WITTEN LLP

Lender Perspectives on Contaminated Sites

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Overview

1. Environmental Reports
2. Lender Questions
3. Lender Concerns
    a) Liability issues
    b) Priority issues
    c) Financial issues
4. Practical Considerations
5. Questions

Environmental Reports

Environmental Reports

Reasons parties obtain environmental reports:

- quantify soil, groundwater, air quality
- evaluate risk to humans and the environment
- basis for agreements (e.g. baseline for a lease)
- release investigation and reporting
- stakeholder risk mitigation (e.g. lender request)

Environmental Reports

Types of assessments:

- Phase I ESA
- Phase II ESA
- Phase III ESA
- Risk Management Plan
- Other assessments: spill response, reclamation, hazardous building materials, geotech/civil engineering

Environmental Reports

How are reports used by lenders?

- To assess environmental condition of the subject property or neighbouring properties
- To inform property valuation and risk

Lender Questions

What do lenders want to know?

1. Consultant
2. Contamination
3. Remediation and Risk Management
4. Mitigation
5. Litigation / Regulatory Action

Lender Concerns

Lender Concerns

What are lenders concerned about?

A. Liability Issues

B. Priority Issues

C. Financial Issues

A. Liability Issues

A. Liability Issues

Two types:

- Civil liability
- Regulatory liability

A. Liability Issues

Some environmental statutes in Canada have express protections for lenders

- i.e. specific exemptions from regulatory liability.

Examples:

1. Ontario: Statutory protection when lenders are ensuring supply of utilities, securing and insuring the property, paying taxes, foreclosure, etc.
2. British Columbia: Statutory protection when lender "acts primarily to protect its security interest" provided it does not exercise control or impose requirements on others that result in contamination.

A. Liability Issues

Alberta

- No express exemptions for lenders in EPEA
- Liability for a "person responsible", including:

  (ii) every person who has or has had **charge, management or control** of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,

- Can lenders have "charge, management or control"?
- Possibly…
  - Rocha v Ontario (Director, Ministry of Environment and Climate Change)
  - Karge, Re

B. Priority Issues

B. Priority Issues

- How should regulatory orders requiring a polluting debtor to clean up contaminated land be treated in an insolvency proceeding vis-à-vis secured creditors?
- ***Orphan Well Association v Grant Thornton Ltd***., 2019 SCC 5 (Redwater)
- ***Qualex-Landmark Towers Inc. v 12-10 Capital Corp***., 2024 ABCA 115

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Redwater

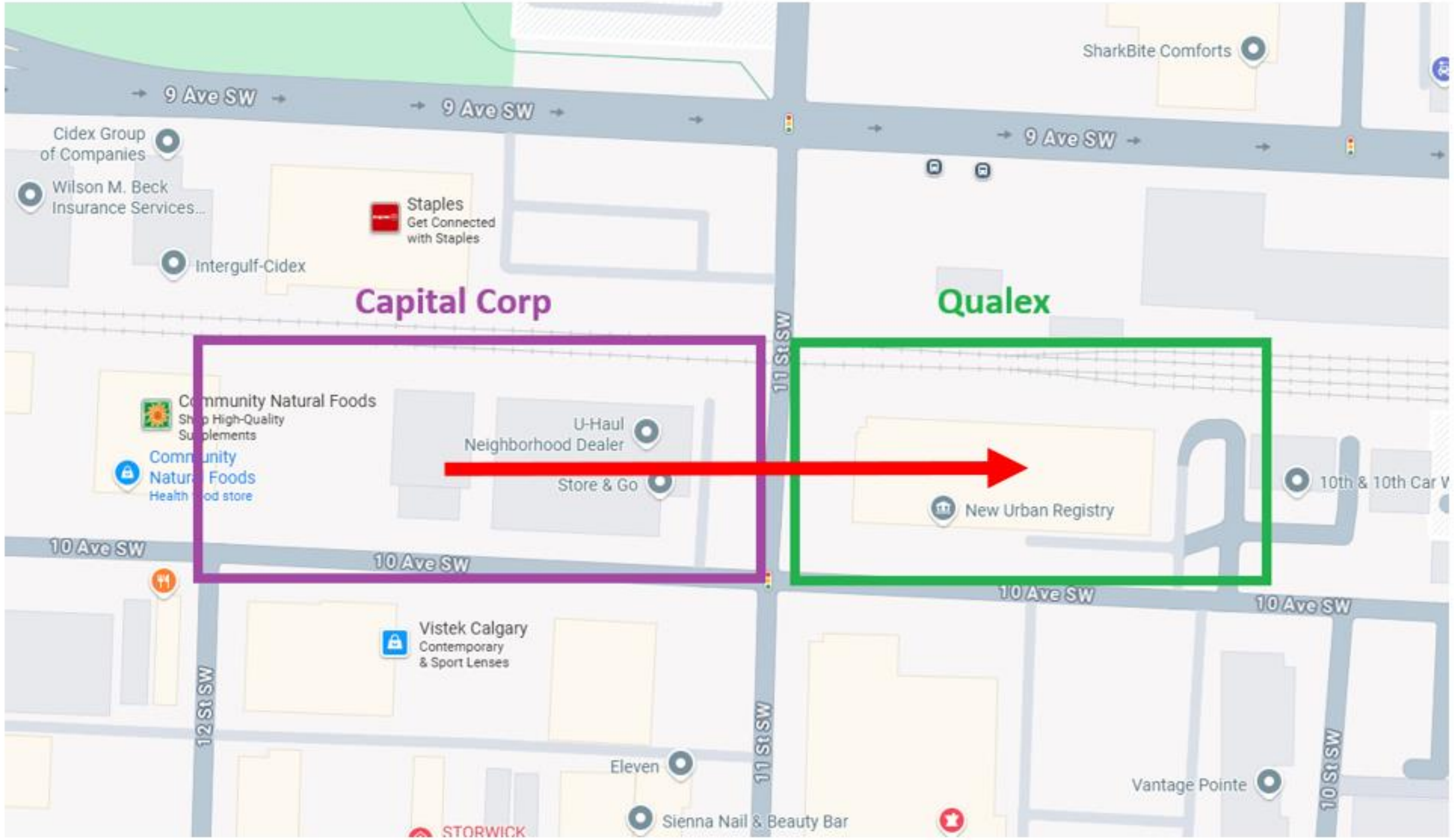
- Redwater Energy → insolvent
- Trustee in bankruptcy attempted to disclaim non-producing assets
- AER took the position that abandonment and remedial obligations must be addressed before any distribution to creditors
- Issue: Whether remedial orders are provable claims

Redwater

Supreme Court of Canada

- Regulatory obligations attached to assets cannot be ignored
- Liability of bankrupt estate for environmental liabilities continued
- AER orders are <u>not</u> provable claims in bankruptcy
- By exerting its power to enforce a public duty, the AER was not a creditor

Qualex



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Qualex

Alberta Court of King’s Bench

- Gave a private unsecured claimant for environmental remediation obligations (i.e. the impacted neighbour) a super-priority over secured creditors with registered mortgages

Alberta Court of Appeal

- Reversed the lower court’s decision
- Redwater does <u>not</u> extend to private disputes between neighbors (at least not outside the insolvency context)

C. Financial Issues

C. Financial Issues

1. Cash Flow
2. Land Value
3. Liquidity

Practical Considerations

Practical Considerations

- Operator and operations
- Lender requirements may include:
  - Conditions precedent
  - Holdbacks
  - Insurance
  - Indemnities and guarantees
  - Ongoing disclosure
  - Lease terms
  - Additional security
- Differences across lenders

Questions?

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