Beyond oil and gas: The latest application of the Redwater super-priority

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In the recent decision of *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 (*Mantle*), the Alberta Court of King's Bench has held that reclamation obligations arising from a gravel production business have super-priority over secured creditors. This decision is the latest application of the principles in the Supreme Court of Canada's decision of *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (*Redwater*). In *Mantle*, the Court has taken an expansive view of the *Redwater* super-priority, by applying it outside of the oil and gas context and by narrowing the exceptions to the super-priority.

Background

Mantle arose in the Notice of Intention to Make a Proposal (NOI) proceedings commenced by the debtor Mantle Materials Group, Ltd. (Mantle). Mantel carries on business operating gravel pits in Alberta, which are regulated by Alberta Environment and Protected Areas (AEPA).

Mantle acquired its gravel properties through a reverse vesting order in the CCAA proceedings of JMB Crushing Systems Inc. (JMB). Before the Reverse Vesting Orders (RVO) transaction, the AEPA had issued abandonment and reclamation orders to JMB, relating to JMB's then gravel properties. The orders were made pursuant to Alberta's *Environmental Protection and Enhancement Act*. The RVO provided that Mantle would remain liable for JMB's existing abandonment and reclamation obligations. After the RVO, Mantle entered a loan transaction with Travelers Capital Corp (Travelers), whereby Mantle was loaned $1.7 million to acquire equipment for future gravel operations. The Travelers' loan was secured by a first-ranking purchase-money security interest.

In years that followed, Mantle experienced operational problems, financial distress, and became insolvent and sought to restructure through the NOI proceedings under the *Bankruptcy and Insolvency Act*. The "main plank" of Mantle's anticipated proposal to creditors was to, through the relief in the NOI proceedings, perform its outstanding abandonment and reclamation obligations.

At issue before the Alberta Court of King's Bench was the request by Mantle to have certain charges approved by the Court for the NOI proceedings (collectively, the Restructuring Charges), which would have priority over all other debts, including Travelers' first ranking security. The Restructuring Charges included an interim financing charge, and the interim financing would be "primarily" used to perform abandonment obligations.

The essential position advanced by Mantle was that *Redwater* directs that no creditors may receive repayment until Mantle's end-of-life obligations are addressed, in turn meaning the Restructuring Charges ought to have super-priority over the Travelers' security. In response, Travelers argued that *Redwater* can not "conscript" assets unrelated to Mantle's environmental obligations, and that Travelers' security was not related to Mantle's environmental obligations, presumably because the abandonment obligations arose well before the equipment purchased with the Travelers' loan proceeds. In making these arguments, Travelers relied on comments in *Redwater* to the effect that end-of-life obligations were not being satisfied with "assets unrelated" to the environmental condition, suggesting that "unrelated" assets might not be subject to the super-priority in a future case.

The decision

In detailed and thoughtful reasons, the Alberta Court of King's Bench in *Mantle* determined that since (i) the equipment over which Travelers had security was part of Mantle's gravel business, (ii) the environmental obligations to be addressed through the Restructuring Charges related to Mantle's gravel business, therefore (iii), the principles in *Redwater* and subsequent case-law meant that the Restructuring Charges should prime Travelers' security.

More particularly, the Court in *Mantle* analyzed the Supreme Court's decision in *Redwater*, as well as the more recent Alberta decisions that have considered environmental obligations in insolvencies, namely *Manitok Energy Inc (Re)*, 2022 ABCA 117 (*Manitok*) and *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 (*Trident*).

These decisions all arose in the context of insolvent oil and gas producers, which operated in Alberta's "cradle-to-grave licensing regime" for oil and gas properties. In *Mantle*,the parties all agreed there was no difference between the legal effect of an abandonment order issued by the AEPA for gravel pits, and orders issued by the Alberta Energy Regulator for oil and gas properties, as was the case in *Redwater, Manitok* and *Trident*. Thus, the Court in *Mantle* had no hesitation analyzing the application of *Redwater* to a non-oil and gas debtor.

Rather, the Court focused firstly on whether *Redwater* and *Manitok* required that all assets of an insolvent corporation are subject to a super-priority in favour environmental end-of-life obligations ahead of all creditors. The Court held that this issue was not decided in *Redwater* or *Manitok*.

Consequently, the Court then considered whether the more recent *Trident* decision governed. In *Trident*, the Alberta Court of King's Bench had previously held that sale proceeds, including from real estate and equipment, must be applied to satisfy outstanding environmental obligations even though those proceeds did not arise from licensed oil and gas assets. The Court in *Trident* reasoned that the debtor "had only one business: exploration and production of oil and gas", hence proceeds from real estate and equipment were sufficiently connected to the environmental obligations to justify the super-priority.

Upon considering *Trident*, including the principles of horizonal *stare decisis*, the Court in *Mantle* concluded that the same result must follow. Like in *Trident*, the Court held that the equipment secured to Travelers was part of Mantle's gravel business and therefore properly subject to a super-priority in favour of Mantle's vast abandonment and reclamation obligations arising from its gravel business. In effect, the Court held that Mantle's abandonment and reclamation obligations had super-priority over Mantle's secured creditors.

Key takeaways

Mantle is undoubtedly the next important decision in the ongoing evolution of the priority for environmental end-of-life obligations in Canadian insolvencies.

For one, *Mantle* applies the *Redwater* analysis beyond Alberta's oil and gas sector. While this extension has been suggested in earlier case-law, and while the Court did not analyze the issue directly as it was not a contested issue, *Mantle* can be seen as confirmation that *Redwater* is not limited to oil and gas insolvencies—it applies broadly where environmental obligations owed to the public go unsatisfied, thereby saddling the public at large.

Additionally, *Mantle* is significant insofar as it confirms the overall analysis in *Trident—i.e.* it will be difficult (or near impossible) for a Court to hive off assets "unrelated" to the environmental super-priority where the insolvent debtor had a single business that lead to the environmental damage. It may be that *Redwater*'s only practical limitation is in the context of debtors with truly distinct and different business lines, such as, for example, a fully integrated oil and gas producer with upstream and downstream divisions.
Further *Redwater* boundary drawing will be left for future cases.

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