

LENDERS EXHALE: QUALEX OVERTURNED ON APPEAL, CONFIRMING THE APPLICATION OF REDWATER

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Just over a year ago, the Alberta Court of King's Bench ("**ACKB**") decision in [Qualex-Landmark Towers v 12-10 Capital Corp](#) ("**Qualex**")^[1] extended the application of an environmental regulator's priority entitlements in bankruptcy and insolvency to civil disputes between private parties outside of formal insolvency proceedings. Specifically, the Court in *Qualex* broadened the application of the "super priority" principle that applies to environmental remediation obligations identified by the Supreme Court of Canada in [Orphan Well Association v Grant Thornton Ltd](#) ("**Redwater**").^[2]

On April 8, 2024, the Alberta Court of Appeal (the "**Court of Appeal**") released its much-anticipated [appeal decision](#) (the "**Appeal**")^[3] overturning the lower court's decision in *Qualex*, thereby curtailing the reach of the super priority claim. While the super priority still reigns, the Court of Appeal has confirmed that it does not extend to private parties.

For a discussion on *Redwater* and the lower court decision in *Qualex*, please refer to our bulletin [here](#).

Lower Court Decision

12-10 Capital Corp ("**Capital Corp**") owned contaminated real property (the "**12-10 Lands**") which contamination had migrated onto and impacted the adjacent property owned by Qualex-Landmark Towers Inc. ("**QLT**").^[4] Alberta Environment and Parks ("**AEP**") directed Capital Corp to complete an environmental remediation plan to address this contamination.^[5] Upon discovery of Capital Corp's insolvency (despite not yet being subject to insolvency proceedings) and its intention to sell the 12-10 Lands, QLT brought a claim against Capital Corp seeking an order requiring Capital Corp to complete the remediation as directed by AEP and a finding that Capital Corp's environmental obligations took priority over its outstanding mortgages. Given that there would be insufficient net proceeds from the sale of the 12-10 Lands to complete the environmental obligations after the mortgages were re-paid, QLT also sought an attachment order to hold any sale proceeds of the 12-10 Lands in trust for the purpose of the environmental remediation work pending the outcome of its claim.^[6]

The ACKB granted the attachment order based on what it saw as the reasonable likelihood that the Supreme Court of Canada's direction in *Redwater* would apply to Capital Corp.^[7]

Appeal Decision

Capital Corp appealed the lower court decision on the basis that the *Redwater* principle cannot apply outside of formal insolvency proceedings absent a common law “super priority”.^[8]

In Canada, provincial legislation applying to mortgage loans functions as the bedrock for lender and borrower certainty. As the super priority asserted by QLT was not grounded in any statutory or prior court authority, the mere suspicion employed by the ACKB that *Redwater’s* umbrella had opened wide enough to cover private disputes could serve no more than acknowledging the subjective hope of QLT’s claim. On this basis, the Court of Appeal set aside the attachment order.^[9]

The Court of Appeal also found that the lower court stepped upon carefully crafted statutory priorities, under which neither provincial nor federal legislation created a right for a private litigant to assert priority entitlement of environmental remediation obligations over a prior registered interest against land.^[10] Whereas the super priority in *Redwater* was statutorily derived, the priority claimed in *Qualex* lacked this element as Capital Corp was not subject to formal insolvency proceedings.^[11]

Lenders Breathe a Sigh of Relief

The Appeal marks a return to normalcy for secured lenders and borrowers in a post-*Redwater* world. Having said that, prospective lenders will need to continue exercising thorough due diligence when taking security in real property. Environmental issues may remain hidden for years and often their complete scope is not fully known at the time of a transaction. Information obtained through proper diligence will assist a lender in making informed and smart lending decisions.

In addition, incorporating appropriate environmental representations and warranties in agreements when taking security in real property can provide additional avenues of relief in the event the contracting party misrepresents or fails to disclose environmental obligations or issues. Types of environmental representations and warranties commonly relate to the environmental condition of and any environmental spills or releases at the property, and the current and historical operations on site, including any required permits or approvals, the use, storage and disposal of hazardous materials and waste and overall compliance with environmental regulations.

Our team at McMillan is equipped to offer insight into and navigate the complexities of bankruptcy and insolvency as well as environmental matters. If you or your business have questions on these matters, please contact Adam Maerov, Talia Gordner, or Ryan Johnson, and our team would be pleased to discuss this topic with you.

[1] *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109.

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

[3] *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2024 ABCA 115 [Appeal].

[4] *Ibid* at para 2.

[5] *Ibid* at para 3.

[6] *Ibid* at paras 5 - 6.

[7] *Ibid* at para 15.

[8] *Ibid* at para 16.

[9] *Ibid* at paras 17 - 19.

[10] *Ibid* at para 22.

[11] *Ibid* at paras 23 - 24.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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