

Super-Priority for Environmental Obligations in Insolvency Law

May 21, 2020

In the recent decision of *British Columbia Attorney General v Quinsam Coal Corporation*, 2020 BCSC 640 (Quinsam), the British Columbia Supreme Court (the Court) considered the priority between a debtor's environmental liabilities and a secured creditor. In its analysis, the Court extensively discussed the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (Redwater). In reference to Redwater, the Court posed the following question:

Did the Supreme Court of Canada intend to extend the “polluter pays” principles to effectively create a super priority for the costs and environmental liabilities associated with the closure or abandonment of oil wells, mines and other resource extraction projects?

Unfortunately, since the assets in dispute did not actually constitute the debtor's property, it wasn't necessary for the Court to answer that specific question. However, the fact such a question was posed serves as a reminder that Redwater may have done just that.

What you need to know

- The treatment of environmental obligations in insolvency proceedings remains a live issue.
- Although the secured creditor prevailed in this case, the findings and comments of the Court in Quinsam appear to confirm that the Redwater decision gave a super-priority to environmental obligations.
- The specific facts of each case will be key to determining whether, and the extent to which, environmental obligations have priority over secured creditors.
- Those lending to industries with significant environmental liabilities will need to be proactive in developing their security package and monitoring performance to manage risk.

The Quinsam decision - facts

The debtor, Quinsam, owned and operated the Quinsam Coal Mine (the Mine) and was the lessee of Middle Point Barge Terminal (Middle Point), where mined coal was stored and from where it was shipped. The Mine ceased operations on June 12, 2019. Quinsam made an assignment into bankruptcy pursuant to the Bankruptcy and Insolvency Act, RSC 1985 c B-3 (the BIA) on July 3, 2019. The trustee in bankruptcy of Quinsam (the Trustee) abandoned the Mine without fulfilling the closure, reclamation and remediation obligations imposed under the Mines Act, RSBC 1996, c 293 (the Mines Act). The trustee later abandoned Middle Point as well. As a result of the **Trustee's abandonment of the Mine and Middle Point, the Province of British Columbia** (the Province) successfully sought the appointment of its own receiver over Quinsam on September 20, 2019.

In response, the Province began to undertake the necessary work related to Quinsam's environmental obligations. The measures to properly reclaim the Mine are expected to cost several millions of dollars more than the security held by the Province.

Several months before its assignment, Quinsam executed a promissory note in favour of ENCECo Inc. (ENCECo) and granted ENCECo a security interest in its coal inventories and the proceeds of sale from such inventories. Those coal inventories were later sold on June 28, 2019 for approximately USD\$1 million. The sale agreement provided that title to the purchased coal transferred on the date of the sale, however, the actual delivery of the coal and payment was to occur at a later date. The sale agreement was accompanied by an irrevocable direction to pay, directing the purchaser to pay a portion of the proceeds to ENCECo. In exchange for the direction to pay, ENCECo released its security interest in the purchased coal, but not in the proceeds.

The Parties' arguments

At issue in Quinsam was the entitlement to the proceeds from the sale of the coal inventory. The Province argued that the proceeds must be used to fund the unfulfilled environmental obligations imposed on Quinsam under the Mines Act. ENCECo argued that it was entitled to the proceeds as a secured creditor of Quinsam.

In support of its argument, the Province relied exclusively on the Redwater decision. The Province argued that Redwater stands for the proposition that unless the regulatory obligations at issue are claims under the BIA, the limited resources of a bankrupt **company should be used to fulfill the company's environmental obligations before** payment is made to secured creditors. ENCECo in response argued that Redwater must not be interpreted in such an overreaching manner, and in any event, was distinguishable due to the different legislative regimes in question.

The Court's decision

After an extensive consideration of Redwater, the Court agreed with ENCECo that the applicable legislation was distinguishable. Most notably, the Court concluded that unlike the legislation under consideration in Redwater, **the Mines Act does not expressly make** the bankrupt estate or trustee liable for end-of-life environmental obligations. However, **the Court also noted that "there are aspects of Redwater that cannot be ignored"**.

Specifically, the Court relied upon Redwater in concluding that the Trustee's abandonment of the Mine was effective to limit only its own personal liability for the environmental orders issued by the Province, but the abandonment did not affect the ongoing liability and obligations imposed on Quinsam in relation to the closure, reclamation and remediation of the Mine. Further, "the abandonment did not permit [the Trustee] to simply walk away from the Mine."¹

The Court also found that, as in Redwater, the Province was acting in the public interest and for the public good in issuing the orders respecting Quinsam's environmental obligations. The Province therefore did not meet the first part of the Abitibi test (being that there must be a debt, liability or obligation owing to a creditor) to have a claim provable in Quinsam's bankruptcy.

This conclusion was reached despite the Province holding a \$7.3 million security deposit in relation to Quinsam's environmental obligations, and the trustee estimating the cost of the environmental liabilities at \$11.9 million, which would make the Province's claim at least arguably quantifiable as a liability owing.

The Court finished its analysis of Redwater by asking whether "the Supreme Court of Canada intend[ed] to extend the "polluter pays" principles to effectively create a super priority for the costs and environmental liabilities associated with the closure or abandonment of oil wells, mines and other resource extraction projects?" While the Court declined to answer this question directly, it did state that "[t]aken at its highest, Redwater requires a trustee in bankruptcy or other insolvency professional to use the assets of the estate to satisfy the regulatory obligations imposed on the bankrupt."²

As a result of the sale agreement for the coal inventories and direction to pay in favour of ENCECo, the Court ultimately found that the portion of the proceeds subject to the direction to pay never formed part of Quinsam's bankrupt estate. They were therefore not available to satisfy the claims of the Province in relation to Quinsam's closure, reclamation and remediation obligations.

Conclusion

Although the secured creditor prevailed in this instance, the findings from the Court regarding the applicability of Redwater are concerning as they seem to suggest what many case commentaries on Redwater have; that through its decision in Redwater, the Supreme Court of Canada in effect gave a super-priority to environmental obligations owed by a debtor over all other creditors. Quinsam is yet another chapter in the turbulent intersection between insolvency law and the environment.

For further commentary on the perils and pitfalls of such a super-priority, please see our [prior publication on the Redwater decision](#).

¹ British Columbia (Attorney General v Quinsam Coal Corporation, 2020 BCSC 640 at para 107 [Quinsam].

² Quinsam, at paras 5 and 109.

By

[Lisa Hiebert, Jessica Cameron](#)

Expertise

[Insolvency & Restructuring](#), [Banking & Financial Services](#), [Environmental](#), [Energy - Oil & Gas](#), [Energy – Power](#), [Mining](#)

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2025 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.