009 ABQB 17, [2009] A.W.L.D. 1666, [2009] A.W.L.D. 1667, [2009] A.W.L.D. 1668, [2009] A.W.L.D. 1669, [2009] A.W.L.D. 1603, [2009] A.W.L.D. 1604, [2009] A.W.L.D. 1602, [2009] A.W.L.D. 1588, 3 Alta. L.R. (5th) 232, [2009] 6 W.W.R. 642, 87 Admin. L.R. (4th) 247, 183 C.R.R. (2d) 9, 467 A.R. 152; Lavallee v. Alberta (Securities Commission) 2010 Carswell Alta 235, 2010 ABCA 48, [2010] A.W.L.D. 1287, [2010] A.W.L.D. 1288, [2010] A.W.L.D. 1289, [2010] A.W.L.D. 1290, [2010] A.W.L.D. 928, [2010] A.W.L.D. 967, [2010] A.W.L.D. 968, 100 Admin. L.R. (4th) 9, 317 D.L.R. (4th) 373, 22 Alta. L.R. (5th) 201, 474 A.R. 295, 479 W.A.C. 295, [2010] 8 W.W.R. 38, 205 C.R.R. 1.

[23] 2010 Carswell Alta 1382, 410 N.R. 382 (note).

6.6.2 Analysis and Findings of the Board

[132] The Board is of the view that it should be bound by *Lavallee* and that it be regarded as declaratory of the law, and binding upon it. The Board is of the view that the rights Sarg asserted were infringed are essentially economic rights. From a reading of the judgment, it appears that (i) the court considered it desirable to express its opinion on the matter; (ii) the matter was fully argued; and (iii) accordingly, the comments are the fully considered opinion of the Court. The passage appears to the Board to be a fully considered opinion.

[133] If the Board is incorrect on the binding effect of *Lavallee* upon it, the Board is of the view that the *Yin v. Lewin* decisions of the Alberta Court of Queen's Bench and the Alberta Court of Appeal are binding upon it with the result that pure economic rights are not protected by Section 7 of the Charter and that here there is no protected liberty at stake. In the Court of Queen's Bench decision, the justice said that he did not find *Wilson* persuasive and that pure economic rights were not protected by Section 7 of the Charter. The Alberta Court of Appeal affirmed the lower court's decision.

[134] The LLR program and its effect on Sarg do not offend Section 7 of the Charter.

6.7 Section 15 of the Charter of Rights and Freedoms

6.7.1 Evidence and Submissions of the Parties

[135] Sarg argued that the LLR program and its effect constitute breaches of Section 15 of the Charter because its effect is discriminatory.

[136] Section 15 of the Charter provides

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[137] Sarg argued that the effect of the LLR program discriminated against small companies because they were less able than large companies to post security; hence the burden was disproportionate. Sarg contended that the program severely restricts the entry and continued presence of small companies in the market based on a rigid formula of assets and liabilities. It submitted that the Board and the LLR provisions are infringing on the rights of Sarg to earn a living based on characteristics that are not in Sarg's control, and it is not being treated the same as other (i.e., wealthier) licensees in this regard. In essence, Sarg argued that if one company has more money and larger margins than other companies, then the former's access to its profession and its ability to earn a living under the LLR scheme is better.

[138] The AG relied on the decision of the Supreme Court of Canada in *Corbiere v. Canada (Minister of Indian & Northern Affairs)* (*Corbiere*)[24] in stating that before Section 15 of the Charter has any application, it must first be shown that discriminatory decision making is occurring on the basis of an "enumerated ground." Enumerated grounds are personal characteristics that are either immutable (i.e., unchangeable) or only changeable at an unacceptable cost to personal identity—for example, race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

[139] The AG said that Sarg's inability to post security as required by the LLR program is not an immutable personal characteristic or a personal characteristic that is only changeable at an unacceptable cost to personal identity.

6.7.2 Analysis and Findings of the Board

[140] The Board notes that the AG did not focus heavily on points it made in its written submissions on the applicability or non-applicability to corporate entities of Sections 7 and 15 of the Charter. The AG was content to hinge its case primarily on the absence of a protected right being established by Sarg.

[141] The Board is of the view that the LLR program is not discriminatory. All Alberta oil and gas licensees are subject to the LLR program.

[142] The Board agrees that neither the financial situation of Sarg nor its unwillingness to post the security demanded of it by the ERCB is a personal characteristic that is immutable or only changeable at an unacceptable cost of personal identity such as race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Furthermore, the Board finds that under the LLR program Sarg was treated in a fashion that made it equal before and under the law without discrimination based on such a characteristic.

[143] The Board holds that Section 15 of the Charter is not breached by the effect of the LLR program on Sarg.

7 OTHER MATTERS

[144] LMG described the advice of ERCB staff who have inspected the Southern Alberta sites and voiced concern about the care and custody exhibited by Sarg.

[145] In relation to care and custody, Mr. Mankow said he checked the sites off and on but wasn't able to be specific about the regularity of his inspections. Mr. Mankow also indicated he was of the belief that the closure order prevented him from accessing or doing any maintenance on the sites.

[146] LMG pointed out that a closure order precludes production but does not prevent a licensee from accessing sites to ensure proper care and custody.

[24] [1999] 2 S.C.R. 203.

[147] LMG noted that it had been more than four years since the abandonment orders were issued and the Southern Alberta facilities had still not been abandoned. LMG asked for timely enforcement of the abandonment responsibilities.

8 CONCLUSION

[148] The Board has decided that the orders under consideration in this proceeding are valid and will be upheld. Because the deadlines for the performance of the work ordered have now expired, new deadlines are hereby established. The abandonment work of Sarg Oils Ltd. as specified in the orders must be performed within 60 days of the date of this decision.

Dated in Calgary, Alberta, on November 15, 2011.

ENERGY RESOURCES CONSERVATION BOARD

<original signed by>

J. D. Dilay, P.Eng.
Presiding Member

<original signed by>

A.H. Bolton, P.Geol.
Board Member

<original signed by>

T.M. McGee
Acting Board Member

APPENDIX 1 HEARING PARTICIPANTS

Principals and Representatives (Abbreviations used in report)	Witnesses
Sarg Oils Ltd. (Sarg) S. C. Stenbeck, Counsel	S. Mankow T. Gladysz
Energy Resources Conservation Board Liability Management Group (LMG) G. D. Perkin, Board Counsel K. Downie, Board Staff	V. Vogt
Canadian Association of Petroleum Producers (CAP), Small Explorers and Producers Association of Canada (SEPAC), and the Orphan Well Association (OWA) O. T. Kotelko	
Attorney General of Alberta R. S. Wiltshire	
Energy Resources Conservation Board staff K.W. Stilwell, Board Counsel A. Koper, Board Counsel S. Mangat, C.E.T. A. Lung, C.E.T. G. Ireland C. Tamblyn	

APPENDIX 2

PROVINCE OF ALBERTA

ALBERTA ENERGY AND UTILITIES BOARD

OIL AND GAS CONSERVATION ACT

ORDER NO. AD 2006-17

AN ORDER RESPECTING THE ABANDONMENT OF WELLS LICENSED TO

SARG OILS LTD.

WHEREAS Sarg Oils Ltd. was required to provide a security deposit to the Alberta Energy and Utilities Board. but failed to do so, after having been given repeated notice of the requirement.

WHEREAS the Alberta Energy and Utilities Board ordered the subject licences suspended in Closure Order No. C 989.

THEREFORE. the Alberta Energy and Utilities Board pursuant to the *Oil and Gas Conservation Act*. RSA 2000, c. O-6 hereby orders as follows:

1. Sarg Oils Ltd. shall, on or before November 17, 2006, abandon the following wells in accordance with the requirements of the Alberta Energy and Utilities Board.

WELL LOCATION	LICENCE NO.
A0/05-05-001-16W4	0029273
00/10-09-001-17W4	0117799
00/12-09-001-17W4	0019730
00/14-16-001-17W4	0032059

2. The appropriate documentation verifying the completed operations. including confirmation of surface abandonment, must be submitted by the specified date referred to in Clause 1.

3. The Alberta Energy and Utilities Board may amend this order on any terms or conditions it may specify.

MADE at the City of Calgary, in the Province of Alberta, this 12th day of October, 2006.

ALBERTA ENERGY AND UTILITIES BOARD

APPENDIX 3

PROVINCE OF ALBERTA

ALBERTA ENERGY AND UTILITIES BOARD

OIL AND GAS CONSERVATION ACT

ABANDONMENT ORDER NO. AD 2006-17A

AN ORDER RESPECTING THE ABANDONMENT OF WELLS LICENSED TO

SARG OILS LTD.

WHEREAS it has come to the attention of the Alberta Energy and Utilities Board that Abandonment Order No. AD 2006-17, ordering Sarg Oils Ltd. to abandon the well with Licence No. 0032059 was issued with an incorrect location.

WHEREAS the Alberta Energy and Utilities Board deems it desirable to correct the location.

Therefore Alberta Energy and Utilities Board pursuant to the *Oil and Gas Conservation Act*, RSA 2000, c. O-6, hereby orders as follows:

1. Abandonment Order No. AD 2006-17 is hereby amended.

2. Clause 1 is struck out and clause 1 hereto is substituted:

   1. Sarg Oils Ltd. shall, on or before November 17, 2006, abandon the following wells in accordance with the requirements of the Alberta Energy and Utilities Board.

WELL LOCATION	LICENCE NO.
A0/05-05-001-16W4	0029273
00/10-09-001-17W4	0117799
00/12-09-001-17W4	0019730
00/04-16-001-17W4	0032059

MADE at the City of Calgary, in the Province of Alberta, this 19th day of October 2006.

ALBERTA ENERGY AND UTILITIES BOARD

APPENDIX 4

PROVINCE OF ALBERTA

ALBERTA ENERGY AND UTILITIES BOARD

OIL AND GAS CONSERVATION ACT

ORDER NO. AD 2006-18

AN ORDER RESPECTING THE ABANDONMENT OF WELLS LICENSED TO

SARG OILS LTD.

WHEREAS Sarg Oils Ltd. was required to provide a security deposit to the Alberta Energy and Utilities Board, but failed to do so, after having been given repeated notice of the requirement.

WHEREAS Sarg Oils Ltd. was given notice by the Alberta Energy and Utilities Board of terminated mineral leases, but failed to comply with the requirements of such notice.

WHEREAS Petrorep and Corexcal, Inc. are believed to be working interest participants in the wells named in the order.

WHEREAS the Alberta Energy and Utilities Board ordered the subject licences suspended in Closure Order No. C 989.

THEREFORE, the Alberta Energy and Utilities Board pursuant to the *Oil and Gas Conservation Act*, RSA 2000, c. O-6 hereby orders as follows:

1. Sarg Oils Ltd., Petrorep, and Corexcal, Inc. shall, on or before November 17, 2006, abandon the following wells in accordance with the requirements of the Alberta Energy and Utilities Board.

WELL LOCATION	LICENCE NO.
A3/03-04-001-16W4	0053700
C0/03-04-001-16W4	0016974
A2/04-04-001-16W4	0053699
D0/04-04-001-16W4	0053703

2. The appropriate documentation verifying the completed operations, including confirmation of surface abandonment, must be submitted by the specified date referred to in Clause 1.

3. The Alberta Energy and Utilities Board may amend this order on any terms or conditions it may specify.

MADE at the City of Calgary, in the Province of Alberta, this 12th day of October, 2006.

ALBERTA ENERGY AND UTILITIES BOARD

APPENDIX 5

PROVINCE OF ALBERTA

ALBERTA ENERGY AND UTILITIES BOARD

OIL AND GAS CONSERVATION ACT

ORDER NO AD 2006-19

AN ORDER RESPECTING THE ABANDONMENT OF A FACILITY LICENSED TO

SARG OILS LTD.

WHEREAS Sarg Oils Ltd. was required to provide a security deposit to the Alberta Energy and Utilities Board, but failed to do so, after having been given repeated notice of the requirement.

WHEREAS the Alberta Energy and Utilities Board ordered the subject licence suspended in Closure Order No. C 989.

THEREFORE, the Alberta Energy and Utilities Board pursuant to the *Oil and Gas Conservation Act*, RSA 2000, c. O-6 hereby orders as follows:

1. Sarg Oils Ltd. shall, on or before November 17, 2006, abandon the following facility in accordance with the requirements of the Alberta Energy and Utilities Board.

SURFACE LOCATION	LICENCE NO.
00/03-04-001-16W4	F9

2. The appropriate documentation verifying the complete facility abandonment operations must be submitted to the Alberta Energy and Utilities Board by the specified date referred to in Clause 1.

3. The Alberta Energy and Utilities Board may amend this order on any terms or conditions it may specify.

MADE at the City of Calgary, in the Province of Alberta, this 12th day of October, 2006.

ALBERTA ENERGY AND UTILITIES BOARD

APPENDIX 6

PROVINCE OF ALBERTA

ALBERTA ENERGY AND UTILITIES BOARD

PIPELINE ACT

ORDER NO. AD 2006-20

AN ORDER RESPECTING THE CLOSURE AND ABANDONMENT OF PIPELINES LICENSED TO

SARG OILS LTD.

WHEREAS Sarg Oils Ltd. is the licensee of pipelines attached to wells which have been ordered abandoned by the Alberta Energy and Utilities Board.

THEREFORE, the Alberta Energy and Utilities Board pursuant to the *Pipeline Act*, RSA 2000, c. P-15, hereby orders as follows:

1. The following pipeline licences are suspended.

LINE NO.	FROM LOCATION	TO LOCATION	LICENCE NO.
002	12-09-001-17W4	04-16-001-17W4	6607
001	04-04-001-16W4	04-04-001-16W4	19219
002	03-04-001-16W4	04-04-001-16W4	
003	03-04-001-16W4	04-04-001-16W4	

2. Sarg Oils Ltd., the licensee of the pipelines named in Clause 1, shall on or before November 17, 2006, abandon the pipelines named in Clause 1 in accordance with the requirements of the Alberta Energy and Utilities Board.

3. The appropriate documentation verifying the completed abandonment operations must be submitted to the Alberta Energy and Utilities Board by the specified date referred to in Clause 2.

4. The Alberta Energy and Utilities Board may amend this order on any terms or conditions it may specify.

MADE at the City of Calgary, in the Province of Alberta, this 12th day of October, 2006.

ALBERTA ENERGY AND UTILITIES BOARD