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How *Qualex* Restricted the Scope of *Redwater*

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Case commented on: *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115

In *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115 (CanLII) (*Qualex CA*), the Alberta Court of Appeal issued a strong decision overturning the lower court and establishing two important points: first, the test from *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 (CanLII) (the *Abitibi* test), which the Supreme Court of Canada applied in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (CanLII) (*Redwater*), does not apply outside of insolvency proceedings, and second, only a regulator can enforce public duties.

Facts

Qualex-Landmark Towers Inc (Qualex) brought a civil claim against 12-10 Capital Corp (12-10 Capital), alleging that chemical contaminants had migrated to its land from adjoining land owned by 12-10 Capital (the 12-10 Lands), and that 12-10 Capital was liable in nuisance and negligence for the damages caused.

Alberta Environment (later known as Alberta Environment and Parks and now as Alberta Environment and Protected Areas (AEPA)) had been monitoring the 12-10 Lands for a time and had twice requested information, including an environmental site assessment, from 12-10 Capital. 12-10 Capital did not comply with these requests, and later entered into an agreement to sell a portion of its land to an arm's length purchaser in January 2022.

Qualex had registered a certificate of *lis pendens* (CLP) on title to the 12-10 Lands, which 12-10 Capital sought to discharge to allow the sale to proceed. Qualex responded with a cross-application for an attachment order under s 17 of the *Civil Enforcement Act*, RSA 2000, c C-15, seeking to "prohibit any dealings with any sale proceeds, to a maximum amount of $2,006,500 (the lowest estimated amount to remediate its land), maintaining that these lands were the only assets of 12-10 Capital and that there would be no surplus available if the lands were sold and the proceeds were paid to the mortgagees. Qualex also argued that 12-10 Capital was insolvent, though no insolvency proceeds had been commenced under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA).

The sale did not proceed. The applications judge ordered the CLP discharged because Qualex was not claiming an interest in the land. He also dismissed the application for an attachment order.

On appeal before the chambers judge, Qualex applied for permission to amend its statement of claim to add the mortgagees of the 12-10 Lands, which was granted. The court also granted an

attachment order after finding the test for such had been met. Under s 17(2) of the *Civil Enforcement Act*, the court may grant an attachment order if it is satisfied that (1) there is a reasonable likelihood that the claimant's claim will be established and (2) there are reasonable grounds for believing the defendant is dealing with or is likely to deal with its property other than for the purpose of meeting its reasonable and ordinary business or living expenses and in a way that is likely to serious hinder the claimant from enforcing judgment against the defendant.

The chambers judge concluded that there was a "reasonable likelihood" that Qualex would obtain judgment against 12-10 Capital and that the money from the proceeds of a sale of the 12-10 Lands would be used to pay a judgment for damages in priority to all claims. See *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109 (CanLII) (*Qualex KB*).

Alberta Court of Appeal Decision

The Alberta Court of Appeal focused on the "reasonable likelihood" aspect of the test, maintaining that the standard does not require a showing on the balance of probabilities that the remedy sought can be obtained, but that there must be "something more than 'suspicion or subjective hope'" (at para 19).

The Court found no statutory court authority to support the priority declaration sought by Qualex (at para 18). Rather, Qualex was an unsecured tort claimant with no statutory right to secure the payment of the damages it was claiming or the costs to remediate, in priority to the secured creditors. It also found Qualex, as a private litigant, could not enforce 12-10 Capital's public duties and in that way obtain priority over secured creditors.

The Court determined that Qualex would be entitled to a writ of enforcement under the *Civil Enforcement Act* if it obtained judgment against 12-10 Capital and that upon registration, the writ would secure a right to payment from any potential sale proceeds. However, the mortgage lenders have statutory priority to the proceeds under the *Land Titles Act*, RSA 2000, c L-4.

My Commentary

The Alberta Court of Appeal's decision was a relief for many, and particularly lenders. There has been much upheaval in this industry ever since *Redwater* and the *Qualex CA* decision was a welcome stabilizer.

In *Redwater*, after applying the *Abitibi* test, the Supreme Court found that the Alberta Energy Regulator's (the AER or Regulator) statutory enforcement powers over an insolvent licensee's assets did not conflict with the federal BIA, and therefore did not engage the federal constitutional doctrine of paramountcy. Effectively this gave the AER a super priority over the assets of the bankrupt. Combine that with the substantial cost of environmental remediation and a real possibility emerges in these scenarios that there will be nothing left for creditors after the Regulator collects. This occurred in *Redwater*.

Redwater strongly signaled a commitment to environmental protection, an understandable concern, though arguably not one that should be handled by the courts. See my earlier post on this

issue here. But *Redwater* also created panic in many industries and real uncertainty for secured lenders. The possibility of having their priorities altered during bankruptcy proceedings substantially increased their lending risk by restricting their ability to collect on their security. See J. Girgis, R. Gurofsky, O. Konowalchuk, & W. McLeod, "*Redwater's* Continuing Impact on Canada's Energy Sector" (Address delivered at the 65th Annual Canadian Energy Law Foundation Conference, Jasper, Alberta, June 2024) [submitted, Alberta Law Review].

Then, as lenders were still scrambling to manage the risk created by *Redwater*, the *Qualex KB* decision was released, which increased their risk even more. *Qualex KB* interpreted *Redwater* broadly, extending its principles to a private dispute outside insolvency proceedings. See my earlier post here and J. Girgis & R. Gurofsky, "The Boundaries of *Redwater*: How *Qualex* expands the 'Protective Umbrella' of *Redwater* for Environmental Reclamation Obligations" (2023) 21 *Ann Rev Insol L* , 2023 CanLIIDocs 3072.

When the *Qualex CA* decision was released, overturning the trial decision and confirming that *Redwater* should not have been extended in this way, there was a notable sigh of relief. *Qualex CA* drew a clear line around *Redwater*; it quashed any notion that private litigants can obtain priority over secured creditors by enforcing public duties and unambiguously confined the reasoning in *Redwater* to insolvency proceedings:

> Here, there is no statutory authority that supports Qualex from obtaining any elevated priority. 12-10 Capital is not the subject of formal insolvency proceedings and consequently, there is no *Redwater* paramountcy issue to resolve. Even if it was… as a private litigant, [Qualex] is not statutorily authorized to enforce 12-10 Capital's public duties and thereby obtain priority over secured creditors." (at para 24) (emphasis in original)

There are several questions that remain unanswered after *Redwater* (see my post here for an example of one). But who can enforce public duties and whether the *Abitibi* analysis can apply outside of bankruptcy proceedings are no longer two of them.

This post may be cited as: Jassmine Girgis, "How *Qualex* Restricted the Scope of *Redwater*" (6 Sept 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/09/Blog_JG_Qualex.pdf