

**ENTERED**



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COURT FILE NO. 2001-05482  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS*  
*ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT  
OF JMB CRUSHING SYSTEMS INC. and 2161889 ALBERTA LTD.

JS  
Nov. 27 2020  
Justice Eidsvik

DOCUMENT **BENCH BRIEF OF ATB FINANCIAL IN RELATION TO TRUST CLAIM  
APPLICATIONS**

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## Introduction

1. The purpose of this brief is to set out the position of ATB Financial (“**ATB**”) in respect of the trust claims advanced by the lien claimants and subcontractor creditors (the “**Claimants**”) of JMB Crushing Systems Inc. (“**JMB**”).
2. The Claimants submit that a trust is constituted in their favour in the agreement between JMB and the Municipal District of Bonnyville No. 87 (the “**MD**”) dated November 1, 2013 (the “**Supply Contract**”).
3. Pursuant to an Order granted by Justice K.M. Eidsvik on May 20, 2020, a lien determination process was set out in relation to the MD project (the “**Lien Claims Order**”). The Lien Claims Order provided *inter alia* that, from the Funds, a Holdback Amount of \$1,850,000.00 was to be held by the Monitor in relation to the MD project (the “**Holdback**”).
4. Since the granting of the Lien Claims Order, a number of the Claimants have filed applications seeking payment of amounts, in addition to the Holdback, they allege should have been held in trust for the Claimants by JMB, such amounts being payable from the funds paid by the MD to JMB pursuant to the Supply Contract (the “**Shortfall**”).
5. ATB is a secured creditor in these proceedings, holding a first ranking security interest in the accounts receivable of JMB (the “**ATB Security Interest**”), which includes the Holdback held by the Monitor and the funds currently held by JMB in a separate account generated from JMB’s operations (the “**JMB Funds**”).
6. The Claimants submit that they are beneficiaries entitled to the Holdback and any JMB Funds necessary to make up the Shortfall, in priority to any other creditor or claimant.
7. ATB submits that: first, if there were a validly constituted trust the ATB Security Interest has priority over that trust, and second, there is no valid trust arrangement between the MD and JMB which would entitle the Claimants to any portion of the Holdback or the JMB Funds (collectively, the “**Funds**”).
8. ATB further submits that the JMB Funds are not traceable by the Claimants, but if a validly constituted trust has been created under the Supply Contract and the JMB Funds are traceable by the Claimants the Court must consider various tracing methodologies.
9. Finally, ATB submits that the claims of Shankowski and 945441 Alberta Ltd. (collectively, “**Shankowski**”) fail in relation to this application as a result of JMB acquiring title to the aggregate being removed from the Shankowski lands, or in other words, from the fact that Shankowski granted a *profit à prendre* to JMB in the aggregate.

## Issues

10. The issues to which ATB directs its attention are:

- A. whether a Security Trust in favour of the Claimants would have priority over the ATB Security Interest;
- B. whether a common law trust in favour of the Claimants would have priority over the ATB Security Interest;
- C. whether the JMB Funds are traceable by the Claimants;
- D. whether the Supply Contract creates a trust in favour of the Claimants; and
- E. how the nature of the Shankowski Aggregates Royalty Agreement impacts the lien and trust claims of Shankowski.

## Analysis

### A. Security Trust

11. The Alberta *Personal Property Security Act* (the “**PPSA**”), and resulting security/priority regime, applies to trusts that secure payment or performance of an obligation. These are typically described as a Security Trust.

Section 3.1(b) PPSA [Tab 1]

12. The Claimants themselves are alleging that section 26 of the Supply Contract creates a trust in their favour that secures their payment from JMB for the Products and Services (as defined in the Supply Contract) provided by the Claimants.

13. ATB agrees with the Claimants in that, if the court finds that the Supply Contract does create a trust in favour of that Claimants, that the trust as alleged is a Security Trust. In turn, the trust would therefore fall within the scope of the PPSA, and ATB submits that the trust would create a security interest against JMB in favour of the Claimants (the “**Claimant Security Interest**”).

14. The Claimants have not registered the Claimant Security Interest at the Alberta Personal Property Registry, as required by the PPSA to properly perfect the Claimant Security Interest.

Section 25 PPSA [Tab 2]

15. Further, the PPSA is clear that a security interest is enforceable (in other words, has proper ‘attachment’) against a third party only where the debtor has signed a security agreement charging specified property of the debtor in favour of the creditor.

## Sections 10(d) and 12(1) PPSA [Tab 3]

16. ATB submits that the Supply Contract does not comply with section 10(d) of the PPSA: the Supply Contract does not grant a security interest in the assets of JMB in favour of the Claimants.
17. Therefore, if this court finds that the Supply Contract creates a trust in favour of the Claimants, that trust would be a Security Trust under the PPSA, and the ATB Security Interest has priority over the Claimant Security Interest as a result of the Claimants failing to have proper perfection and attachment under the PPSA.

**B. Non-Security Trust**

18. In the event that this Court finds that the Supply Contract created a trust in favour of the Claimants, but that the trust is not a Security Trust as discussed above, then the priority over the Funds as between the trust and the ATB Security Interest is governed by the common law and equity.
19. Professors Roderick Wood and Ronald Cuming speak to this situation in their text, *Personal Property Security Law*. With reference to the priority rules set out in the PPSA, they consider priority over after-acquired property which is both the subject of a trust claim and the subject of security in favour of a *bona fide* creditor without notice of the trust.

Ronald C.C. Cuming, Catherine Walsh, and Roderick J. Wood,  
*Personal Property Security Law* (Toronto: Irwin law Inc., 2005) at pp 422-424 [Tab 4]

20. Those authors suggest that where the secured party comes to the transaction with clean hands its security should take priority over the equitable/trust interest in the same collateral to protect the secured party, as a *bona fide* innocent party, for prejudice.
21. ATB has acted in good faith, and comes to these circumstances with clean hands: they advanced funds to JMB on the strength of the MD receivable as reported to ATB by JMB.
22. ATB was not aware of the Claimants' equitable interest in the Funds, should this Court find that the Claimants possess one, and ATB is therefore 'Equity's Darling' as a *bona fide* party who acquired an interest in the Funds without knowledge of the alleged equitable interest held by the Claimants.

*Bank of Montreal v. i Trade Finance Inc.*,  
2011 SCC 26 at paras 58-67 [Tab 5]

23. The decision of *Horizon Earthworks Ltd., Re* is factually similar to the case at bar. In that case the Alberta Court of Appeal considered priority over funds payable by the Municipal District of Greenview No. 16 and whether those funds should go to a number of unpaid subcontractors by virtue of an alleged trust, or to the Bank of Nova Scotia, who was secured in respect of accounts receivable of the debtor, Horizon.

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*Horizon Earthworks Ltd., Re*, 2013 ABCA 302 ("**Horizon**") [Tab 6]

24. The Court reviewed a number of documents which, it was argued, taken together created a trust in favour of the subcontractors who were retained to finish the project after Horizon ceased work and assigned into bankruptcy.
25. First, the agreement between the Municipality and Horizon for the services to be performed in building and grading a municipal road, which, at clause 1.2.35 provides:
- A. the Contractor shall promptly pay, or ensure that prompt payment is made, for all labour, services, equipment, supplies and Material used for, on or about the Work, including any sum due from the Contractor, any subcontractor or any person for the labour or services of any subcontractor, foreman, worker or other person;
  - B. if the Municipality has reason to believe that such payments will not be promptly made, the Municipality may retain out of any money due on any account to the Contractor from the Municipality such amount as the Municipality may deem sufficient to satisfy the same; and
  - C. the Municipality may pay directly to any claimant such amount owing.
26. Second, the Court considered the Indemnity and Surety Agreement entered into between Horizon and Western Surety as bonding agent for the project, (the "**Surety Agreement**") which provides at Clause 22 that:
- A. the Principal agrees that all funds due or to become due under any Bonded Contract, are trust funds for the benefit of and payment to all persons to whom the Principal incurs, in the performance of such Bonded Contract, obligations for which the Surety would be liable under any Bond;
  - B. if the Surety assumes or discharges any such obligation, it shall be entitled to assert the claim of such person to the trust funds; and
  - C. the Principal shall open an account which shall be designated as a trust account for the deposit of such trust funds.
27. In concluding that the Bank of Nova Scotia had priority over the accounts receivable payable by the Municipality, the Court held that while there was language purporting to create a trust in the Surety Agreement, the Municipality was not a party to those agreements and **had no legal obligation to pay unpaid creditors of Horizon** such as subtrades.

*Horizon* at para 43

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28. The Court concludes: “if money is due or to become due Horizon under the Harper Creek Contract on the date of bankruptcy... that asset, **subject to the rights of secured creditors**, becomes the property of the Trustee upon bankruptcy”.

*Horizon* at para 44

29. Despite the wording in the agreement between Horizon and the Municipality, and the Surety Agreement purporting to create a trust, the court held that the accounts receivable to be paid by the Municipality must be payable to Bank of Nova Scotia by virtue of its security.
30. It is important to note that the language used to create the purported trust in the case at bar is far less specific than that used in *Horizon*: at no point does the Supply Contract reference payment to the subtrades, nor does it place any obligations on the MD or JMB to segregate any funds for payment to those parties.

### C. Tracing

31. ATB is not fully apprised of all of the facts as it relates to JMB’s use of the JMB Funds, which would include what amounts have flowed into and out of the JMB account holding the JMB Funds.
32. Subject to confirming the evidence as it relates to the use of the JMB Funds, ATB submits that if the Court determines the Claimants have a valid trust claim, then the Claimants do not have a viable tracing claim against the JMB Funds because the funds from the MD project will have been comingled with other funds held by JMB and/or converted into other property, and are therefore unidentifiable.

*Graphicshoppe Ltd., Re*, 2005 CarswellOnt 7008  
[2005] OJ No. 5184 at para 120 [Tab 7]

33. If this Court finds that the JMB Funds are traceable by the Claimants, then ATB submits that a *pro rata* distribution among the Claimants is not the sole basis on which the JMB Funds could be traceable, and that the Court has available to them various other means to trace the JMB Funds, including the ‘first in-first out’ rule (the rule in *Clayton’s Case*) or the lowest intermediate balance rule.

*Easy Loan Corp. v. Wiseman*,  
2017 ABCA 58 at paras 32-41 [Tab 8]

### D. The Supply Contract does not create a trust

34. For their trust claim, the Claimants rely solely on the wording contained in the Supply Contract, to which they are not a party. ATB submits that, taken in its entirety, it is apparent that the Supply Contract does not create a trust in favour of the Claimants, nor was it ever intended to.

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35. However, to the extent that this Honourable Court finds that a trust was intended, ATB submits that it must nevertheless fail.
36. The relevant section of the Supply Contract, section 26, refers to products supplied **by JMB** and services performed **by JMB**. The law is clear that where there is uncertainty of object (namely, the intended beneficiaries) the trust will fail, and the property will result to the settlor (MD) or the trustee (JMB).

Eileen E. Gillese, *The Law of Trusts* 3d ed  
(Toronto: Irwin Law Inc., 2014) at page 45 [Tab 9]

37. It is further important to note that in the absence of a conveyance of the alleged trust property to the trustee a trust is never properly constituted and thus no trust arises.
38. In this case, the accounts receivable comprising the Holdback funds were deliberately withheld from JMB, despite requests for payment of same.

Tenth Report of FTI Consulting Canada Inc.,  
In its Capacity as Monitor of JMB Crushing Systems Inc.,  
And 2161889 Alberta Ltd. at para 15 [Tab 10]

39. Even if there were an intention on the part of MD to create a trust in favour of the Claimants, MD did not convey the Holdback funds. Pursuant to the Lien Claims Order the Holdback funds were paid directly to the Monitor. Without that order, MD was unlikely to release payment at all.

#### **E. *Profit à Prendre***

40. In specific reply to the claim by Shankowski that they are entitled to payment from the Funds by virtue of either the alleged trust or the Aggregate Royalty Agreement, ATB submits that JMB acquired ownership of the aggregate removed from Shankowski's lands at the time it was severed from the soil by virtue of a *profit à prendre*.
41. The Court in *Last Mountain Valley No. 250 (Rural Municipality)* makes it clear that in the absence of express wording to the contrary, ownership of the aggregate was transferred to JMB at the moment it was removed from the soil: "[t]his is a right which flows from the legal relationship created by the written agreement between the parties and a right accorded, by implication of law, to the [grantee] as the grantee of a *profit à prendre*".

*Last Mountain Valley No. 250 (Rural Municipality) v.  
Ter Keurs Bros. Inc.*, 2020 SKQB 37 at para 36  
citing *Saskatoon Sand and Gravel Ltd. v. Steve*,  
973 CarswellSask 175 (SKQB) at para 20 [Tab 11]



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42. There are three primary characteristics of a *profit à prendre*: the right to enter lands; the right to sever the aggregate from the soil; and the right to haul away the aggregate for use by the party who severed it from the lands.

*Bussey Seed Farms v. DBC Contractors*,  
2016 ABQB 577 at para 14 [Tab 12]

43. These are precisely the rights granted to JMB under the Aggregates Royalty Agreement. That agreement contains no language suggesting that title to the aggregate remains with Shankowski, and a *profit à prendre* exists in the absence of express wording to that effect. That the parties had agreed to an arrangement in the nature of a *profit à prendre* was confirmed by counsel for Shankowski.

Transcript from Proceedings In the Matter of  
the Compromise Or Arrangement of JMB Crushing Systems Inc.  
and 2161889 Alberta Ltd., heard Calgary 16, 2020 at page 32 [Tab 13]

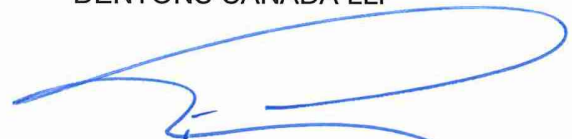
44. In turn, JMB, as owner of the aggregate removed from Shankowski's lands, delivered the aggregate to the MD. There is no resulting nexus between the Funds and Shankowski under either of Shankowski's lien claim and trust claim.
45. Shankowski has only an unsecured claim against JMB for non-payment of the royalties contemplated in the Aggregates Royalty Agreement.

### Relief Sought

46. ATB requests that the Applications advanced by the Claimants be dismissed.

All of which is respectfully submitted this 23<sup>rd</sup> day of November, 2020

DENTONS CANADA LLP



Tom Gusa, Counsel for ATB Financial