

# The Expanding Scope of Redwater

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# Agenda

1. Issues for Energy Sector: Changing Priorities & Uncertainty
2. Regulator's Response to *Redwater*
3. Does Liability Management Framework Address Issues Arising from *Redwater*?
4. Ongoing Issues for Canada's Energy Sector
5. Testing Boundaries of *Redwater*: *Qualex*
6. Would Legislative or Common Law Changes Create More Certainty in this Area?

# Changing Priorities / Commercial Impacts

In *Redwater*, the SCC determined that reclamation and abandonment liabilities must be dealt with before any distribution to the debtor's creditors, including its secured creditors.

The decision was a change to the previously understood law in respect of priorities and had significant commercial impacts on the resource sector.

# Regulator's Response to Redwater: Directive 067, Directive 088 and Liability Management Framework

- Shift from Formulaic Approach to “Holistic Approach”
- Directive 067
  - LLR Focus - formulaic approach
  - 2017 - Addition of Discretion based on “Risk Factors”
    - RISK FACTORS include corporate and financial assessments
  - 2021 - Broader Discretion focused on “holistic approach”
    - Elimination of LLR Program
    - Additional “Risk Factors” to be assessed by Regulator

# Regulator's Response to Redwater: Directive 067, Directive 088 and Liability Management Framework

- Introduction of new Liability Management Framework in 2021
- Incorporates Directive 067
- Introduces Directive 088 - Licensee Life-cycle Management
  - Gives Regulator discretion to monitor a licensee and its “Risk Factors” throughout the entire life cycle of a license.

# Ongoing Issues for Canada's Energy Sector: Different Stakeholder Interests & AER Super Priority

## 1. Which assets can satisfy environmental obligations?

[O]nly Redwater's substantial assets were unaffected 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.

*Redwater* at para 159.

But what are “related assets”?

# Ongoing Issues for Canada's Energy Sector: Different Stakeholder Interests & AER Super Priority

1. Priority of municipal taxes in relation to environmental obligations:  
*Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839
2. Receiver's power over property of third parties:  
*Yukon (Government of) v Yukon Zinc Corporation (YZC)*, 2021 YKCA 2
3. What is the meaning of "contingent"?

It appears to be settled law that abandonment and reclamation obligations exist in any well from the moment it's drilled, and that the only contingency is when, not if, these obligations crystallize.

Abandonment and reclamation obligations are "inherent in oil and gas properties from the minute extraction of the resource commences".

*Manitok Energy Inc (Re)*, 2022 ABCA 117 at para 38.

4. Priority of proceeds arising from debtor's assets:  
*Manitok Energy Inc (Re)*, 2022 ABCA 117

# Testing the Boundaries of *Redwater*: *Qualex*

In *Qualex*, the Court applied the principles / legal test from *Redwater* to subordinate the claim of a secured creditor to environmental obligations *in a circumstance where no formal insolvency proceeding had been initiated*.

The *Qualex* decision was highly unexpected, created significant issues in banking law and was ultimately overturned on appeal.



What legislative/common law changes would create more certainty in this area?

*Discussion*