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Environmental Obligations Enforced Between Private Parties: The Extension of *Redwater*

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Case commented on: *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, [2023 ABKB 109 \(CanLII\)](#)

The *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, [2023 ABKB 109 \(CanLII\)](#) (*Qualex*) decision extends the principles from the Supreme Court’s decision in *Orphan Well Association, Alberta Energy Regulator v Grant Thornton Limited and ATB Financial*, [2019 SCC 5 \(CanLII\)](#) (*Redwater*) to a private dispute outside insolvency proceedings.

In *Qualex*, Justice Blair Nixon granted an attachment order to the appellant, Qualex-Landmark Towers Inc (QLT) against the respondent’s, 12-10 Capital Corp, land (the 12-10 Lands). The order took priority over prior registered secured creditors and secured the cost of remediating the environmental contamination that had migrated from the respondent’s land to the appellant’s land.

Facts

In 2007, QLT purchased lands, the “QLT Lands”. The QLT Lands are located adjacent to the 12-10 Lands. At that time, there were contamination concerns with the 12-10 Lands, which were revealed by subsurface investigations in 2006.

In 2009, Capital Corp purchased the 12-10 Lands. At the direction of Alberta Environment and Parks (AEP), Capital Corp did some subsurface investigation between 2012 and 2015. QLT was not aware of this testing or the results.

In 2018, AEP told Capital Corp to submit an environmental site assessment (“ESA”) on the 12-10 lands. Capital Corp did not comply.

QTL later discovered that its lands were contaminated, and that the contamination had migrated from the 12-10 Lands. QTL commenced an action, seeking damages. Subsequently, during cross-examinations, QTL became aware that:

- (1) the 12-10 Lands were the only real property in which Capital Corp had an interest (at para 21);
- (2) Capital Corp had three outstanding mortgages (Mortgages) registered against the 12-10 Lands, one in favour of Peoples Trust Company and the other two in favour of Trez Capital Limited Partnership; one of the Trez mortgages had an interest rate of 25% per annum (at paras 23-24);

- (3) there was an aggregate of approximately \$17,200,000 in outstanding mortgages and accrued interest secured against the 12-10 Lands (at para 25) and;
- (4) Capital Corp was likely insolvent on a balance sheet test, though it had not entered into formal insolvency proceedings (at para 48).

Upon these discoveries, QLT became concerned that the value of the 12-10 Lands would not be enough to satisfy both the outstanding mortgages and accrued interest on the land, as well as the cost of environmentally remediating the QTL Lands, and that a sale of the 12-10 Lands would dispose of Capital Corp's only valuable asset without addressing its environmental obligations (at para 8).

Prior Proceedings

The Master (as he was then) denied the QLT application for an attachment order against Capital Corp. This decision is the subject of this appeal.

The appeal also dealt with an application by QLT to amend the Statement of Claim to add the mortgagees on the 12-10 Lands as defendants, which was granted.

Decision

To grant an attachment order, the court must be satisfied that:

- (1) There is a reasonable likelihood that the claimant's claim against the defendant will be established, and
- (2) There are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,
 - a. Otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and
 - b. In a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

Application of Legal Test

After noting first that *Redwater* had established a super priority for environmental remediation obligations over secured lenders (at para 43), and second that he did not know the "boundaries of the protective umbrella that *Redwater* had opened in respect of environmental reclamation obligations" (at para 44), Justice Nixon went on to find that QLT did have a reasonable likelihood that its claim for environmental remediation would rank in priority to the Mortgages (at para 116). He relied on the following factors to reach his decision:

- (1) The "polluter-pays" principle, which is recognized in Canadian law, requires the entity responsible for the pollution to remedy the environmental damage (at para 75). In this case, Capital Corp, the polluter, conceded the contamination of the QLT Lands and the migration of the contamination from the 12-10 Lands (at para 69).

- (2) The likelihood of these liabilities being paid depends on whether the polluter has assets to satisfy its remediation obligations. In this case, Capital Corp was insolvent, though not formally (at para 83).
- (3) The 12-10 Lands were the only valuable asset within Capital Corp, and the aggregate amount due on the Mortgages exceeded the value of the Lands. As a result, if Capital Corp had sold the property and applied the proceeds of the sale to pay down the Mortgages, there would not be enough money to address the environmental liabilities (at para 84).
- (4) *Redwater* instructs that, in a formal insolvency proceeding, a super priority charge in favour of the regulator would be imposed on the real property of the 12-10 Lands. But the development of the common law does not limit that charge to apply only in insolvency proceedings. Rather, this charge “likely arises coincidental with the Contamination and will hang over the real property like an umbrella until the environmental remediation obligation is satisfied” (at para 85).

Justice Nixon then determined that QLT does not need to be a regulator for its claim for environmental remediation to rank in priority to the mortgagees. Given that environmental remediation is a “public duty owed to fellow citizens”, it would be “absurd if the beneficiary of that public duty (such as QLT, in its capacity as a directly affected party) had no recourse against a corporation that is technically insolvent (such as Capital Corp)” (at para 89).

For the second part of the legal test, Justice Nixon found that the decision to sell the 12-10 Lands and apply the sale proceeds to the Mortgages was an expense outside the ordinary course of business. And for the final part, he determined that selling the 12-10 Lands, the only substantial asset held by Capital Corp, would hinder QLT’s ability to enforce a judgment.

For these reasons, Justice Nixon exercised his discretion to award an attachment order against Capital Corp in the amount of \$2,006,500, QLT’s estimated cost to remediate the QLT Lands, in respect of any sale proceeds arising from the 12-10 Lands.

Comments

Qualex is the first decision to apply the reasoning in *Redwater* to non-insolvency proceedings between two private parties.

In *Redwater*, the Supreme Court applied the three-part test from *Newfoundland and Labrador v AbitibiBowater Inc*, [2012 SCC 67 \(CanLII\)](#) to determine that the abandonment orders issued by the Alberta Energy Regulator (AER) were not “claims provable in bankruptcy” (*Bankruptcy and Insolvency Act*, [RSC 1985, c B-3 \(BIA\)](#) at s 2). Rather, the AER was exercising a power to enforce a public duty.

The *Redwater* decision was significant. Finding that the environmental reclamation obligations were not sufficiently certain as to constitute claims provable in bankruptcy meant that the obligations would not be subject to the priority scheme in the *BIA*, effectively giving the AER a super priority over secured creditors.

Redwater highlighted the commitment to environmental protection at all levels, but it did so at the cost of creating significant uncertainty for creditors. By undermining the legislated priority scheme in the *BIA*, and putting the AER ahead of secured creditors, the decision imposed a substantial cost on secured creditors by changing their priority and increased their lending risk by constraining their ability to collect on their security. See my earlier post on *Redwater*, [Lessons from Redwater: Discard the AbitibiBowater Test and Legislate Super Priority for the Regulator](#).

By extending these principles from *Redwater*, *Qualex* potentially erodes the certainty of security interests even further – it takes it outside of insolvency proceedings and creates a super priority in favour of private party claims. However, the reality is that this decision is a preliminary one, with Justice Nixon himself questioning the limits of *Redwater*. Hopefully these decisions highlight the uncertainty in this area and compel Parliament to step in.

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