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Managing Environmental Obligations and Implementing the SCC Redwater Decision: Where We Are Today

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Agenda

1. ***The Redwater Decision: Refresher***
2. ***Case Law Update on the Redwater Principles.***
3. ***Legislative Amendments on Liability Management*.**
4. ***Liability Management COVID Policies and Funding.***

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Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5 ("*Redwater*")

- **Redwater Energy Corporation, with a secured debt owing to the Alberta Treasury Branches ("ATB"), went into receivership and bankruptcy under federal *Bankruptcy and Insolvency Act (*BIA).**

- **GTL, the Receiver/Trustee disclaimed 107 out of 127 AER-licensed assets. The AER and the OWA sought Orders compelling the Trustee (as licensee under Alberta's OGCA &PA) to fulfil Redwater's statutory environmental obligations.**

Issues:

1. **Ability of a Trustee / Receiver to 'disclaim' or 'renounce' uneconomic property; and**

2. **Priority of a Regulator's environmental orders, including the payment of the LMR security deposit to address licensee's environmental obligations.**

Supreme Court decision

SCC's Decision:

- **5:2 split, majority overturning the Alberta Courts' decisions.**

- **Power of a Trustee/Receiver to 'disclaim' property under the BIA exists but only addresses Trustee/Receiver's personal liability. The liabilities disclaimed remain the obligations of the bankrupt estate.**

- **Environmental obligations (and related regulatory programs such as the LMR security deposit) and the Regulator's abandonment/reclamation orders, are NOT financial claims or 'claims provable in bankruptcy.' Therefore, they must be complied with by the Trustee in priority to any other claim including secured creditors.**

- **Alberta's oil and gas regulatory regime can coexist with the BIA. Paramountcy doctrine does not apply.**

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Redwater Principles

- **Super-priority not automatic. The 3-part test to determine whether an environmental obligation amounts to a claim provable in bankruptcy:**
- (1) there must be a debt, a liability or an obligation to a creditor;
- (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and
- (3) it must be possible to attach a monetary value to the debt, liability or obligation.

***Newfoundland and Labrador v. AbitibiBowater Inc*. 2012 SCC 67 (*Abitibi*).**

- **A Regulator is not a Creditor: A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. In seeking to enforce the bankrupt's end-of-life obligations, the Regulator is acting in the public interest and for the public good. (*Northern Badger* - 1991 ABCA)**

- **"Monetary value"/"Sufficient certainty" test: It must be sufficiently certain that the regulator will perform the environmental work and seek reimbursement.**

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Case Law Update on Redwater Principles

- More governmental agencies/regulators in other sectors (not only oil & gas) may extrapolate the Redwater principle of "public good" super-priority for environmental obligation: Wing (Re), 2019 ONSC 4063
- Ontario Securities Commission) found that bankrupt engaged in insider trading, etc., issued cease trade order and required bankrupt to pay administrative penalties for violating it.
- In a motion for enforcement, OSC argued that monetary penalties were not claims provable in bankruptcy.
- The Abitibi/Redwater three-part test was not met.
- Motion granted. OSC was not acting as creditor but was acting to enforce securities laws. Cease trade violation order was not claim provable in bankruptcy.

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Case Law Update on Redwater Principles

- **Remediation and reclamation service opportunities will likely increase. However, who will pay the bill is crucial!**
  - **the insolvent?**
  - **the Receiver/Trustee; or**
  - **the Regulator (the power lies here during insolvency) and the OWA?**
  - **WIPs/JVPs!**
- **Manitok Energy Inc (Re), 2019 ABQB 520: receivership commenced before the SCC Redwater Decision, and was ongoing for 17 months.**

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Case Law Update on Redwater Principles

- **Under the law at that time, the Receiver renounced some assets, operated debtors' properties, sold good assets, and received proceeds which amounted to approximately $11 million.**
- **The AER and secured creditors reached an agreement regarding the allocation of sale proceeds.**
- **Receiver applied for partial discharge and to transfer renounced assets to OWA.**
- **3 oil & gas companies sought adjournment, on the grounds that the SCC super-priority principle was not applied, as the Receiver did not make provision to fund the abandonment and reclamation obligations associated with the renounced assets.**
- **As WIPs or as industry participants funding the OWA, they may be liable for end-of-life obligation of the renounced assets.**

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Case Law Update on Redwater Principles

- **Decision: Receiver's application granted; WIPs' request for adjournment dismissed.**
- **WIPs hoped to convince the Court and the AER, that any funds realized from the estate should be applied to end-of-life obligations of renounced assets, thus reducing risk and amount of WIPs' responsibilities for such obligations.**
- **In effect, the WIPs proposed that the Court and the AER give priority to their interests and unsecured contingent claims against the debtors, with respect to reclamation activities, over interests of secured creditors.**
- **While AER's Orders may have super-priority, unsecured, non-Regulator creditors do not.**
- **The OWA did not request an adjournment; the OWA is not the Regulator.**

Has this changed, in light of recent legislative amendments expanding OWA's powers?

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Legislative Amendments on Liability Management

- **Alberta passed *The Liabilities Management Statutes Amendment Act, 2020,* came into force June 15, 2020, as "***one part of a new suite of policies to be announced in the near future which will touch every stage in the life cycle of a well, from exploration to postclosure, while at the same time ensuring industry is able to meet its obligations in a manageable way***." (Hansard, April 1, 2020 at 320).**
- **The Act amended the *Oil and Gas Conservation Act* and the *Pipeline Act* to impose additional duty for licensees and approval holders.**
- **New s 26.2 of the OGCA to "provide reasonable care and measures to prevent impairment or damage in respect of a well, facility, well site or facility site."**
- **If licensee or approval holder cannot fulfil the obligations, the duty shall be fulfilled by the WIPs.**
- **If WIPs are not performing the obligations, the AER may order the OWA to provide reasonable care and measures to prevent impairment or damage.**
- **The OWA can now operate the assets and undertake production with consent of the mineral rights holders (ss. 11 &12).**

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Legislative Amendments on Liability Management

- OWA can undertake remediation activities (under Part 5 of the EPEA) associated with orphan sites in addition to suspension, abandonment and reclamation activities and that the costs of these activities can be recovered from the Fund.
- New section (s. 106.1) allows the AER, to apply to the court for the appointment of a receiver, etc., of the property of a licensee.
- Seems to ensure that the receiver can be paid out of the orphan fund. This addresses the post-Redwater concern that receivers would be hard to find.
- Orphan funds can now be used to cover the costs of these obligations, and some additional classes of costs, including costs associated with monitoring the behavior of orphan wells and facilities, and the costs of a receiver (s. 70).

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Legislative Amendments on Liability Management

- **The Amendment enabled an *amendment regulation*, OC 174/2020, June 3, 2020, which amended the *Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001*.**
- **The amendment expanded the scope of authority to the Orphan Well Association (OWA), and the activities that it may fund.**
- **Of Significance is the power of OWA to enter into agreements with any person, for any reason related to exercising and carrying out its delegated powers, duties and functions.**
- **Qualifying Agreements include:**
  - an agreement with WIPs for suspension, abandonment, remediation or reclamation;
  - an agreement to purchase, lease or obtain access to lands for the purposes of suspension, abandonment, remediation or reclamation; and
  - an agreement providing a reasonable likelihood of reducing the number of, or preventing the occurrence of, orphan wells & facilities.
- **The orphan fund may be used to pay for obligations of the OWA under these Agreements.**

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New Policies on Liability Management

Alberta's Liability Management Framework – announced July 30, 2020.

- **Licensee Capability Assessment System:** replacing the LLR, to assess the capabilities of oil and gas operators to meet regulatory liabilities obligations, prior to receiving regulatory approvals**.**
- **Licensee Special Action:** proactive support for struggling operators.
- **Inventory Reduction Program:** five-year rolling spending targets for reclamation that every active site operator must meet, includes the area-based closure program.
- **Landowner Opt-in**: a formal opt-in mechanism for landowners to nominate sites for cleanup.
- **Addressing Legacy and Post-closure Sites**: a process to address legacy and post-closure sites that pre-exist current standards. A panel will be established.
- **Expanding the Mandate of the Orphan Well Association**: via the legislative amendments.

The Orphan Levy - September 10, 2020

- **AER released a bulletin setting the 2020/2021 Orphan Fund Levy. The prescribed levy is $65 million for 2020/2021, up from $60 million in 2019/2020.**
- **$3.4 million of the levy was not received in 2019 due to the insolvency of some operators (OWA Annual Report, 2019).**

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Potential Opportunities for Environmental Services Professionals

- **Other potential areas of economic growth for environmental services –**
- **Assist licensees in complying with new obligations.**
- **Proactive/Preventive Consulting, and Software services.**
- **Assist licensees in creating new approaches to minimizing environmental risks.**
- **Assist licensees in monitoring and implementing abandonment and reclamation strategies.**
- **Be creative in recycling oil and gas wells and facilities for new businesses, such as subsurface waste disposal.**

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Canada's COVID-19 Economic Response Plan: Orphan and Inactive Oil and Gas Wells

- **The Government of Canada provided funding to sustain jobs by cleaning up the environment in the energy sector:**
  - Up to $1 billion to the Government of Alberta;
  - Up to $400 million to the Government of Saskatchewan;
  - Up to $120 million to the Government of British Columbia;

  to support work to clean up orphan and inactive oil and gas wells across these provinces; and
  - $200 million to the Alberta Orphan Wells Association (OWA) to support its work to clean up orphan oil and gas wells and well sites across Alberta.
  - The OWA will fully repay this amount.
- **As part of this funding, <u>local landowners will have the ability to nominate and prioritize wells for remediation</u>.**

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Canada's COVID-19 Economic Response Plan: Orphan and Inactive Oil and Gas Wells

- As part of these agreements, the Government of Alberta committed to implement strengthened regulation to significantly reduce the future prospect of new orphan wells.
- The funding program will have oversight from a federal-provincial committee.
- The federal government will ensure municipal and Indigenous engagement.
- Many inquiries from municipalities on how to navigate the Orphan Well Association (OWA) in respect of choosing which wells and areas in Alberta to clean up first.

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Canada's COVID-19 Economic Response Plan: Orphan and Inactive Oil and Gas Wells

- Potential opportunities for environmental services professionals.
- Business proposal could be made to:
  - Municipalities
  - Indigenous communities
  - Local landowners
  - insolvent companies and the Regulator where secured creditor is not involved
  - the Receiver/Trustee and Regulator

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Thank you and Questions?

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