

## ***New Case Law - Clarifying or Muddying the Waters Post Redwater?***

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Canadian courts continue to grapple with issues at the untidy intersection of insolvency law and environmental regulation. Two recent cases, *British Columbia (Attorney General) v. Quinsam Coal Corporation*<sup>1</sup>, and *Yukon (Government of) v. Yukon Zinc Corporation*<sup>2</sup> offer insight into how some Canadian courts are applying the Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*<sup>3</sup> ("Redwater").

Read our firm's updates on the *Redwater* saga [here](#) and [here](#).

### ***British Columbia (Attorney General) v. Quinsam Coal Corporation***

#### **Facts**

The Quinsam Coal Corporation ("Quinsam") owned and operated the Quinsam coal mine (the "Quinsam Mine") located on Vancouver Island. The Quinsam Mine ceased operations on June 12, 2019.

On July 3, 2019, Quinsam made an assignment into bankruptcy under the *Bankruptcy and Insolvency Act* ("BIA").<sup>4</sup> On July 5, 2019, Quinsam's trustee in bankruptcy abandoned the Quinsam Mine without fulfilling the closure, reclamation, and remediation obligations imposed under BC's *Mines Act* ("Quinsam's Environmental Obligations"). In response, the BC Government stepped in to undertake the necessary work to mitigate damage to the environment and people.<sup>5</sup> The BC Government holds over \$7M in financial security for reclamation activities at the Quinsam Mine. However, the measures to fulfill Quinsam's Environmental Obligations are expected to cost several million dollars more than the security the BC Government holds.<sup>6</sup>

<sup>1</sup> *British Columbia (Attorney General) v. Quinsam Coal Corporation*, 2020 BCSC 640 [*Quinsam*].

<sup>2</sup> *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15 [*Yukon Zinc*].

<sup>3</sup> *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [*Redwater*].

<sup>4</sup> *Quinsam*, *supra* note 1 at para 1.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

## Issue and Positions of the Parties

The BC Supreme Court was asked to determine who was entitled to the proceeds from the sale of Quinsam’s coal inventories (“the Proceeds”). ENCECo argued that it was entitled to the Proceeds as a secured creditor of Quinsam. The BC Government argued that the Proceeds must be used to satisfy Quinsam’s Environmental Obligations.

## Judgment

The BC Supreme Court considered the application of *Redwater* at length. The BC Supreme Court held that “at most, *Redwater* requires that a trustee in bankruptcy or other insolvency professional use only the assets of the estate to satisfy unfilled regulatory obligations.”<sup>7</sup> The BC Court held, however, that as the portion of the Proceeds directed to be paid to ENCECo did not form part of Quinsam’s bankrupt estate, this portion of the Proceeds was not required to be used to satisfy Quinsam’s Environmental Obligations.

The BC Court held that, similar to the Alberta Energy Regulator in *Redwater*, the BC Government was not a creditor under step one of the Abitibi test (there must be a debt, liability or obligation to a creditor). The BC Government was acting in the public interest and for the public good in issuing orders and in generally seeking to enforce Quinsam’s Environmental Obligations. Quinsam’s Environmental Obligations are not claims provable in bankruptcy.<sup>8</sup>

Further, the BC Supreme Court noted that Quinsam’s trustee’s abandonment of the Quinsam Mine pursuant to s. 14.06(4) of the BIA did not permit Quinsam’s trustee to simply walk away from the Quinsam Mine.<sup>9</sup> Following *Redwater*, Quinsam’s trustee’s personal liability with respect to Quinsam’s Environmental Obligations was limited. However, the abandonment did not affect Quinsam’s ongoing liability for Quinsam’s Environmental Obligations.<sup>10</sup>

## *Yukon (Government of) v. Yukon Zinc Corporation*

### Facts

The Yukon Zinc Corporation (“YZC”) owns the Wolverine Mine in the Yukon. Since 2015, the Yukon Government has held roughly \$10.5M in security, paid by YZC, to fund clean-up at the Wolverine Mine.<sup>11</sup> The condition of the Wolverine Mine has deteriorated significantly in recent years and the estimated cost to clean-up the Wolverine Mine has

<sup>7</sup> *Ibid* at paras 5, 109.

<sup>8</sup> *Ibid* at para 108.

<sup>9</sup> *Ibid* at para 107.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at para 26.

skyrocketed. Because of the increase in estimated clean-up costs, in 2018 the Yukon Government required YZC to furnish an additional \$25M in security.<sup>12</sup> The total security required for the Wolverine Mine is now \$35.5M. YZC refused to pay the additional \$25M in security.

YZC is now bankrupt. The Yukon Government has been using the \$10.5M security to pay for water treatment and care and maintenance at the Wolverine Mine, as well as funding the activities of YZC's receiver.<sup>13</sup> As of January 2020, there was roughly \$5M remaining in security for Wolverine Mine.<sup>14</sup>

The Yukon Government brought an application for an order declaring that:

- 1 the Yukon Government has a provable claim in the bankruptcy of YZC in the amount of \$35,548,650 for the costs of remedying the environmental damage affecting the real property of YZC
- 2 the Yukon Government's claim is secured by security on the real property of YZC affected by the damage and property contiguous with it, related to the environmental damage
- 3 the security is enforceable in the same way as any other security on real property, and
- 4 the Yukon Government's provable claim ranks in priority above any other claim, right, charge or security against the property.<sup>15</sup>

## Judgment

The Supreme Court of Yukon held that the Yukon Government does not currently have a claim provable in bankruptcy for the additional \$25M in security. The Court categorized the additional \$25M in security required by the Yukon Government as "an obligation to post security as a condition of a license."<sup>16</sup> An obligation to post security is not an obligation, debt or liability provable in bankruptcy because, a) it is a secondary obligation and, b) it is not recoverable by legal process.<sup>17</sup> In the alternative, the Court found that the obligation to post security was too remote or speculative to be considered a contingent claim.<sup>18</sup>

<sup>12</sup> *Yukon Zinc*, *supra* note 2 at para 28.

<sup>13</sup> *Ibid* at para 30.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at para 2.

<sup>16</sup> *Ibid* at para 92.

<sup>17</sup> *Ibid* at para 93.

<sup>18</sup> *Ibid* at paras 106, 125-127.

The Supreme Court of Yukon held that the Yukon Government will have a claim provable in bankruptcy for any clean-up costs the Yukon Government incurs above and beyond the \$10.5M currently held as security. The Yukon Government's claim for costs incurred would be secured by YZC's real property affected by environmental damage and any contiguous property that is related to the environmental damage.<sup>19</sup> That security is a first priority on the affected and contiguous real property, including any mineral claims that are affected, pursuant to the limited super priority in s. 14.06(7) of the BIA.<sup>20</sup>

### Case Comment

In *Quinsam*, the BC Supreme Court asked the provocative question:

Did the Supreme Court of Canada [through *Redwater*] intend to extend the "polluter pays" principle 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?<sup>21</sup>

*Quinsam* was decided without answering this question because the proceeds did not belong to Quinsam.

*Yukon Zinc* suggests that *Redwater* did not effectively create a super priority for all environmental obligations.

In *Redwater*, the Supreme Court of Canada held that the Alberta Energy Regulator did not have a claim provable in bankruptcy for the costs associated with Redwater's environmental obligations. In seeking to enforce Redwater's environmental obligations, the Alberta Energy Regulator was acting in the public interest and for the public good, not as a creditor.<sup>22</sup> Redwater's environmental obligations were outside of the bankruptcy legal regime, incurred as conditions of its environmental licensing approval.<sup>23</sup> This essentially created a super priority for Redwater's environmental obligations, as assets from Redwater's estate were required to be used to satisfy Redwater's environmental obligations before being distributed to secured creditors.<sup>24</sup>

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<sup>19</sup> *Ibid* at para 86.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Quinsam*, *supra* note 1 at para 109.

<sup>22</sup> *Redwater*, *supra* note 3 at para 122.

<sup>23</sup> *Ibid* at para 118.

<sup>24</sup> *Ibid* at paras 160, 162-163.

If *Redwater* effectively created a super priority for environmental obligations, then why did the Yukon Government argue that the obligation to furnish security for Wolverine Mine was a claim provable in bankruptcy? Could not the Yukon Government have argued that the obligation to furnish security for Wolverine Mine was not a claim provable in bankruptcy, but rather a pre-existing licensing obligation? Should not YZC's environmental obligations then have received the *Redwater* super priority?

The answer to these questions may lie in the structure of Yukon's statutory scheme for mining. In *Yukon Zinc*, the Supreme Court of Yukon highlighted that the remedy under Yukon's statutory scheme for failing to furnish security is prosecution and a fine on conviction.<sup>25</sup> The Yukon legislature did not provide that a court could order payment of mine security similar to the enforcement of a judgment.<sup>26</sup> Without the ability to enforce payment of YZC's additional security, the Yukon Government may have viewed asserting a claim in bankruptcy and taking advantage of the limited super priority in the BIA, s.14.06(7), as the best opportunity to achieve reimbursement of its costs to clean up.

Whether *Redwater* created an absolute super priority for environmental obligations is still up for debate. What is clear is that analysing claims at the intersection of insolvency law and environmental regulation remains a complex and fact dependent exercise.

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<sup>25</sup> *Yukon Zinc*, *supra* note 2 at para 107.

<sup>26</sup> *Ibid.*