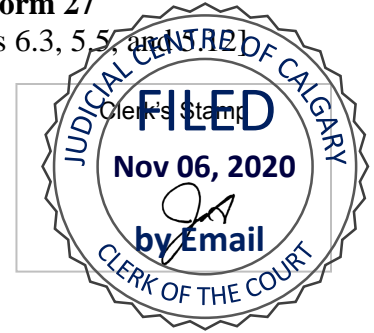


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Form 27
[Rules 6.3, 5.5, and 5.1]

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COURT FILE NUMBER 2001-05482
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY



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Nov. 27, 2020
Justice Eidsvik100

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

AND IN THE MATTER OF A
PLAN OF ARRANGEMENT OF
JMB CRUSHING SYSTEMS INC.
and 2161889 ALBERTA LTD.

APPLICANTS JMB CRUSHING SYSTEMS INC.
and 2161889 ALBERTA LTD.

DOCUMENT **APPLICATION BY JERRY
SHANKOWSKI and 945441
ALBERTA LTD. TO SET ASIDE
ORDERS AND FOR
DECLARATION OF AND
ENFORCEMENT OF TRUST**

(Applicants on This Application) **JERRY SHANKOWSKI AND
945411 ALBERTA LTD.**

(Respondents on This Application) **JMB CRUSHING SYSTEMS
INC., GOWLING WLG
(CANADA) LLP, TOM
CUMMING, CAIREEN, E.
HANERT, ALISON J. GRAY,
FTI CONSULTING CANADA
INC., MCCARTHY
TÉTREAULT LLP, SEAN F.
COLLINS, PANTELIS
KYRIAKAKIS, NICOLE FITZ-
SIMON, NATHAN STEWART**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

HAJDUK LLP
Barristers & Solicitors
#202 Platinum Place
10120-118 Street
Edmonton, Alberta, T5K 1Y4
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File No.: 5448 RBH

NOTICE TO RESPONDENT(S):

JMB CRUSHING SYSTEMS INC., GOWLING WLG (CANADA) LLP, TOM CUMMING, CAIREEN, E. HANERT, ALISON J. GRAY, FTI CONSULTING CANADA INC., MCCARTHY TÉTREAULT LLP, SEAN F. COLLINS, PANTELIS KYRIAKAKIS, NICOLE FITZ-SIMON, NATHAN STEWART

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the master/judge.

To do so, you must be in Court when the application is heard as shown below:

Date Friday, November 27, 2020
Time 10:00 a.m.
Where Calgary Courts Centre (by Webex)
Before Whom The Honourable Madam Justice K.M. Eidsvik in Chambers

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. Granting permission to add the named Respondents on This Application, JMB CRUSHING SYSTEMS INC., GOWLING WLG (CANADA) LLP, TOM CUMMING, CAIREEN, E. HANERT, ALISON J. GRAY, FTI CONSULTING CANADA INC., MCCARTHY TÉTREAULT LLP, SEAN F. COLLINS, PANTELIS KYRIAKAKIS, NICOLE FITZ-SIMON, NATHAN STEWART, as Respondents on this Application;
2. An Order setting aside the Orders granted by the Honourable Madam Justice K.M Eidsvik (“Eidsvik J.”) on October 16, 2020, being the Order (Amended and Restated Mantle Sale Approval and Vesting Order) and the Reverse Vesting Order;
3. An Order declaring JMB Crushing Systems Inc. (“JMB”) a Trustee by virtue of paragraph 26 of the Contract between JMB Crushing Systems ULC, the predecessor of JMB, and the Municipal District of Bonnyville No. 87 (“MD of Bonnyville”) dated effective November 1, 2013, as amended (the “Contract”), of the “Funds” less the “CRA Amount” each as defined by

the Order granted by Eidsvik J. on May 20, 2020 (the “Eidsvik May 20 Order”) establishing a Builders’ Lien Claim process in respect of the sums owing by the MD of Bonnyville to JMB pursuant to the Contract, in the sum \$3,327,768.40, or such other sums as may be proven and as this Honourable Court deems appropriate and just in favour of all unpaid suppliers of materials, labour or other services in relation to the Contract;

4. An Order requiring JMB to deposit sufficient additional funds with the Clerk of the Court or with the Monitor which will be sufficient when added to the Holdback Amount as defined by the Eidsvik May 20 Order to equal the sum set out in paragraph 2 hereof;
5. An order setting aside the Amended Royalty Aggregates Agreement agreed to between Counsel for JMB and Counsel for the Applicants on October 15, 2020 by email;
6. Directing that notice be provided to all actual or potential beneficiaries of the Trust of the complete terms of the Contract and of their right to claim to be a beneficiary of the Trust and for payment out of their claims from the Holdback Amount and the additional funds contemplated by subparagraph c. hereof in accordance with their entitlements;
7. Directing payment to Jerry Shankowski and 945411 Alberta Ltd. (the “Applicants”) in care of their solicitors, Hajduk LLP, of the sum of \$588,457.61, or such other sums as may be proven and as this Honourable Court deems appropriate and just, from the Holdback Amount and the additional funds contemplated by paragraph 3 hereof;
8. An Order requiring indemnification by JMB, Counsel for JMB, the Monitor and Counsel for the Monitor in favour of the Applicants and the other actual or potential beneficiaries of the Trust constituted by paragraph 26 of the Contract to the extent of any monies unrecoverable from the “Funds” as defined by the Eidsvik May 20 Order;
9. Deeming service good and sufficient of this Application and any supporting Affidavits upon all affected parties and particularly on the Respondents on This Application named in paragraph 1;
10. Such other and further relief as may be required and as this Honourable Court deems appropriate and just; and,
11. Costs of this Application in any event of the cause, payable forthwith by JMB, Counsel for JMB, the Monitor and Counsel for the Monitor, on a scale as between a solicitor and own client (full indemnity) or on such other scale or in such other amounts as this Honourable Court deems appropriate and just.

Grounds for making this application:

12. GOWLING WLG (CANADA) LLP, TOM CUMMING, CAIREEN, E. HANERT and ALISON J. GRAY are Counsel for JMB CRUSHING SYSTEMS INC. and were Counsel on the Applications for the Eidsvik May 20 Order, the Mantle Order and the Reverse Vesting Order.

13. FTI CONSULTING CANADA INC. is the Monitor appointed by the Initial Order and the Amended and Restated Initial Order.
14. MCCARTHY TÉTREAULT LLP, SEAN F. COLLINS, PANTELIS KYRIAKAKIS, NICOLE FITZ-SIMON and NATHAN STEWART are Counsel for the Monitor and were Counsel for the Monitor in relation to the Eidsvik May 20 Order, the Mantle Order and the Reverse Vesting Order.
15. Each of the parties and Counsel named as Respondents on This Application had a duty of good faith pursuant to the Companies' Creditors Arrangements Act (Canada), R.S.C. 1985, c. C-36, section 18, to act in good faith at all times in relation to the within Action.
16. Each of the parties and Counsel named as Respondents on this Application had a duty of utmost good faith and full and frank disclosure of all material matters of which the other parties to the Action were not aware and could not have been aware, including particularly the existence and text of paragraph 26 of the Contract between JMB Crushing Systems ULC and the Municipal District of Bonnyville No. 87, and the definitions in that Contract of "Product" and "Services, when making application for the Eidsvik May 20 Order, the Mantle Order and the Reverse Vesting Order, and each of the parties and Counsel named as Respondents on this Application failed to disclose the full text of the Contract and particularly of paragraph 26 and the definitions of "Product" and "Services" therein and the express Trust created thereby to the Court when making application for the said Orders, as such Order were sought and granted effectively without notice or *ex parte* to the extent that the other parties to the Action were not aware and could not have been aware of such information.
17. On May 20, 2020, in this Action, the Eidsvik May 20 Order was granted by Eidsvik J. establishing a protocol for any builders' liens registered or capable of being registered in respect of the Contract between JMB and the MD of Bonnyville, and discharging any builders' liens then registered against certain lands ("MD of Bonnyville Lands") stipulated in the Eidsvik May 20 Order and owned by the MD of Bonnyville.
18. The Eidsvik May 20 Order provides a separate protocol for builders' lien claims against the Lands in relation to the Contract between JMB and the MD of Bonnyville.
19. A considerable amount of the aggregate supplied by JMB to the MD of Bonnyville pursuant to the Contract (as defined in the Eidsvik May 20 Order) were extracted from the lands of the Applicants and JMB is owed monies by the MD of Bonnyville in respect of such aggregate supplied, and the Applicants are owed royalties in respect of the portion of the aggregate supplied which was extracted from the lands of the Applicants.
20. The Applicants first were provided with a copy of the Contract on or about October 9, 2020, by its attachment as Exhibit "C" to the unfiled Affidavit of Jason Panter ("Panter") sworn October 9, 2020, now filed in this Action ("Panter Affidavit").
21. The Applicants or their Counsel did not realize the significance of the Contract and the existence of paragraph 26 of the Contract prior to October 17, 2020 when the Applicant's

Counsel was preparing for Questioning on Affidavit of Panter and for the Special Chambers application then scheduled for October 22, 2020, for the consideration of the challenges to the Determinations by the Monitor of the Lien Claims of the Applicants and of RBEE Aggregates Consulting Ltd..

22. Paragraph 26 of the Contract provides:

26. From the amounts paid to JMB by the MD, JMB is deemed to hold that part of them in trust which are required to needed to pay for any salaries, wages, compensation, overtime pay, statutory holiday pay, vacation pay, entitlements, employee and employer Canada Pension Plan contributions, employee and employer Employment Insurance contributions, Workers' Compensation premiums and assessments, income taxes, withholdings, GST and all costs directly or indirectly related to the Product and Services. JMB shall pay the foregoing from such trust funds.

23. The Contract defines "Product" and "Services", respectively, as:

1. In this Agreement, capitalized words will have the following meanings:

[...]

e. "Product" means the production by JMB of the aggregate described in this Agreement which includes the crushing and cleaning of rock/gravel, and all related services whereby rock/gravel is made into usable crushed aggregate for the MD in accordance with the required specifications set out in this Agreement;

f. "Services" means the hauling and stockpiling of crushed aggregate by JMB as set out in this Agreement and anything else which is required to be done to give effect to this Agreement; *[emphasis added]*

[...]

24. Neither JMB, nor Counsel for JMB (nor the Monitor, nor Counsel for the Monitor), disclosed the complete terms of the Contract, nor the existence of paragraph 26 thereof and the Trust established thereby, to either the Court or to the Applicants or any other Lien Claimant pursuant to the *Builders' Lien Act* ("BLA") or any of the actual or potential beneficiaries of the Trust, at any time or pursuant to the Lien Claims process established by the Eidsvik May 20 Order prior to the provision of the Panter Affidavit on or about October 9 2020.

25. Neither JMB, nor Counsel for JMB, nor the Monitor, nor Counsel for the Monitor, disclosed to either the Court or to the Applicants or any other Lien Claimant pursuant to the *Builders' Lien Act* ("BLA") at any time or pursuant to the Lien Claims process established by the Eidsvik May 20 Order the fact that the only purpose for which the Aggregate provided to the MD of Bonnyville pursuant to the Contract was put or intended to be put was for use in construction of or repairs to public highways such that no Builders' Lien could arise in any such public highways or at all in connection with the provision of the Product (usable crushed aggregate) by JMB to the MD of Bonnyville or in connection with the provision of any materials or services to or at the request of JMB or the MD of Bonnyville in connection with the Contract until the provision of the Panter Affidavit and the further Affidavit of Blake Elyea sworn October 16, 2020.

26. Both JMB, Counsel for JMB, the Monitor and Counsel for the Monitor would have previously had knowledge and been aware that no lien was maintainable as against the nature of the *improvements* and that the only recourse by the creditors of JMB would have been as beneficiaries under the aforementioned Trust, to the extent of any corresponding entitlement thereunder.
27. JMB had a trust, fiduciary or other duty as a Trustee under paragraph 26 of the Contract to take all reasonable steps to disclose to and notify any actual or potential beneficiaries of the Trust of the existence of the Trust and the existence of the Trust Property, being the sums paid from time to time by the MD of Bonnyville to JMB, which JMB breached, and thereby caused significant loss and damages to the Applicants to the extent of the sums owing by JMB to the Applicants together with solicitor and own client (full indemnity) scale costs of participation in the within proceedings including preparing and submitting the Lien Claim of the Applicants and of preparing and submitting the challenge to the Lien Claim Determination of the Monitor, and the Monitor had a corresponding duty to notify the Court of matters of which JMB ought to have notified the Court and any actual or potential beneficiaries of the Trust.
28. JMB and its Counsel failed to discharge their respective duties of full and frank disclosure of all material facts, whether detrimental to the position of JMB or not, in applying for the Initial Order, the Amended and Restated Initial Order, the Eidsvik May 20 Order, the Order (Amended and Restated Mantle Sale Approval and Vesting Order) and the Reverse Vesting Order which each were actually or effectively *ex parte* or without notice Orders due to the lack of effective notice and disclosure to any actual or potential beneficiaries of the Trust established by paragraph 26 of the Contract of the complete terms of the Contract, nor the existence of paragraph 26 thereof and the Trust established thereby.
29. JMB (and as approved by the Monitor), have obtained Orders from time to time in this Action which have prejudiced the interests of the actual and potential beneficiaries under the Trust.
30. JMB has failed to act in good faith in these proceedings.
31. The existence of the Trust means that neither the Applicants nor any other suppliers of materials or services to JMB in connection with the Contract had any need to rely or to seek to rely upon any Lien Claim pursuant to the *BLA* or pursuant to the Eidsvik May 20 Order, but are entitled to payment from the sums referred to in paragraphs 2 and 3 hereof in priority to any claims by JMB and before JMB has any right or entitlement to any such monies.
32. The Applicants acted to their prejudice in not opposing the Order (Amended and Restated Mantle Sale Approval and Vesting Order) and the Reverse Vesting Order based on the non-disclosure of the Contract and of paragraph 26 thereof and the breach of the duty of full and frank disclosure by JMB and its Counsel.
33. The Applicants were seriously prejudiced by the failure of JMB and its Counsel to provide the Court with full and frank disclosure in relation to the Initial Order, the Amended and Restated Initial Order, the Eidsvik May 20 Order, the Order (Amended and Restated Mantle Sale

Approval and Vesting Order) and the Reverse Vesting Order and would have opposed each of the said Orders or any one or more of the said Orders if they had known of the complete terms of the Contract and particularly paragraph 26 thereof and of the actual and only intended uses of the Product in constructing and repairing public highways.

34. The Applicants, Jerry Shankowski and 945411 Alberta Ltd. would not have consented to the Amended Royalty Aggregates Agreement if they had known of the true amount outstanding by JMB to the said Applicants, and of the existence of paragraph 26 of the Contract and the definitions of “Product” and “Services” therein.
35. Such further and other grounds as may appear from the evidence.

Material or evidence to be relied on:

36. The Affidavit of Jerry Shankowski, sworn August 10, 2020, filed;
37. The Affidavit of Jerry Shankowski, sworn November 6, 2020, to be filed concurrently with this Application;
38. The Affidavit of Jason Panter, sworn October 9, 2020, filed;
39. The Affidavit of Blake Elyea, sworn October 16, 2020, filed.

Applicable rules:

40. Rules 1.2, 1.3, 1.4 and 6.3 of the *Alberta Rules of Court* and generally all other applicable provisions of the *Alberta Rules of Court*.

Applicable Acts and regulations:

41. *Alberta Rules of Court*;
42. *Builders’ Lien Act*;
43. *Companies’ Creditors Arrangement Act* RSC 1985, c C-36.

Any irregularity complained of or objection relied on:

44. Non-disclosure of the Contract and breach of the duty of full and frank disclosure by JMB and its Counsel in relation to the applications for the Initial Order, the Amended and Restated Initial Order, the Eidsvik May 20 Order, the Order (Amended and Restated Mantle Sale Approval and Vesting Order) and the Reverse Vesting Order.
45. Breach of Trust or breach of fiduciary or other duty by JMB in failing to notify the Applicants and other actual or potential beneficiaries of the Trust established by paragraph 26 of the Contract of the existence of the Trust and of the complete terms of the Contract.

How the application is proposed to be heard or considered:

46. Orally, in person or in such other manner as may be directed by the Court, before the presiding Justice in Chambers.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.