REDWATER'S CONTINUING IMPACT ON CANADA'S ENERGY SECTOR

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In 2019, the Supreme Court of Canada rendered its decision in Orphan Well Association v. Grant Thornton Ltd. *(*Redwater*), ruling that environmental reclamation obligations were not claims provable in bankruptcy. This allowed the Alberta Energy Regulator (AER) to assert its claims outside the bankruptcy scheme, giving it priority over secured creditors and destabilizing Canada's energy and lending sectors. The decision disrupted commercial certainty as lenders struggled to recover loans from insolvent oil and gas companies. Although the AER and subsequent case law attempted to address the fallout, these measures have not fully restored stability. This article argues that comprehensive legislative action is needed to clarify the legal framework and mitigate* Redwater*'s impact on the industry.*

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I. INTRODUCTION

In 2019, the Supreme Court of Canada issued the *Orphan Well Association v. Grant Thornton Ltd.* decision, commonly known as *Redwater*.[1] In *Redwater*, the Supreme Court found that the environmental reclamation obligations were not sufficiently certain to constitute claims provable in bankruptcy, meaning that the obligations would not be subject to the priority scheme in the *Bankruptcy and Insolvency Act*.[2] By allowing the Alberta Energy Regulator (AER, or the Regulator) to assert its claim outside the bankruptcy scheme, the Supreme Court effectively gave the AER a super priority over secured creditors. This left nothing for the creditors after the AER got paid because the cost of the insolvent company's end-of-life obligations exceeded the proceeds of their asset sales.

This article will argue that *Redwater* destabilized Canada's energy sector, its oil and gas sector, and its lending industries, as lenders' ability to realize on their loans to insolvent oil and gas companies vanished in many cases. By disrupting the legislated bankruptcy priority scheme, the Supreme Court undermined the commercial certainty on which these industries were basing their operational and lending decisions.

The response to *Redwater* was swift. After the two lower court decisions in *Redwater*, both of which ruled against the Regulator, the Regulator overhauled the regulatory framework governing the issuance and transfer of licences. This overhaul increased the scope of its discretion over licence transfers, which was one of the main issues in *Redwater*.[3] And after the Supreme Court's decision in *Redwater*, which overturned the Court of Appeal decision, numerous cases went through the lower courts requiring them to interpret and apply *Redwater* to different fact scenarios. The principles arising from these cases established parameters and defined the terms arising from *Redwater*, as will be shown later in the article.[4]

Neither the overhauled regulatory framework nor the principles arising from the case law, however, have gone far enough to provide the necessary guidelines and principles needed to re-inject the commercial certainty *Redwater* eliminated. They also fail to properly establish the boundaries needed to contain the application of *Redwater*. This became clear in 2023 when a lower court decision, *Qualex-Landmark Towers v. 12-10 Capital Corp.*, interpreted *Redwater* so broadly that private citizens in non-insolvency

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1 *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*].

2 RSC 1985, c B-3 [*BIA*].

3 See e.g. Alberta Energy Regulator, *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals* (Calgary: Alberta Energy Regulator, 2017), online (pdf): [perma.cc/QT4M-R4DK] [Alberta Energy Regulator, *Directive 067*], which is discussed in detail below.

4 See e.g. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 [*Trident*] (the Court determined that municipal taxes do not have the same priority status as environmental reclamation obligations). *Trident* and other relevant cases are discussed below.

proceedings were able to assert the same priority as the Regulator.[5] This decision was overturned on appeal, with the appellate Court confirming that the chambers decision was not an appropriate extension of *Redwater*, nor was this extension recognized at law. Specifically, the Court of Appeal maintained that the "priority declaration Qualex seeks to obtain is unsupported by any statutory or existing court authority. It requires a change in law where the potential consequences are multifaceted and far reaching."[6] Further, the Court held that the "priority declaration Qualex seeks exceeds the limits on the power of the judiciary to change the law."[7]

Despite being overturned, the *Qualex* trial decision highlights the problems arising from *Redwater* and demonstrates that this area of law needs clearly articulated principles. Additionally, apart from *Qualex*, there are ongoing uncertainties for the lending and energy industries that arose from the *Redwater* decision that the Court of Appeal of Alberta did not address in *Qualex*. This article will demonstrate that the principles from *Redwater* as well as the potential overly broad application of *Redwater* will continue to destabilize Canada's oil and gas and lending industries unless Parliament or the provincial legislature address the fallout of the decision in a comprehensive manner.

This article will start with an overview of the Canadian insolvency process and a summary of *Redwater*. Following that, in Part IV, there will be a discussion of the reordering of priorities in bankruptcy and how this has given rise to commercial uncertainty. *Redwater* raised questions about the statutory priority under the federal *BIA* and the provincial *Environmental Protection and Enhancement Act*.[8] The treatment of these legislative frameworks and how they can be differentiated under the *Redwater* principles are questions yet to be settled; they have caused substantial disruption in the lending industry, leading both lenders and debtors to question their positions and entitlements on a macro and microeconomic level.

Following this, Part V of the article will discuss the Alberta government's response to *Redwater* in the form of Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals.[9] This part will provide an overview of Directive 067, 2017, followed by a comparative analysis between the historical and current Directive. Part VI will demonstrate that Directive 067 does not address the issues that arose after *Redwater*.

Part VII of the article considers how courts have been dealing with *Redwater* and maintains that the decisions interpreting *Redwater* have been able to provide some clear principles, but they do not ultimately address the commercial uncertainty that *Redwater* created. This section will focus on topics ranging from the different stakeholder interests and how far the AER's super priority interest extends, to the types of assets available to satisfy environmental obligations, and how a "contingent" obligation is interpreted in the energy sector.

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5 *Qualex-Landmark Towers v 12-10 Capital Corp*, 2023 ABKB 109, rev'd *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115 [*Qualex*].

6 *Qualex*, *ibid* at para 18.

7 *Ibid* at para 20.

8 *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*].

9 Alberta Energy Regulator, *Directive 067*, *supra* note 3.

Part VII will also consider the extension of *Redwater*. Here, there will be a discussion of *Qualex*, which shows the potential for *Redwater* to be expanded in unexpected and unintended ways, leading to more commercial uncertainty for the lending industry and to the continued modification of priorities for creditors in bankruptcies.

Part VIII offers suggestions, through legislation and case law, that could inject the necessary commercial certainty into this area. It will consider the issues that could potentially arise in upcoming cases and the topics that need clarification, and discuss the potential difficulties in this area of law if these issues are not addressed.

II. OVERVIEW OF THE INSOLVENCY PROCESS

An insolvency proceeding under the *BIA* or the *Companies' Creditors Arrangement Act* is facilitated under one common collective proceeding known as the "single proceeding model," which is imposed to prevent the disorder that would result if creditors implemented individual proceedings against a debtor upon its bankruptcy.[10]

A party must hold a "claim provable" or "provable claim" to assert a debt or liability in a bankruptcy, though not every debt or liability will constitute a provable claim.[11] A provable claim is broad and can include debts due at the time of the bankruptcy filing or thereafter.[12] It can include unliquidated claims, such as causes of action in contract, tort, or other category of claim.[13] A contingent liability may constitute a claim, though not if it is too remote or speculative.[14]

A provable claim operates within the bankruptcy proceeding and can be enforced against the property of the bankrupt and paid according to the bankruptcy priority scheme, whereas a claimant does not benefit from the property of the bankrupt or the distribution scheme under the *BIA* when a claim is not provable.[15] Provable claims are paid out according to the priority scheme under the *BIA*.[16]

Regulatory obligations are treated slightly differently, depending on how they are characterized. If they are determined to be non-monetary obligations, they must be satisfied ahead of the claims of creditors, but if they can be reduced to provable claims, they will be dealt with according to the bankruptcy priority scheme and will rank as unsecured claims. Courts characterize these obligations on a case-by-case basis by applying the three-part test from *Newfoundland and Labrador v. AbitibiBowater Inc.*, which examines whether: (1) the

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10 *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 55.

11 *BIA*, *supra* note 2, s 2 (both terms have the same definition).

12 *Ibid*, s 121(1).

13 Roderick J Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 244.

14 *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 at para 36 [*Abitibi*].

15 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 33; Lloyd W Houlden, Carl H Morawetz & Janis P Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Carswell: Toronto, 2009) (loose-leaf updated July 2022, release 2022-7), at ch 6, s 7, citing *Venneri v Bomasuit*, 1950 CanLII 316 (ONSC).

16 *BIA*, *supra* note 2, ss 136, 140.1.

regulator advanced a claim as a creditor; (2) the asserted debt, liability, or obligation existed at the time of insolvency; and (3) it is possible to assign a monetary value to the claim.[17]

III. SUMMARY OF THE *REDWATER* DECISION

In *Redwater*, after applying the *Abitibi* test, the Supreme Court found that the abandonment orders issued by the Regulator were not monetary in nature and therefore not "claims provable in bankruptcy."[18] Rather, the AER was acting qua regulator, exercising a power to enforce a public duty.[19] The Supreme Court concluded that the environmental reclamation obligations were not sufficiently certain as to constitute claims provable in bankruptcy, meaning the obligations would not be subject to the priority scheme in the *BIA* and the AER could assert its claim outside the bankruptcy scheme.[20] As a result of this decision, the Supreme Court effectively gave the AER a super priority over secured creditors, and since the cost of the insolvent company's end-of-life obligations exceeded the proceeds of their asset sale, it meant there was nothing left for the creditors after the AER was paid.

Redwater Energy Corporation (Redwater Corp), a publicly traded oil and gas company, held oil and gas licences granted by the AER. In 2013, Alberta Treasury Branches (ATB) advanced funding to Redwater Corp and in exchange, took a security interest in Redwater Corp's present and after acquired property. In 2014, when Redwater Corp started to experience financial problems, it held licenced assets comprised of wells, facilities, and pipelines, only some of which were revenue-producing. In 2015, when Redwater Corp owed ATB approximately CDN$5.1 million, ATB obtained a court order appointing Grant Thornton Limited (GTL) as the receiver of the company.

When GTL was appointed, it had to oversee Redwater Corp's abandonment obligations of its non-revenue producing assets, obligations which arose under provincial regulations.[21] GTL found that Redwater Corp could not meet the Regulator's abandonment requirements unless it disclaimed its non-revenue producing assets, as the costs of abandonment would have exceeded the sale proceeds generated from the revenue-producing assets. GTL advised the Regulator that it would only be taking control of approximately 20 of the 127 Redwater Corp properties licenced by the Regulator and would be renouncing or disclaiming the remainder of the properties.

The Regulator disagreed, maintaining that despite its receivership, GTL had to fulfill its regulatory obligations as "licensee" under the *OGCA* prior to distributing funds from the estate to ATB and other creditors. It proceeded to issue orders requiring the abandonment and remediation "for environmental and public safety reasons" of the assets the Receiver had disclaimed.[22] When Redwater Corp was subsequently assigned into bankruptcy, GTL, as bankruptcy trustee, advised the AER that it would not comply with these orders given the limited resources in the estate. In response, the AER indicated it

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17 *Abitibi*, *supra* note 14 at para 26.
18 *Redwater*, *supra* note 1 at para 162.
19 *Ibid* at paras 247–48.
20 *Ibid* at paras 153–54.
21 *Oil and Gas Conservation Act*, RSA 2000, c O-6, ss 1(1)(cc), 27, 29 [*OGCA*].
22 *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 6 [*Redwater* ABCA].

would not approve any licence transfers sought by GTL in the context of a sale and brought proceedings against GTL as Redwater Corp's trustee.[23]

At issue in the litigation was how the provincial regulatory requirements interacted with the distribution scheme in the *BIA*. Under the provincial regulations, GTL had to satisfy Redwater Corp's environmental obligations before distributing the proceeds to creditors. But as noted, the *BIA* requires that any debts and liabilities allowed against the estate be "claims provable," leaving in question the status of the Regulator's contingent claim and whether it should be enforced as an unsecured claim.[24]

In the lower courts, both Redwater Corp's trustee and the secured lender successfully argued that the AER's attempt to use the statutory power conferred upon it under provincial law conflicted with the *BIA*'s scheme of distribution. Both the Court of Queen's Bench of Alberta (as it then was) and the Court of Appeal of Alberta applied the *Abitibi* test, concluding that the Regulator held a "claim provable" in bankruptcy and was therefore subject to the bankruptcy priority regime.[25] This regime conflicted with the provincial legislation requiring the receiver as licensee to complete the environmental remediation. As a result, the Courts applied the constitutional doctrine of paramountcy to resolve the operational conflict in favour of the valid federal legislation, leaving the AER to claim as an unsecured creditor.[26]

However, in a 5 to 2 decision, the Supreme Court reversed these findings. The crux of the Supreme Court's decision was that the AER was exercising a public duty for the benefit of "their fellow citizens" without the expectation of any financial benefit.[27] The Supreme Court applied the three-part *Abitibi* test to determine whether the AER held a "claim provable" in Redwater Corp's bankruptcy.

Under the first step, the Supreme Court found that the Regulator was not a creditor of Redwater Corp but was exercising a "power to enforce a public duty."[28] An environmental obligation is owed to citizens, not to the Regulator, and paying these obligations does not benefit the Regulator, it only allows it to perform the remediation work to benefit third parties. For these reasons, the Regulator was deemed not to be collecting a debt and was therefore not a creditor of Redwater Corp.[29]

The Supreme Court could have stopped after finding that the first part of the *Abitibi* test was not met, but it went on to analyze the remaining parts of the test. There was no dispute amongst the parties that the second part of the test — that the liability or obligation occurred before the debtor became bankrupt — had been met.[30]

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23 *Ibid* at para 16.
24 *BIA*, *supra* note 2, ss 2, 121(1).
25 *Redwater Energy Corporation (Re)*, 2016 ABQB 278 at paras 164–16; *Redwater* ABCA, *supra* note 22 at paras 73–81.
26 *Ibid*.
27 *Redwater*, *supra* note 1 at paras 134–35, citing *Panamericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 at para 33.
28 *Ibid* at para 124.
29 *Ibid* at paras 128, 135.
30 *Ibid* at para 120.

Under the third step, a contingent debt or liability owed by a bankrupt must be sufficiently certain or capable of valuation to constitute a provable claim.[31] The Supreme Court found that neither of the two debts in this case — the abandonment of the assets and the conditions imposed before the Regulator would approve the licence transfers — were sufficiently capable of valuation, and determined that there was sufficient certainty that the Regulator would perform the abandonments.[32] For these reasons, the third step was not met.

The majority of the Supreme Court in *Redwater* found that the Regulator was not a creditor and therefore did not hold a provable claim under the *BIA*.[33] As such, the Regulator could comply with its obligations under provincial law without coming into conflict with the *BIA*, even if that meant that its provincial obligations gave it an effective super priority over the claims of secured creditors.[34]

The dissenting judgment in *Redwater* also analyzed steps one and three of the *Abitibi* test but found that the Regulator was a creditor despite acting in the public interest and that it was sufficiently certain that the Regulator would perform the abandonment work.[35]

IV. GENERAL ISSUES ARISING FROM *REDWATER* AFFECTING THE ENERGY SECTOR

The *Redwater* decision reordered the priorities in bankruptcy, undermining the legislated priority scheme and giving rise to significant commercial uncertainty for parties in insolvency proceedings. This section discusses how those reordered priorities affected the stakeholders in the *Redwater* decision, and the uncertainty this produced for Canada's energy industry and for lenders and debtors.

A. CHANGING PRIORITIES

For many years in Alberta before *Redwater*, there was a dynamic tension between the AER on one hand and insolvent companies and their creditors on the other, over the obligation to reclaim and abandon uneconomic well sites. The AER would frequently attempt to impose payment and security deposit requirements as a condition of effecting licence transfers, which inevitably reduced the number of asset sales and in turn the use of proceeds to repay creditors.[36]

Whether the AER was able to impose these terms in formal insolvency proceedings was an open question due to the fact that bankruptcy, an area of exclusive federal jurisdiction, established a scheme of distribution that limited environmental priority to the contaminated property. The "contaminated property" in the energy context consisted of oil and gas well

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31 *Ibid* at para 138.
32 *Ibid* at para 142.
33 *Ibid* at para 122.
34 *Ibid* at para 106.
35 *Ibid* at paras 238, 248, 255.
36 See e.g. *Alberta Treasury Branch v Alston Energy Inc* (12 February 2015), Calgary 1401-05127 (ABQB) (Second Report of the Receiver at para 24); *Spyglass Resources Corp v National Bank of Canada* (20 January 2016), Calgary 1501-00681 (ABQB) (First Report of the Receiver & Manager at paras 40–41).

sites and associated facilities that were non-saleable and "orphaned" to the Orphan Well Association (OWA). The AER, however, was asserting rights under provincial law requiring payment in respect of the non-saleable assets to complete the transfer of saleable oil and gas wells, thus coming into conflict with federal legislation.

In certain cases, the question of whether the AER was imposing conditions on the transfer of licences beyond the scope of its jurisdiction was also raised.[37] The commodity crash of 2014 led to a significant uptick in the number of oil and gas insolvencies with the result that the conflict over priority payables and licence transfers approached a full-fevered pitch as the crisis deepened.[38] Receivers were often tasked with negotiating ad hoc deals between the secured lenders and the AER in order to facilitate sales of oil and gas assets.

This conflict came to a head in *Redwater*, which commenced in the lower courts in 2015 and culminated in the Supreme Court's decision issued in January of 2019. As a result of the majority's decision, and in what was an immediate and drastic change to the previously understood law, the AER was entitled to impose conditions on the transfer of licences to require payment or performance of abandonment and reclamation obligations of a debtor. This included the circumstance, which was frequent in pre-*Redwater* insolvency proceedings, where the debtor attempted to transfer only wells and other facilities with sufficient value or licensee's liability management rating to solvent operators such that a security deposit was not required to complete the transaction.[39] Post *Redwater*, the AER could, after assessing the value of the debtor's remaining assets, require that anticipated environmental liabilities be accounted for prior to approving the transfer of the more valuable assets.

The *Redwater* decision had far-reaching implications for each of its stakeholders, including the Crown, the Regulator, the OWA, surface rights holders, and participants in the upstream oil and gas sector. The most immediate and profound effect of the decision, however, related to the relative financial priority between the company's creditors and the cost to reclaim and abandon the wells.

Prior to the Supreme Court's decision in *Redwater*, a company that was in an insolvency proceeding was entitled to sell economic wells and direct the proceeds to its creditors as well as disclaim uneconomic wells without paying or accounting for the costs required to abandon and reclaim such wells. The purchaser would assume the environmental liabilities associated with the economic wells acquired. The environmental liabilities associated with the uneconomic wells would either be entirely left to the OWA, or, in some cases, the

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[37] See e.g. *Sydco Energy Inc (Re)*, 2018 ABQB 75 [*Sydco*].

[38] Marc Stocker et al, "The 2014-16 Oil Price Collapse in Retrospect: Sources and Implications" (2018) World Bank Group Working Paper 8419, online: [perma.cc/4LK9-9CJW]; "With the Benefit of Hindsight: The Impact of the 2014-16 Oil Price Collapse" in World Bank Group, ed, *Global Economic Prospects: Broad-Based Upturn, but for How Long?* (World Bank Group: Washington, DC, 2018) 51, online (pdf): [perma.cc/RD5C-NHGF].

[39] The licensee's liability management rating (LMR) is the formula for assessing a company's liabilities and assets, and indicates a company's ability to address its abandonment, remediation, and reclamation obligations.

receiver would negotiate a deal with the AER and the secured lender such that a portion of the proceeds would be allocated to address a portion of such liabilities.[40]

In *Redwater*, the Supreme Court changed the law on this issue by holding that reclamation and abandonment liabilities must be dealt with before any distribution to the insolvent party's creditors, including its secured creditors.[41] Given the substantial amount of reclamation and abandonment liabilities in many of these cases, the common result in an insolvency proceeding following *Redwater* was that even secured creditors could not collect on much or any of their debt.[42]

B. UNCERTAINTY

Canada's energy industry represents approximately 11.8 percent of its gross domestic product according to 2022 data.[43] It is capital intensive and relies heavily on debt facilities in its operations. Changes in the law that create uncertainty in the energy industry, as occurred in *Redwater*, can have a significant impact on both a macro and microeconomic level for lenders and debtors.

From a macroeconomic perspective, the decision created an increased burden on lenders. Due to the risk associated with the subordination of their security interest in favour of a regulator, lenders had to undertake more detailed due diligence into their borrowers' existing or potential future unremedied environmental liabilities. They became significantly more cautious in their lending practices when deploying debt to the oil and gas sector because they could not calculate the ever-fluctuating retirement obligations or determine whether there was sufficient loan to value ratio to ensure repayment in the event of a liquidation or bankruptcy.[44]

Difficulty obtaining debt increases the financial strain on companies operating within the oil and gas industry, particularly smaller companies whose assets are generally comprised of wells in the later stage of their life cycle. While oil pricing has been buoyant over the last couple of years, the impact of *Redwater's* reordering of the priority scheme becomes particularly evident when commodity pricing is depressed. Imposing greater financial constraints is both beneficial and costly; they are necessary to uphold the "polluter pay" principle, but they also appear to be a likely cause of the increased number of

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40 See e.g. *National Bank of Canada v Spyglass Resources Corp* (7 March 2016), Calgary 1501-13786 (ABQB) (Consent Order: Revised SISP Timeline).

41 *Redwater*, *supra* note 1 at para 159.

42 See e.g. *Trident*, *supra* note 4; *In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc*, (9 March 2023) Calgary 25-2332583 (ABKB) (Consent Order filed on 9 March 2023); *Orphan Well Association v Bow River Energy Ltd*, (3 April 2023) Calgary 2001-13391 (ABKB) (Third Report of the Receiver filed on 2 November 2020); *GMT Capital Corp v Strategic Oil and Gas Ltd and Strategic Transmission Ltd* (6 July 2020), Calgary 2001-01210 (ABQB) (Second Report of the Receiver).

43 Natural Resources Canada, *Energy Fact Book 2023-2024*, Catalogue No M136-1E (Ottawa: Natural Resources Canada, 2023) at 7.

44 Jassmine Girgis & Robyn Gurofsky, "Pushing the Boundaries of *Redwater*: How Qualex Expands the 'Protective Umbrella' for Environmental Reclamation Obligations" in Jill Corraini Nadeau & Justice Blair Nixon, eds, *Annual Review of Insolvency Law 2023* (Toronto: Thomson Reuters Canada, 2024) 433.

insolvencies of small to mid-sized oil companies following the 2014 commodity price crash.[45]

On a microeconomic level, the *Redwater* decision has injected additional uncertainty into the ability of insolvent entities to sell assets. Historically, the calculation of liability management rating (LMR), while not necessarily effective in curbing the number of orphan wells, provided some certainty because there was a formula available to calculate the security deposit requirements the Regulator would levy on a purchaser in a sale transaction. Ultimately, this tool was inadequate because it could not test a licensee's financial means to abandon and reclaim its assets, particularly because the calculation was often significantly less than the actual asset retirement obligations (ARO). Despite being problematic, however, the LMR process was relatively straightforward in that a licensee had some reasonable expectation of what the security deposit requirements would be and knew it would not have to provide security as long as its ratio of deemed liabilities to deemed asset values did not fall below 1.0 (and later, 2.0).[46]

After *Redwater* and the increased discretion of the Regulator under Directive 067, 2021, the details of which will be discussed in the next section, there is a significant amount of uncertainty as to whether the Regulator would permit licence transfers and on what terms, creating challenges for insolvent estates to dispose of assets. In many oil and gas insolvencies, the Regulator refused to permit individual assets sales if the transactions did not involve the purchaser assuming all licenced assets held by the insolvent entity, unless sufficient security was posted or abandonment work completed.[47] The cost associated with fulfilling these conditions would often be uncertain without undertaking a significant amount of work, a step that was difficult for many insolvent companies, if not impossible, given their limited resources. This in turn would make it difficult to negotiate transactions in an insolvency proceeding for various reasons, including that purchasers were not prepared to assume all licenced assets or because purchasers were unwilling to assume an unquantified security obligation or abandonment work. When an oil and gas company's insolvency does not produce any transactions, it means there are no parties to assume the environmental liabilities associated with the assets or provide revenues to stakeholders associated with those assets going forward.

V. THE REGULATOR'S RESPONSE TO *REDWATER*

The Regulator acted quickly after *Redwater*. In the wake of the lower courts' decisions, the AER overhauled the regulatory framework governing the issuance and transfer of

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45 Office of the Superintendent of Bankruptcy, "Insolvency Statistics in Canada — 2014: Table 4: Insolvencies by NAICSEconomic Sectors, Canada," online: [perma.cc/ZZ4R-9G7J]; Office of the Superintendent of Bankruptcy, "Insolvency Statistics in Canada — 2016: Table 4: Insolvencies by NAICS Economic Sectors, Canada," online: [perma.cc/FT3Z-8GHB].

46 Alberta Energy Regulator, *Bulletin 2016-16: Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision* (Calgary: Alberta Energy Regulator, 2016), online (pdf): [perma.cc/QR8Q-R2TU] [Alberta Energy Regulator, *Bulletin 2016-16*].

47 See e.g. *In the Matter of the Companies' Creditors Arrangement Act of Bow River Energy Ltd* (21 October 2020), Calgary 2001-06997 (ABQB) (Affidavit, Lavelle at paras 9–12; Affidavit, De Pauw at paras 10–13); *In the Matter of the Companies' Creditors Arrangement Act of Accel Energy Canada Limited and Accel Canada Holdings Limited* (17 April 2020), Calgary 1901-16581 (ABQB) (Monitor's Eleventh Report to Court at paras 8.1, 8.2).

licences and created a framework through which it increased its discretion over licence transfers — one of the issues at the heart of the *Redwater* decision — and enhanced its monitoring powers over the entire licensee lifecycle. As a result of this overhaul, under Directive 067 and the new Liability Management Framework, the AER now possesses broad discretionary powers to determine the requirements to obtain and retain various types of licences and approvals for energy development in Alberta. Directive 067, 2017 expands on the eligibility requirements for acquiring and holding licences and approvals specified under several pieces of provincial legislation, including the *Oil and Gas Conservation Act*, the *Pipeline Act*, the *Geothermal Resource Development Act*, the *Mineral Resource Development Act*, and their respective regulations.[48] Directive 088, 2021 establishes a framework for the AER to monitor the licensee throughout the energy lifecycle.

A. BULLETIN 2016-16: LICENSEE ELIGIBILITY: AER MEASURES TO LIMIT ENVIRONMENTAL IMPACTS PENDING REGULATORY CHANGES TO ADDRESS THE *REDWATER* DECISION

Before discussing Directive 067, 2017, it is worth mentioning that after the trial decision in *Redwater* (and before the release of Directive 067, 2017, which followed the Court of Appeal of Alberta *Redwater* decision), the AER issued Bulletin 2016-16, through which it sought to expand its discretion over the transfer of licences.[49] In that bulletin, the AER stated that the impacts of the *Redwater* decision at the trial level were significant particularly because, in the AER's view, the decision permitted receivers and trustees to avoid the licensee's abandonment, reclamation, and remediation obligations under AER-administered legislation. Immediately upon the issuance of the bulletin, the AER sought to impose changes to the licence application process, to be effective immediately. These changes included seeking to treat all licence eligibility as nonroutine, exercising its discretion to refuse an application, requiring additional information from an applicant where the AER deemed appropriate, and, importantly, increasing the LMR from 1.0 to 2.0 or higher immediately following the transfer.[50]

B. DIRECTIVE 067, 2017

In early December 2017, the AER released Directive 067, 2017 to replace the previous edition that had been in effect since July 2005, which focused solely on the calculation of the LMR at the time of transfer. The publication of Directive 067, 2017 followed the release of the Court of Appeal of Alberta *Redwater* decision, wherein the Court was critical of the AER's actions in refusing licence transfer applications by GTL. In that decision, the Court of Appeal found that the AER had exceeded its jurisdiction and was attempting to attach conditions to licence transfers in relation to wells that had been disclaimed by the trustee and were not subject to the sale. The Court found that the AER's actions resulted in

> [T]ransfer[ring] economic value from the producing wells to the non-producing wells in order to enforce the environmental obligations attached to the latter. This clearly has the effect of disrupting the

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48 *OGCA*, *supra* note 21; *Pipeline Act*, RSA 2000, c P-15; *Geothermal Resource Development Act*, SA 2020, c G-5.5; *Mineral Resource Development Act*, SA 2021, c M-16.8.

49 Alberta Energy Regulator, *Bulletin 2016-16*, *supra* note 46 (the issuance of this bulletin appears to have been in direct response to the trial decision in *Redwater*).

50 *Ibid*.

> distribution scheme under the *BIA*. Even if the Trustee must take the licenses 'warts and all', there is no justification for the Regulator transferring warts from one licence to another.[51]

The Court went on to say that the AER's licensing scheme depended on the enforcement of environmental liabilities outside of the bankruptcy regime, in violation of the "single proceeding" model in insolvency, and that the Regulator could not "establish a parallel process to collect claims."[52]

While Directive 067, 2017 is understood as having been a direct response to the Court of Appeal of Alberta decision in *Redwater*, some commentators have suggested instead that the amendments in the December 2017 edition were in fact a response to the order granted by Justice Romaine in *Sydco Energy (Re)*.[53] Although the reasons for judgment had not yet been released when the amendments were made, the *Sydco* decision illustrates the internal turmoil at the AER arising out of the lower court decisions in *Redwater* and its attempt to retain control over the regulatory process for insolvent corporations.

In *Sydco*, the Court of Queen's Bench of Alberta (as it then was), heard a sale approval application by a receiver seeking additional direction from the Court in the context of the licence transfers. The receiver brought the application after the AER blocked its attempt to sell certain of Sydco Energy Inc.'s (Sydco) assets to a numbered company at the licence transfer stage. The AER took 109 days to issue its decision (instead of the then standard 30 days) and while it eventually granted the application, it did so on the conditions that the purchaser would: (1) post full security for all liabilities associated with the AER licences it acquires regardless of the purchaser's post transaction LMR; and (2) only acquire the AER licenced assets from "arm's length transferors."[54] The AER did not calculate the security deposit required, which created uncertainty for the purchaser as it had no way of knowing the amount of the security the AER would require. The second condition was equally problematic for the purchaser as two of the directors had been prior directors of Sydco. As a result, while approval for the licence transfers was granted on a conditional basis, it was apparent to all parties involved that the conditions attached to such approval could not be met.[55]

The AER's broad interpretation of "non-arm's length" party and its view that it could refuse licence transfers if the applicant had directors, officers, security holders, or agents from a separate non-compliant entity, came under significant scrutiny from the Court in *Sydco*. The Court found that in making its decision, the Regulator exceeded its jurisdiction, attempted to circumvent the decisions in *Redwater*, frustrated the rehabilitative objectives of the *BIA*, and disrupted the distribution scheme.[56] The Court stated that while the AER "naturally has concerns about the impact of orphaned and abandoned wells on the public purse … it must, in insolvency situations as in all others, act in accordance with the law of Alberta, which now includes the principles and declarations set out in the *Redwater*

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[51] *Redwater* ABCA, *supra* note 22 at para 82.
[52] *Ibid* at para 88.
[53] See e.g. Jeffrey L Oliver, "Statutory Discretion in the Wake of *Redwater:* Navigating Choppy Waters Without Sinking the Ship" (2018) 7:5 Insolvency Inst Can (Articles) 1 at 11–12; *Sydco*, *supra* note 37.
[54] *Ibid* at paras 11, 23.
[55] The non-compliances in *Sydco*, *ibid*, related solely to the company's insolvency in that it failed to pay certain of its levies and did not satisfy the end-of-life obligations.
[56] *Ibid* at paras 64, 66.

decisions."[57] The conditions imposed by the AER were, at the time, outside the purview of existing directives.

When the AER issued Directive 067 in December 2017, it made it clear in a bulletin that the Directive was aimed at ensuring the privilege of holding licences "is only granted to, and retained by, responsible parties."[58] The AER also introduced a discretionary power under Directive 067, 2017, allowing the AER to withhold or revoke a licensee's or approval holder's privileges if it was of the opinion the applicant posed an "unreasonable risk" of orphaning or otherwise abandoning an asset.[59] The AER accompanied this discretionary power with a list of enumerated factors it would consider in its analysis of "unreasonable risk."[60] These factors appear to address some of the issues arising in *Sydco*, including compliance history, corporate structure, the company's experience, outstanding debts, and the involvement of the company's directors, officers, or shareholders in entities that have initiated or been subject to insolvency proceedings.[61] Under Directive 067, 2017, and notwithstanding the Courts' comments in *Sydco* and *Redwater*, the AER authorized itself to refuse or grant licence eligibility, or grant eligibility with restrictions, terms, or conditions, based on a negative assessment of these factors.[62]

C. DIRECTIVE 067, 2021

Directive 067, 2017 increased the AER's scrutiny of licence eligibility, and the new edition of Directive 067 issued on 7 April 2021, continued this trend.[63] The AER marketed Directive 067, 2021 as its response to the Government of Alberta's Liability Management Framework, launched in July 2020, which focused on the abandonment and reclamation obligations of the oil and gas industry in order to reduce the number of orphan and inactive well sites in Alberta.[64]

Directive 067, 2021 included significant changes to licensing eligibility in Alberta, particularly through: (1) changing the financial disclosure requirements of applicants and licence holders; (2) adding new assessment criteria for determining unreasonable risk; and (3) amending the general eligibility requirements.[65] Such amendments shifted the AER's licensing process from the previously used Licensee Liability Rating program (LLR) to a more holistic Licensee Capability Assessment system, which permits the AER to exercise increased scrutiny over a company's financial capabilities to better gauge its corporate

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57 *Ibid* at para 57.

58 Alberta Energy Regulator, *Bulletin 2017-21: New Edition of Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licenses and Approvals* (Calgary: Alberta Energy Regulator, 2017) at 1, online (pdf): [perma.cc/QT4M-R4DK] [Alberta Energy Regulator, *Directive 067*, *2017*].

59 Alberta Energy Regulator, *Directive 067*, *supra* note 3, s 4.5.

60 *Ibid*.

61 *Ibid*, s 4.5, Schedules 1–3.

62 *Ibid*, s 3.

63 Alberta Energy Regulator, *Bulletin 2021-11: New Edition of Directive 067* (Calgary: Alberta Energy Regulator, 2021), online: [perma.cc/TTW8-ZCBN] [Alberta Energy Regulator, *Directive 067, 2021*].

64 Alberta Energy Regulator, *Directive 088: Licensee Life-Cycle Management* (Calgary: Alberta Energy Regulator, 2024), online: [perma.cc/C4SZ-7P4W] [Alberta Energy Regulator, *Directive 088*]. As part of the new Liability Management Framework, the AER released Directive 088 on December 1, 2021, pursuant to which the AER is given broad discretionary powers to take steps against a licensee during the "energy development life cycle," including applying a holistic assessment of a licensee's capabilities and performance.

65 Alberta Energy Regulator, *Directive 067, 2021*, *supra* note 63.

health.[66] Prior to the release of Directive 067, 2021, the Government of Alberta and the AER indicated that the LLR program did not adequately measure the financial health of a licensee or eligibility to transfer licences, as the AER could only consider the financial health of the company or licensee itself under Directive 067, 2017.[67] As a result, under Directive 067, 2021, the AER was given the ability to go beyond the licensee and evaluate the financial health of entities associated or affiliated with the licensee, or its directors, officers, or shareholders.[68] In addition, the AER expanded its investigatory powers, allowing it to consider the following new factors:

1. the failure to maintain in Alberta persons authorized to make decisions and take action on behalf of the licensee;
2. the assessed ability of the company to meet its regulatory and liability obligations throughout the energy development life cycle;
3. the assessed ability of the company to provide reasonable care and other measures to prevent impairment or damages in regard to a pipeline, well, facility, well site, or facility site;
4. outstanding debts owed for municipal taxes, surface lease payments, or public land disposition fees or rental payments by the company or by current or former AER licensees or approval holders that are directly or indirectly associated or affiliated with the company;
5. being or having been subject to or initiating insolvency proceedings (including bankruptcy, receivership, proposal, or *Companies' Creditors Arrangement Act* (Canada) proceedings); and
6. *any other factor the AER considers appropriate in the circumstances*.[69]

A new regulatory framework was unquestionably necessary to mitigate the ever-growing number of orphan wells in Alberta.[70] However, Directive 067, 2021 has come under criticism from academics and practitioners.[71] Many in the industry believe the new disclosure requirements extend far beyond what is required to assess whether an oil and gas company is capable of operating responsibly in the industry, and exceed the Regulator's mandate and expertise.[72]

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66 Alberta Energy Regulator, *Directive 088*, *supra* note 64.

67 Government of Alberta, *Alberta Energy Regulator Announcement: New Liability Management Framework* (Edmonton: Government of Alberta, 2020).

68 Alberta Energy Regulator, *Directive 067, 2021*, *supra* note 63, ss 3–4.

69 *Ibid*, s 4.5 [emphasis added].

70 Orphan Well Association, "Orphan Well Association 2016/17 Annual Report" (2017), online (pdf): [perma.cc/Q4GQ-RJVD]; Orphan Well Association, "2017 Annual Report" (2018), online (pdf): [perma.cc/HV5Z-HKDP]; Orphan Well Association, "Annual Report 2020/2021" (2021), online (pdf): [perma.cc/Q3MW-3RP6]. These reports indicate that as of 31 March 2016, the Orphan Well Association's well inventory stood at 768 wells. As of 31 March, 2017, the number increased to 1391. And in 2018, over 2000 new wells were added to the OWA's well inventory.

71 See e.g. Brittney N LaBranche, "Alberta Energy Regulator Implements Amendments to Directive 067" (9 April 2021), online: [perma.cc/WN2C-6X8Y]; Drew Yewchuk, Shaun Fluker & Martin Olszynski, "A Made-in-Alberta Failure: Unfunded Oil and Gas Closure Liability" (2023) 16:31 School Pub Pol'y 1 at 17–18.

72 Alberta Energy Regulator, *Draft Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* (January 2021), online (pdf): [perma.cc/6S6F-X2CC]; Alberta Energy Regulator, *Draft Directive 067: Stakeholder Feedback and AER Response* (released April 2021), online: [perma.cc/QHK7-9CSP]. In January 2021, prior to the implementation of the April 2021 edition of Directive 067, the AER released a draft of Directive 067 to engage in a feedback process with stakeholders, including members of industry, financial institutions, environmental groups, law firms, and First Nations. As a summary of this feedback process, the AER released Draft Directive 067 (released April 2021): Stakeholder Feedback and AER Response, a 12-page document which adopts a question-and-answer style where the AER addresses specific stakeholder questions or concerns. When

D. LIABILITY MANAGEMENT FRAMEWORK AND DIRECTIVE 088: LICENSEE LIFE-CYCLE MANAGEMENT

The AER introduced Directive 088 in 2021 as part of its overhaul of the licensee liability framework through a "holistic assessment" of a licensee's performance across the entire energy development life cycle and not just at the licence transfer stage.[73] Key aspects of Directive 088 include:

- A licensee capability assessment allowing the AER to assess factors like financial health of a licensee and magnitude of liabilities to levy security requirements against the licensee.[74] The directive contains no details or metrics to evaluate the company's financial health, giving the AER broad discretion to do what it thinks appropriate based on its assessment of the licensee's financial health at the time of the assessment.

- An assessment of high-risk licensees, specifically adopting the factors found in Directive 067, in which the AER, in its discretion, identifies licensees it views as likely to be at risk of failing to meet their regulatory and liability obligations, and imposes corrective action on that licensee ranging from education to the issuance of reasonable care and measures orders.[75]

- Closure quotas, nominations, and timelines established by the AER as part of an inventory reduction program designed to incentivize the amount of closure work and reduce liabilities.[76] Licensees have the option of selecting an AER-proposed timeline or proposing their own timeline to the AER provided that appropriate supporting information accompanies the submission.[77]

- Details surrounding licence transfer applications, including that each application will trigger a holistic assessment to assess the security deposit requirements as a condition of transfer.[78]

- Requirement for security deposits, to be determined at the discretion of the AER based on its holistic assessment of the licensee. If a security deposit is determined to be required, the amount of that deposit is no longer based on a formula, but instead based on, among other things, the present value of future cash flows of

asked to provide further explanation for the newly added unreasonable risk factors, the AER notes that their analysis of what constitutes an unreasonable risk is to occur "within the context of its mandate and the purposes of the acts that it administers" (at 7). The factors listed under Section 4.5 of Directive 067 are the "key factors" in determining unreasonable risk, but the AER may consider "other factors that [it] would consider appropriate in the circumstances" (at 7). In response to questions about the transparency of this seemingly broad assessment, the AER responded that all applications for licence eligibility and amendments are posted to the Public Notice of Application page and stakeholders or the public may then file a statement of concern.

[73] Alberta Energy Regulator, *Bulletin 2021-45: New Requirements and Guidance Related to Liability Management* (Calgary: Alberta Energy Regulator, 2021), online (pdf): [perma.cc/ZZ8C-AAUU].

[74] Alberta Energy Regulator, *Directive 088*, *supra* note 64 at s 2.1.

[75] *Ibid*, s 3.

[76] *Ibid*, s 4.

[77] *Ibid*, s 4.2.

[78] *Ibid*, s 5.

> the licensee, marginal and inactive wells, and any other amount the AER may consider appropriate, up to a maximum of the licensee's total liabilities.[79]

The holistic approach adopted by the AER gives it a broader mandate to monitor the status of a company and the number of inactive wells within its inventory. Forcing a company to address its inventory of inactive wells pursuant to Directive 088 when that company is financially stable may in fact decrease the number of orphans in insolvency proceedings. However, issues with Directive 088 and the manner in which it is applied, as discussed in more detail in Part VI below, may undermine its objectives.

E. DIRECTIVE 067, 2024

The AER's most recent effort at revising Directive 067 occurred in March 2024.[80] Prior to its release, in AER Bulletin 2023-41 issued in November 2023, the Regulator identified the shortcomings of the previously relied upon LMR calculation in respect of liability management:

> The current method of collecting security when a licensee's ratio of deemed assets to deemed liabilities (its LMR) is less than 1.0 is not the best indicator of risk. Analysis of past insolvent licensees showed that many of them had an LMR greater than 1.0.[81]

Recent changes to the Liability Management Framework, including to Directive 067 and Directive 088, appear to have been drafted with this problem in mind. While this amendment was predominately designed to support the AER's expanded mandate to regulate geothermal and mineral resources, it also addressed several insolvency issues that had been brought into sharper focus following *Redwater*.

In the "unreasonable risk" criteria of Directive 067, the AER noted that the absence of a decision-maker at the licensee in Alberta authorized to address matters dealing with wells, pipelines, or facilities would now be relevant consideration when assessing "unreasonable risk."[82] This Directive may have been a response to the increasing number of oil and gas companies with boards or management resident outside of Canada.[83] In addition, licensees became obligated to give the AER 30 days' notice of defaults on debt obligations or covenant violations, representing even greater involvement by the AER into a licensee's financial affairs.[84] Perhaps most notably, however, and in what was a direct response to a rising tide of unpaid municipal tax obligations, the assessment of "unreasonable risk" now includes consideration of whether the proposed licensee has "outstanding debts owed for municipal taxes, surface lease payments, or public land disposition fees or rental payments

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[79] *Ibid*, s 6.

[80] Alberta Energy Regulator, *Bulletin 2023-41: Ongoing Implementation of the Liability Management Framework* (Calgary, Alberta Energy Regulator, 2023), online (pdf): [perma.cc/B9XU-UT25] [Alberta Energy Regulator, *Bulletin 2023-41*]; Alberta Energy Regulator, *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* (Calgary: Alberta Energy Regulator, 2024, online (pdf): [perma.cc/PDD8-KKHF] [Alberta Energy Regulator, *Directive 067, 2024*].

[81] Alberta Energy Regulator, *Bulletin 2023-41*, *ibid*.

[82] Alberta Energy Regulator, *Directive 067, 2024*, *supra* note 80, s 4.5.

[83] Jeff Lewis, Jeffrey Jones & Nathan Vanderklippe, "Under the Radar: China's Stealthy Return to Alberta's Oil Patch," *The Globe and Mail* (19 May 2017), online: [perma.cc/NR53-9DTJ].

[84] Alberta Energy Regulator, *Directive 067, 2024*, *supra* note 80, s 5.

… or by current or former AER licensees, or approval holders that are directly or indirectly associated or affiliated with the applicant, licensee, or approval holder."[85]

VI. DOES THE LIABILITY MANAGEMENT FRAMEWORK ADDRESS THE ISSUES ARISING FROM *REDWATER*?

It is too soon to tell whether the enhanced discretion afforded to the AER in the new Liability Management Framework and Directives 067 and 088 specifically, combined with the expanded scope of the *Redwater* test, will positively impact the status of orphan wells and improve the reclamation rate of those wells in Alberta. This is due to the simple reason that wells become orphans when a corporation is no longer capable of meeting its obligations and there is typically a lag between the acquisition of licenced assets and an insolvency.

While the new Liability Management Framework is intended to ensure a corporation's financial health is monitored throughout the life-cycle of a licence, properly undertaking such a monumental task involves ensuring the Regulator has sufficient resources with the appropriate expertise at its disposal to carry out the monitoring. Evaluating the economic health of a company has not previously been part of the Regulator's mandate and putting that infrastructure in place to effectively carry out the framework will take time.

Further, the number of oil and gas insolvency proceedings has decreased in recent years compared to the period between 2014 to 2018.[86] There are a myriad of reasons for this reduction in insolvency filings, including the improvement in market conditions and an increased focus on debt reduction by companies in the exploration and production sector of the oil patch. Another contributing factor may be lenders' reluctance to fund insolvency proceedings after *Redwater* due to the altered priorities, which directed any realizations generated from those proceedings to the OWA.

As a result, it may be several years before we can determine the impact of these AER initiatives on the number of orphaned wells or insolvent oil and gas companies. While greater scrutiny over who can hold licences is laudable, it is not clear that the factors enumerated in Directives 067 and 088 will in fact ensure that oil and gas producers will be in a position to satisfy end-of-life obligations, for three reasons.

First, the process is not transparent, particularly in the Regulator's evaluation of the financial health of a licensee or, where applicable, any of its related parties. Assessing the economic health of a company is complex, requiring consideration of numerous factors, including a company's working capital availability, overall leverage over its assets, the terms of any debt it carries, the strength of the management team, or the willingness of equity holders to support the company in a liquidity event. The Liability Management Framework does not specify which of the applicable data points the Regulator considers in

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85 *Ibid*, s 4. These factors appear to be linked to recent insolvency cases in Alberta. See e.g. *Orphan Well Association v SanLing Energy Ltd*, 2024 ABKB 240 [*SanLing Energy*] (which entered receivership proceedings in April 2021 on application by the OWA after non-performance on numerous AER compliance orders).

86 See e.g. Amanda Stephenson, "Consumer Bankruptcies on the Rise in Alberta While Oil and Gas Bankruptcies Decline," *Calgary Herald* (12 February 2019), online: [perma.cc/WZ3N-DY5U].

its assessment of a licensee. Without a clear articulation of the relevant factors guiding the Regulator's assessment, the process lacks transparency.

Second, the discretionary nature of the Regulator's assessment will likely contribute to a non-uniform application of the factors found in both Directives 067 and 088. Different assessors may place different weight on certain economic factors, creating even greater uncertainty for the oil and gas industry.

Lastly, without a clear framework for addressing end-of-life obligations, including set timelines for abandonment and reclamation, and a clear methodology for posting bonds or security (with transparency as to their calculation and priority for the return of such security in the event the obligations for the specific well are addressed), it is likely that orphaned wells will continue to be an issue in Alberta.

VII. STATE OF THE ENERGY INDUSTRY NOW: POST *REDWATER* AND POST DIRECTIVE

A. WHAT ARE THE ONGOING ISSUES IN CANADA'S ENERGY SECTOR?

When *Redwater* prioritized environmental obligations in insolvency proceedings, all sectors dealing with environmental reclamation efforts were put on alert. The combination of the uncertainty that had been injected by *Redwater* and the cost and difficulty of identifying and appropriately gauging the extent of environmental damage meant every industry dealing with environmental remediation had to reassess its handling of these obligations. These sectors have needed guidance on how far the AER's super priority interest extends and since *Redwater*, cases have been testing its reach in many industries including the energy industry, the mining industry, and the oil and gas sector.

This section discusses the ongoing issues in this area, as well as how the trajectory of cases has addressed these issues until now. Three specific and at times overlapping issues have arisen in the case law after *Redwater*, which the lower courts have attempted to address by applying *Redwater* then filling in gaps as required. The cases have considered how far the AER's super priority interest extends, the types of assets that are available to satisfy environmental obligations, as in, the distinction between "related assets" and "unrelated assets," and the meaning of a "contingent" liability. The recent case of *Qualex* raised an additional and previously unconsidered issue, namely the application of *Redwater* outside of a formal insolvency proceeding in a case involving two private citizens. *Qualex* will be discussed in the next section.

B. WHAT ARE THE DIFFERENT STAKEHOLDER INTERESTS AND HOW FAR DOES THE AER'S SUPER PRIORITY INTEREST EXTEND?

Redwater granted the AER a super priority position over the other creditors in a bankruptcy.[87] Since *Redwater*, some courts have imposed distinct limitations on the super

[87] *Redwater*, *supra* note 1 at para 162.

priority interest, whereas others have interpreted it broadly.[88] So far, courts have not issued conflicting decisions.[89] The discussion below focuses on the priority of proceeds that arise from a sale of the debtor's assets, the priority of municipal obligations in relation to environmental obligations, and how far the receiver's power extends to complete environmental reclamation efforts. The different stakeholder interests and the limits of the AER's super priority interest is an area that will likely continue to expand as more cases question and test the boundaries of *Redwater*.

1. PRIORITY OF PROCEEDS ARISING FROM DEBTORS' ASSETS

One of the first cases after *Redwater* to explore its bounds was *Manitok Energy Inc (Re)*.[90] In *Manitok*, the Court determined that when assets are sold and the proceeds of sale are held in an interest-bearing trust account, the priority to the assets is not altered.[91] Rather, the funds simply replace the real estate.[92]

Manitok Energy Inc and certain affiliates (Manitok) was a public company engaged in oil and gas exploration. Manitok filed a notice of intention (NOI) to make a proposal under the *BIA*, after which, it went into receivership. At the time, Manitok owed significant debts to its secured lender, the Regulator, surface and mineral lessors, municipalities, and trade creditors who supplied equipment and services used to clean up oil and gas well sites. A few of Manitok's creditors had filed builders' liens against Manitok's interests for unpaid work.

The receiver sold some of Manitok's valuable assets but before one of the sales could close, the Supreme Court released *Redwater*, which led the Receiver and the lien holders to litigate over whether the proceeds remaining in the estate would be used to satisfy Manitok's ARO or the builders' lien claims.[93] One of the issues that arose from *Manitok* dealt with the priority of the proceeds of sale that were being held in an interest-bearing trust account pursuant to a vesting order. The builders' lien claimants argued that since the proceeds were paid into a trust, they were not captured by the *Redwater* decision.

The Court of Appeal found that despite the proceeds being paid into a trust account, the priority of interests was not altered, meaning stakeholders did not receive new or better rights.[94] The trust account was used only to hold and segregate the proceeds for the

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88 See e.g. *Trident*, *supra* note 4 at paras 9–10 (the Court determined that municipal taxes do not have the same priority status as environmental reclamation obligations).

89 *Eye Hill (Rural Municipality) v Saskatchewan (Energy and Resources)*, 2023 SKCA 120 (where the Saskatchewan Court of Appeal most recently did a straightforward application of *Redwater)*. The appeal involved a dispute between the rural municipality of Eye Hill No 382 and the Ministry of Energy and Resources over certain undistributed proceeds realized by the receiver during the receivership of Bow River Energy Ltd. (Bow River). Eye Hill argued it had priority to the proceeds related to unpaid property taxes owing by Bow River pursuant to the municipality's legislation. However, the Court applied the *Abitibi* test and reached the same result as the Supreme Court in *Redwater*. They found that the Ministry was not a creditor and that its claim was not provable in bankruptcy. Rather, the Court said that the Ministry was acting in a regulatory capacity and exercising its powers in the public interest to enforce the fulfillment of public duties Bow River assumed when it obtained licences from the Ministry.

90 2022 ABCA 117 [*Manitok*].

91 *Ibid* at paras 42–45.

92 *Ibid* at para 45.

93 *Ibid* at para 6.

94 *Ibid* at paras 44–45.

stakeholders, not to allow the proceeds to circumvent the principles from *Redwater*. Specifically, the Court said:

> The claims of the two respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the *Redwater* principles … the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any 'trust' does not create any new or enhanced rights in any stakeholder.… A court cannot by such a "trust order" reorder the priorities in an insolvency.[95]

2. PRIORITY OF MUNICIPAL TAXES IN RELATION TO ENVIRONMENTAL OBLIGATIONS

In *Trident*, the Court of King's Bench of Alberta determined that municipal taxes did not have the same priority status as environmental reclamation obligations.[96] Trident was a group of privately owned oil and gas exploration and production companies.[97] When Trident ceased operating, the OWA obtained a receivership order. At that time, Trident's primary obligations consisted of CDN$407 million of ARO, over CDN$71 million of secured debt, and over CDN$18 million of unsecured trade debt. The receiver sold Trident's assets, including non-licenced assets such as real estate and machinery, to purchasers who assumed the ownership liabilities and ARO for those assets, but they did not assume the unpaid municipal tax obligations.[98]

After the sales, while holding the remaining funds, which were partly or wholly generated through selling Trident's non-licenced assets, the receiver sought direction from the Court on the distribution of those funds. The AER and OWA argued that they should receive the funds pursuant to their super priority while certain municipalities asserted that their entitlement to the municipal tax obligations incurred post-receivership ranked in priority to the AER and the OWA.[99] The Court had to decide whether the AER and OWA were entitled to those proceeds of sale, and, if so, whether they should take those proceeds in priority to the municipal tax obligations. The Court answered both questions affirmatively.

In *Trident*, the parties agreed on several points. They agreed that all assets of insolvent oil and gas companies would be subject to the super priority of the AER and that the receiver could not make distributions before dealing with the ARO. They also agreed that municipal taxes could accrue after insolvency. What they disagreed on was whether the taxes accruing post insolvency would become non-provable claims, which would then subject them to a super priority like ARO.[100] The municipalities maintained that they enjoyed a similar public interest position as the AER and OWA and that they should therefore occupy a similar super priority status in relation to the accrued taxes and collect them outside of the bankruptcy scheme. Justice Neufeld disagreed, finding that municipalities did not have a public interest mandate like the AER and the OWA but were creditors collecting on a debt. He did note, however, that this position places "rural

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95 *Ibid* at paras 42, 44.
96 *Trident*, *supra* note 4 at paras 64–67.
97 *Ibid* at paras 61–64.
98 *Ibid* at para 12.
99 *Ibid* at para 16.
100 *Ibid* at paras 54–55.

municipal governments in a very unfair position *vis-à-vis* the Province of Alberta," and that there is a "structural unfairness at play here from a municipal taxation and finance perspective as between the provincial government and rural municipalities" that needed to be addressed by the province.[101] Given the finding, however, unlike the AER, the municipalities would not satisfy the *Abitibi* test.[102]

C. WHAT ASSETS ARE AVAILABLE TO SATISFY ENVIRONMENTAL OBLIGATIONS?

Another question that arose after *Redwater* centred on which assets could be used to satisfy environmental contamination. In *Redwater*, Chief Justice Wagner, writing for the majority, held that unrelated assets were not required to satisfy Redwater's environmental liabilities. Specifically, he said:

> Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage.[103]

However, Chief Justice Wagner did not elaborate on what related or unrelated assets are or discuss how to make that determination. The question of how to distinguish between related and unrelated assets is important, as lenders make their risk assessments based on whether particular assets are likely to become encumbered by environmental reclamation obligations. Since *Redwater*, the three cases discussed below have dealt with this issue, though none of these cases have provided a substantive definition or understanding of related assets. Rather, they have determined, on the facts before them, whether the assets in question were related or unrelated. It is therefore likely that these cases will continue to come before courts until they articulate factors or guidelines to help determine which assets are related and which are unrelated.

The first case after *Redwater* to deal with the issue of related assets was *Manitok*, in which two issues arose in relation to related assets. First, the Court of Appeal of Alberta determined that the proceeds of the sale of valuable oil and gas assets can be used to satisfy the environmental contamination of the unrelated assets that were encumbered by ARO.[104] The Court of Appeal noted that finding otherwise would mean there would be no proceeds available to satisfy environmental obligations, and that adopting this interpretation would "render *Redwater* meaningless."[105] Finally, it noted that bankrupts could not avoid these obligations by converting valuable assets into cash.[106] Specifically, it said that nothing in Alberta's regulatory regime, the *BIA*, or in *Redwater*, "permits a licensee to avoid its abandonment and reclamation obligations by converting valuable licensed assets into cash before an enforcement order can be issued" by the Regulator.[107] It went on to note that *Redwater* said that "the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets," and that an interpretation asserting the

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[101] *Ibid* at paras 59–63, 81–82.
[102] *Ibid* at para 62.
[103] *Redwater*, *supra* note 1 at para 159.
[104] *Manitok*, *supra* note 90 at para 36.
[105] *Ibid* at para 29.
[106] *Ibid* at para 30.
[107] *Ibid*.

opposite would mean that very few related assets would ever be used to satisfy these obligations.[108]

The second issue regarding related assets in *Manitok* was whether the sale proceeds of assets unrelated to the oil and gas business could be used to satisfy Manitok's ARO. On this issue, the Court answered in the affirmative, noting that *Redwater* did not draw a distinction between the different types of assets when it repeatedly referred to the "assets of the estate."[109] It also noted that "there is no clear boundary between licensed assets and other assets" such as oil and gas rights, royalty rights, intellectual property, seismic data, and vehicles.[110] However, the Court of Appeal of Alberta refrained from deciding on whether "assets completely unrelated to the oil and gas business" could be used to satisfy reclamation obligations, finding this issue could be "left for another day."[111]

The second case to discuss the issue of related assets was *Trident*. In *Trident*, Justice Neufeld determined that all the proceeds would be distributed to the AER for use by the OWA, including those derived from the sale of real property that were used for office or equipment rental storage.[112] He noted that Trident had one business — an oil and gas development — and "[i]t ma[de] no sense to differentiate real estate assets from other assets used in that business."[113]

D. WHAT IS THE MEANING OF "CONTINGENT"?

The meaning of contingent in the context of an environmental remediation claim is now settled law in Alberta. Whether an environmental remediation obligation is contingent has been addressed by two cases and confirmed by a third. The Court of Appeal of Alberta, in the two cases of *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, determined that ARO exist in any well from the moment the well is drilled.[114] The only contingency about the ARO is when, not if, these obligations crystallize.[115] *Manitok* confirmed that these obligations are "inherent in oil and gas properties from the minute extraction of the resource commences."[116]

E. TESTING THE BOUNDARIES OF *REDWATER*: *QUALEX*

In the recent decision of *Qualex*, the Court of King's Bench of Alberta extended the *Redwater* principles to apply to a private dispute between neighbouring landowners, outside of formal insolvency proceedings.[117] While this case related to contaminated real

108 *Ibid*.
109 *Ibid* at para 35.
110 *Ibid*.
111 *Ibid* at para 36.
112 *Trident*, *supra* note 4 at para 80.
113 *Ibid* at para 67. See also *Mantle Materials Group, Ltd v Travelers Capital Corp*, 2023 ABCA 302, leave to appeal to SCC refused, 2024 CanLII 48151 (SCC) (where the Court provided a broad definition of "related assets," finding that the assets subject to a purchase money security interest were part of the debtor's gravel business, which was equipment being used for environmental reclamation. As such, the assets were caught by the *Redwater* super priority).
114 *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 [*Perpetual Energy* 2021]; *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2022 ABCA 111.
115 *Perpetual Energy* 2021, *ibid* at para 86.
116 *Manitok*, *supra* note 90 at para 38.
117 *Qualex*, *supra* note 5.

estate assets believed to have been caused by a legacy dry cleaning business, *Qualex* had potentially wide-ranging implications for the energy industry. Although it was overturned, the lower court decision demonstrates the issues that can arise when a court takes a common law-created priority interest and interprets it broadly and in a manner inconsistent with existing legislation. The most notable development arising from the lower court decision in *Qualex* was the potential that a private litigant could assert an environmental claim against another person and have that claim rank in priority to the person's pre-existing secured creditors.[118] Unlike in *Redwater*, a private litigant is not acting as a public regulator but is instead a common plaintiff.[119]

In *Qualex*, the plaintiff corporation owned land adjacent to the defendant's property and alleged that its land was contaminated by runoff originating from the defendant's property. The plaintiff's claim was in tort and was unsecured, meaning it should have ranked subordinate to the defendant's three mortgagees who had validly registered security against the relevant land. Notwithstanding the clear and unambiguous priority scheme, the plaintiff was granted a pre-judgment attachment order equal to the estimated cost of remediating environmental contamination emanating from the defendant's lands and in priority to the mortgagees.[120] Relying on the *Redwater* principles and a creative application of the *Abitibi* test, the Court, without reference to the applicable legislation, granted the private landowner an interest in the sale proceeds for its environmental tort claim in priority to the claims of valid and enforceable mortgages.[121]

The trial decision in *Qualex* tested the boundaries of *Redwater* in at least two respects. First, it applied the *Redwater* priority analysis to a private dispute, in circumstances where the applicable regulatory body had not taken an active role in the dispute or the litigation but was free to pursue all available remedies (including the enforcement of payment orders) against the offender.[122] In other words, *Qualex* did not involve a public entity enforcing a public duty. Second, it held that a charge can arise in favour of an unsecured tort claimant, with priority over prior-registered secured creditors, to secure the payment and performance of remediation obligations outside of a formal insolvency process. This is significant because under both the federal and provincial priority schemes, unsecured tort claims rank below the claims of secured creditors. In sum, *Qualex* appears to be the first reported decision post-*Redwater* to open the door to the possibility of a super priority charge arising in favour of a private litigant and outside of any insolvency proceedings.

The Court of Appeal overturned the lower court decision, thus setting important boundaries to the *Redwater* umbrella. In finding Qualex's "super priority" claim "hopeless," the Court stated that the decision of the chambers judge displaced valid statutory priority and interfered with the legislative intent expressed in the *Environmental Protection and Enhancement Act*.[123] *EPEA* provides that any private party who suffers loss or damage as a result of an offence under the legislation, is entitled to sue for and recover

[118] *Ibid* at para 50.
[119] *Ibid* at para 100.
[120] See e.g. *Civil Enforcement Act*, RSA 2000 c C-15, s 35; *Law of Property Act*, RSA 2000, c L-7, s 64; *Land Titles Act*, RSA 2000, c L-4, s 104; *Personal Property Security Act*, RSA 2000, c P-7, ss 20, 22, 32, 35.
[121] *Qualex*, *supra* note 5 at paras 115–16.
[122] *Ibid* at paras 110–12.
[123] *Ibid* at para 21; *EPEA*, *supra* note 8.

from the person responsible for the offence, an amount equal to the loss or damage proved to have been suffered.[124] In other words, had *EPEA* been followed in *Qualex*, the adjacent landowner would have been entitled to a cause of action. If damages were proven in that action, a judgment in the amount of such damages would have been issued. The priority of that judgment holder under the *BIA* is just like any other judgment holder; it is subordinate to all secured and other priority claims enumerated in section 136 of the *BIA*. As a result, the chambers judge in *Qualex* disrupted the priority created in *Redwater* so dramatically that it no longer mirrored what is contemplated by the legislation.

In *Redwater*, the Supreme Court was clear that: (1) the super priority was statutorily-derived and its beneficiary was determined by reference to the applicable statutes; and, (2) the Regulator was determined not to be a creditor of the bankrupt and its claim was not a claim provable in bankruptcy, which meant that the claims owing to other creditors could not be satisfied until the corresponding obligations were performed.[125] Both of these propositions flow from express statutory provisions: if a regulatory obligation is not a claim provable in bankruptcy, it is not subject to the stay of proceedings and continues to be binding on the estate. But, if that obligation is a claim provable in bankruptcy, it is determined according to the priority schemes in the *BIA* and applicable provincial legislation.[126]

Phrased differently, the AER's super priority arising in *Redwater* was a consequence of the treatment of claims in a proceeding under the *BIA*. The super priority is in essence a side effect of the formal process itself. In particular, the stay of proceedings and the *BIA* distribution scheme with respect to claims establish a specific distribution waterfall in respect of unsecured claims. Provincial law applicable to secured claims is left largely untouched, except to the extent that a claim that is not provable in bankruptcy otherwise binds the estate.

The Court of Appeal in *Qualex* noted this, stating that in *Redwater*, the super priority afforded to the Regulator did not create a common law priority entitlement "untethered from the applicable legislation and its objections."[127] In the case of *Qualex*, by contrast, the Court of Appeal found that there was no statutory authority to support Qualex obtaining any elevated priority.[128]

The Court of Appeal in *Qualex* also took issue with the Chambers Judge's decision to elevate a private citizen to the position of a regulator enforcing a public duty. The Court of Appeal's concern was in part legislative: namely, the legislation specifically tasked the Regulator and not private litigants with the enforcement of environmental remediation obligations for the public good.[129] As noted above, departing so substantially from the legislation represented a change in the law that is not for courts to make.[130] The remainder of its concern focused on a "logical fallacy" to Qualex's argument that its claim benefitted the public and served the underlying purpose of *EPEA*. The Court found that "[a] private

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124 *EPEA*, *ibid*, s 219.
125 *Redwater*, *supra* note 1.
126 *Ibid*.
127 *Qualex*, *supra* note 5 at para 23.
128 *Ibid* at para 24.
129 *Ibid* at para 26.
130 *Ibid* at para 21.

litigant, acting in its own interests, is under no obligation to act for the benefit of others. Private litigation is not equivalent to regulation in the public interest."[131] Furthermore, upending commercial certainty created by legislated priority schemes by establishing common law super priorities in favour of private litigants for environmental remediation claims "brings no assurance that money recovered will be used other than to serve the litigant's interest."[132]

The Court of Appeal of Alberta's decision in *Qualex* provided clarity on the boundaries of the *Redwater* priority scheme. However, it did not clarify the uncertainties for the lending and energy industries arising out of the *Redwater* decision. For example, *Redwater* has the potential to impact industries other than the oil and gas sector. Provincial statutes addressing priority rights in the oil and gas context, such as those found in the *Mines and Minerals Act* and which govern the process for registration of a security notice or builders' lien, are highly relevant to the energy sector and create straightforward and well understood priority rights.[133] Had the Regulator in *Qualex* sought the relief against the defendant instead of the private landowner, thus enforcing the public duties associated with remediation under *EPEA*, the mortgagees registered over the contaminated commercial properties would most likely have lost their fight. This demonstrates that the *Redwater* priority likely expands beyond the scope of the energy industry.

Another concern with the common law priority scheme is the impact on commercial certainty. The threat is straightforward and stems from the ostensible priority issue described above. Without clear legislation, *Redwater* remains open to interpretation with the risk that courts may continue to push its boundaries, as occurred in *Qualex*. Every energy company that seeks credit is aware that risk is a key factor in lending determinations. Every lender granting credit is seeking a stable system in which their relative position in the priority scheme is certain. Unsettling priorities that were previously secured will necessarily increase risk and uncertainty. Increased risk may not only increase the cost of borrowing but undermine the availability of loans generally, which is highly problematic for an industry heavily reliant on credit.

The Court of Appeal in *Qualex* recognized the risks associated with a broad interpretation of the common law priority regime created by *Redwater*. Citing the Canadian Bankers' Association in its intervener materials, the Court noted the complex web of legislation governing priorities both inside and outside of the insolvency context, which underpins a significant portion of the market and provides certainty for both lenders and borrowers.[134] The Court of Appeal cautioned that in this context, even where the development of the common law is necessary to clarify a legal principle, resolve an inconsistency, or to keep the law aligned with the evolution of society, "courts must proceed with great caution where the revision is major and its ramifications complex."[135]

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[131] *Ibid* at para 26.
[132] *Ibid*.
[133] *Mines and Minerals Act*, RSA 2000, c M-17, s 95(4).
[134] *Qualex*, *supra* note 5 at para 18, citing *R v Salituro*, [1991] 3 SCR 654 at 670.
[135] *Qualex*, *ibid* at para 18.

VIII. WHAT LEGISLATIVE OR COMMON LAW CHANGES WOULD CREATE MORE CERTAINTY?

Redwater and subsequent decisions created unintended consequences for certain stakeholders whose interests were set aside in favour of addressing environmental obligations. While the increased scope of powers afforded to the AER under Directive 067, 2021 have attempted to mitigate the environmental fallout from the oil and gas industry, it is not yet clear that Directive 067, 2021 will achieve its aim. Furthermore, certain stakeholders have been very vocal about the impact of *Redwater* on their position.

In some cases, the government has selectively attempted to address the concerns of certain of these stakeholders. One example of this can be found in the Department of Energy's Ministerial Order 043/2023, which was issued in direct response to the overarching complaints by municipalities in Alberta who claim to have over CDN$250 million owed to them in property taxes by oil and gas companies.[136] Under this Ministerial Order, the AER, in addition to the discretion it holds under Directive 067, 2021, is required to assess whether the transferor and transferee have outstanding municipal tax arrears exceeding the threshold amount currently set at CDN$20,000. If they do, the AER is required to reject the licence transfer of that company regardless of whether the assets are situated in that municipality. This means that a transaction involving any oil and gas properties, whether in an insolvency proceeding or not, must first satisfy outstanding municipal taxes in excess of CDN$20,000 owed by either the vendor or purchaser before the licences can transfer and the transaction can close. It is noteworthy that in an insolvency proceeding, this requirement to first satisfy property taxes directly circumvents the super priority afforded to the Regulator by *Redwater*, thus calling into question whether the Ministerial Order is even constitutionally valid.

Also noteworthy is that in insolvency cases that preceded the Ministerial Order, many of the assets that were transferred to responsible producers in insolvency sales, producers who assumed the obligation to pay property taxes post closing, would not have been transferable had the Ministerial Order been in effect at the time. In other words, a significant number of oil and gas insolvencies post-*Redwater* had municipal tax arrears surpassing the CDN$20,000 threshold.[137] Despite this, assets were sold to responsible producers who assumed not only the environmental obligations associated with the purchased assets, but the ongoing obligation to pay property taxes. And because of these

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[136] Ministerial Order 043/2023, (2023) Government of Alberta Department of Energy (*Responsible Energy Development Act*); Matt Scace, "Alberta Oil and Gas Companies Owe Rural Municipalities at least $250M in Property Taxes," *Calgary Herald* (28 February 2024), online: [perma.cc/6K98-B6Y5]. The results of a survey of municipalities in September 2022 conducted by the Alberta Government suggests that the numbers are not as bad as the municipalities state. Of the CDN$250 million claimed, approximately CDN$130 million represents arrears which the municipalities continue to count as collectible and owing to them. Approximately CDN$54 million of this belongs to non-operating companies and repayment is not expected. The remaining CDN$76 million belongs to 99 operating companies, 15 of which are responsible for CDN$71 million or 93 percent. Approximately CDN$48 million is subject to an ongoing repayment plan. See also Government of Alberta, "Unpaid Oil and Gas Property Taxes: A Breakdown and Analysis of the Survey Results as Reported by Municipalities in September 2022" (2022), online: [perma.cc/2UYR-UWFR].

[137] See e.g. *Trident*, *supra* note 4; *Alberta Energy Regulator v Lexin Resources Ltd* (24 October 2017), Calgary 1701-03460 (ABQB) (Affidavit, Thorlakson at Exhibit "E"; Affidavit, Fai at Exhibit "E"). See also *SanLing Energy*, *supra* note 85; *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61 at para 10.

transactions, the burden transferred to the OWA was reduced and the applicable municipality's tax revenues increased. In some cases, the burden associated with the unpaid property taxes is simply too high for any purchaser to justify in an acquisition. Thus, while the Ministerial Order is intended to protect municipalities from non-compliant operators, the practical effect of the order is that in many cases, it will hinder the ability of receivers or trustees to transfer saleable assets to responsible producers.

The unintended consequence of this is an increase in the number of orphaned wells and a decrease in the tax base for the municipalities the order sought to protect. It represents an attempt by the government to use an impractical and imprudent solution to rectify an issue arising out of the *Redwater* priority regime while also directly contravening that priority regime.

It appears that a broader legislative approach that considers both the environmental and economic consequences is necessary. This should be done at the federal level, with input from Alberta, British Columbia, and Saskatchewan, the provinces with the largest number of orphaned properties in Canada. A decision as to which priorities are paramount should be made and codified in the legislation.

However, a clear framework establishing the priority of obligations, both equally important, is not the sole answer to the problem. As was the case before *Redwater*, the environmental regulatory regime in Alberta allows oil and gas companies to defer the financial consequences of addressing environmental liabilities relating to individual wells. Before the revamp to Directive 067, 2021, the focus of the Regulator when considering a licence transfer was whether a licensee was able to achieve an LMR over 2.0.[138] While the LMR rating system has been replaced with a discretionary regime under Directive 067, 2021 and Directive 088, in which the LMR is only one factor assessed, the deferral of financial consequences associated with environmental liabilities continues. Further, the discretionary nature of the Regulator's assessment will likely contribute to a non-uniform application of the Directive 067 factors. Fundamentally, as long as the financial consequences are deferred and the factors considered are discretionary, dealing with end-of-life obligations will continue to create issues in insolvency proceedings. While Directive 088 includes attempts by the AER to mitigate against the effect of such deferrals, including by imposing timelines for AER directed closure quotas, the ability of a licensee to opt out of the AER-imposed timelines weakens what could otherwise be a very effective element to the new framework.

IX. CONCLUSION

The Supreme Court's decision in *Redwater* disrupted many Canadian sectors by undermining the legislated bankruptcy priority scheme. These sectors structure their operational and lending decisions in part based on these legislated priorities and *Redwater* left both the sectors and their lenders without the commercial certainty that is necessary for an economy to flourish.

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[138] Alberta Energy Regulator, *Directive 067*, *2017*, *supra* note 58; Alberta Energy Regulator, *Directive 067*, *2021*, *supra* note 63.

The case law principles and government actions that emerged after *Redwater* were a reaction to the decision, some of which created even more uncertainty than the decision itself. But as shown in this article, none of the judicial decisions or government actions have gone far enough to provide the principles and boundaries needed to re-inject the commercial certainty *Redwater* eliminated.

Redwater did not just create uncertainty by altering the priority scheme. *Redwater* also demonstrated that the *Abitibi* test, the test used to determine whether the Regulatory had a "claim provable," was unpredictable and the circumstances in which the test could be applied were also uncertain. This was made clear when the chambers judge in *Qualex* used the *Abitibi* test outside insolvency proceedings, in a case involving private parties. This decision was overturned on appeal and the Court of Appeal made clear that the *Abitibi* test is not applicable in these circumstances. However, the fact that this avenue was pursued by the lower court in the first place shows the importance of developing more stringent boundaries in this area in order to deal with the challenges created by *Redwater*.